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The Independence and Impartiality of ICSID Arbitrators

Current Case Law, Alternative Approaches, and Improvement Suggestions

Maria Nicole Cleis

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List of Abbreviations

AAA	American Arbitration Association
AS	Amtliche Sammlung [official collection of Swiss law]
ASA	Association Suisse de l'Arbitrage [Swiss Arbitration Association]
BIT	Bilateral Investment Treaty
Can.	Canada
CAS	Court of Arbitration for Sport
CCJA	Common Court of Justice and Arbitration
CERD	Committee on the Elimination of Racial Discrimination
CETA	Comprehensive Economic and Trade Agreement Between Canada and the European Union and its Member States
CIETAC	China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center
ECHR	European Court of Human Rights
EU	European Union
IBA	International Bar Association
ICC Court	International Court of Arbitration of the ICC
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID Chairman	The Chairman of the ICSID Administrative Council
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State dispute settlement
LCIA Court	Arbitration Court of the London Court of International Arbitration
LCIA	London Court of International Arbitration
Malay.	Malaysia
Mex.	Mexico
MIGA	Multilateral Investment Guarantee Agency
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires [Organisation for the Harmonization of Business Law in Africa]
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC Board	Board of Directors of the Arbitration Institute of the Stockholm Chamber of Commerce
SCC Institute	Arbitration Institute of the Stockholm Chamber of Commerce
SCC	Stockholm Chamber of Commerce

Switz.	Switzerland
TTIP	Transatlantic Trade and Investment Partnership
U.N.	United Nations
U.S.	United States of America
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
Venez.	Venezuela
WIR	World Investment Report
World Bank	International Bank for Reconstruction and Development
WTO AB	Appellate Body of the World Trade Organization
WTO DSB	Dispute Settlement Body of the World Trade Organization
WTO	World Trade Organization

Introduction

Foreign direct investments are an important part of today's globally integrated economy. Their popularity and level have dramatically risen since the 1990s, when technological advances and the demise of the Soviet Union fueled the trend towards globalization. Foreign direct investments take on many forms. They are characterized by the acquisition of virtually any kind of asset that creates a lasting interest by a foreign national in another State. The acquired asset can be a physical one, such as a building, factories, machines or equipment, or it can be a portion of a foreign company's shares.[1] Currently, most foreign direct investments are made in the services sector.[2] In terms of industries, the extractive industry, the electric power industry, transportation, construction and finance are particularly attractive.[3] Foreign investors are frequently involved in providing public services in their host countries, such as operating water and sanitation systems, electricity plants, telecommunication services or public transportation systems. In the past, foreign direct investments have allowed developing countries to tap foreign financial sources and know-how to support their industrialization process. Investors, on the other side, were able to gain access to new markets.

Foreign investors are particularly vulnerable to government interference with their operations. They invest with a view to a long term operation, and therefore take substantial sunk costs. At the same time, their inability to participate in the democratic process in their host State makes it difficult to foresee government actions. Accordingly, they have a heightened interest in the stability and predictability of the regulatory environment in their host State.[4]

1 Doak Bishop, James Crawford & W. Michael Reisman, Foreign Investment Disputes: Cases, Materials and Commentary 9 (2nd ed. 2014); Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 91 (2009).

2 United Nations Conference on Trade and Development, *World Investment Report 2015*, at 12, UNCTAD/WIR/2015 (June 25, 2015) [hereinafter UNCTAD, *WIR 2015*]; Organisation for Economic Co-operation and Development, *OECD International Direct Investment Statistics 2014*, at 15, *available at* http://dx.doi.org/10.1787/idis-2014-en.

3 UNCTAD, WIR 2015, *supra* note 2, at 13–14; International Centre for Settlement of Investment Disputes, *The ICSID Caseload-Statistics* (*Issue 2016–1*), at 12, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf [hereinafter ICSID, *Caseload-Statistics 2016–1*].

4 Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Recueil des Cours 331, 343 (1972).

International investment agreements (IIAs) and bilateral investment treaties (BITs) satisfy those interests by protecting foreign investors from a range of adverse regulatory actions by host States. They contain definitions of the kinds of investments covered, and specify the substantive standards of protection they afford. Along with the spike in international investment in the second half of the 1990s, a particularly high number of BITs were entered into.[5] Even today, their number is still growing,[6] though not at as high a rate.

The substantive protection afforded by BITs and IIAs is procedurally enforceable pursuant to the dispute resolution clauses contained in such agreements. These clauses usually provide for the settlement of disputes between an investor and a host State (so-called investor-State dispute settlement, or ISDS) by arbitration (investor-State arbitration).[7] For example, arbitration is the dispute settlement mechanism of choice in the U.S. Model BIT,[8] in Swiss BITs,[9] in the North American Free Trade Agreement[10] and in the Energy Charter Treaty.[11] Today, arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States[12] is the most important

5 United Nations Conference on Trade and Development, *World Investment Report Overview 2015: Reforming International Investment Governance*, at 24 fig.10, UNCTAD/WIR/2015(Overview) (June 25, 2015); Christoph H. Schreuer, *The Dynamic Evolution of the ICSID System*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID) 15, 20 (Rainer Hofmann & Christian J. Tams eds., 2007) [hereinafter Schreuer, *Dynamic Evolution*]; ANTONIO R. PARRA, THE HISTORY OF ICSID 199 (2012).

6 United Nations Conference on Trade and Development, *IIA Issues Note: Recent Trends in IIAs and ISDS*, No. 1 (Feb. 2015), at 2, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

7 GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 3 n.10 (2007) [hereinafter VAN HARTEN, INVESTMENT TREATY ARBITRATION]. The terms investor-State dispute settlement, investor-State arbitration, investment treaty arbitration, and investment arbitration are often used interchangeably.

8 2012 U.S. Model Bilateral Investment Treaty, *available at* http://www.state.gov/documents/organization/188371.pdf (last accessed on Dec. 30, 2016).

9 *See, e.g.*, Agreement on the Promotion and Reciprocal Protection of Investments, Switz.-China, art. 11, para. 2, Jan. 27, 2009, AS 2010 1717; Agreement for the Promotion and Protection of Investments, Switz.-India, art. 9, para. 3, Apr. 4, 1997, AS 2002 2037; Agreement on the Promotion and Reciprocal Protection of Investments, Switz.-Venez., art. 9, para. 2, Nov. 18, 1993, AS 1999 2149; Agreement concerning the Promotion and Reciprocal Protection of Investments, Switz.-Malay., art. 9, para. 2, AS 1978 1183.

10 North American Free Trade Agreement, U.S.-Can.-Mex., art. 1120, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

11 The Energy Charter Treaty, art. 26, para. 2 (c) and 4, Dec. 17, 1994, 34 I.L.M. 381 (1995) [hereinafter ECT].

12 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 (entered into force Oct. 14, 1966) [hereinafter

ISDS mechanism.[13] The Convention was adopted in 1965, and established the International Centre for Settlement of Investment Disputes (ICSID) as one of the five organizations of the World Bank Group.[14]

Like other ISDS mechanisms, the ICSID Convention does not contain rules on investors' substantive rights, but provides disputing parties with a procedural mechanism for the resolution of investment disputes.[15] Investment arbitration under the ICSID Convention allows investors to bring claims directly against their host States,[16] while evading the potentially biased courts in their host States, and avoiding reliance on their home States' discretionary exercise of diplomatic protection. By replacing the "gunboat diplomacy" formerly used to resolve investment disputes, and instead assessing competing legal claims in an independent and neutral manner,[17] ICSID arbitration de-politicizes such controversies and advances the rule of law.[18]

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the Washington Convention, the ICSID Convention or the Convention]. Disputes which are governed by the ICSID Convention are also subject to the ICSID Rules of Procedure for Arbitration Proceedings [hereinafter the ICSID Arbitration Rules or the Arbitration Rules].

13 *See* UNCTAD, *WIR 2015*, at 114, UNCTAD/WIR/2015 (June 25, 2015); Meg Kinnear & Frauke Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 34, 34 (Chiara Giorgetti ed., 2015); LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 6–7 (2nd ed. 2011); Rainer Hofmann & Christian J. Tams, *Introduction: The International Convention on the Settlement of Investment Disputes (ICSID) – Taking Stock after 40 Years*, *in* THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID), 9 (Rainer Hofmann & Christian J. Tams eds., 2007).

14 REED, PAULSSON, AND BLACKABY, *supra* note 13, at 9.

15 After long and unsuccessful attempts to agree on uniform substantive standards of investment protection in other international fora, such a goal was not even pursued during the drafting process. *See id.* at 2; Broches, *supra* note 4, at 343–344.

16 *See* CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION – A COMMENTARY ix (2nd ed. 2009) [hereinafter SCHREUER ET AL., COMMENTARY]; Schreuer, *Dynamic Evolution*, *supra* note 5, at 16.

17 Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L. L. 233, 226 (2013) [hereinafter Rogers, *Politics*]; Stephan W. Schill, *Private Enforcement of International Investment Law*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 29, 31 (Michael Waibel et al. eds., 2010); REED, PAULSSON, AND BLACKABY, *supra* note 13, at 4–5; Catherine A. Rogers, International Arbitration in a Time of Global Upheaval, Kluwer Arbitration Blog (Sept. 17, 2014), http://kluwerarbitrationblog.com/blog/2014/09/17/international-arbitration-in-a-time-of-global-upheaval/ [hereinafter Rogers, Global Upheaval].

18 Broches, *supra* note 4, at 343; David W. Rivkin, *The Impact of International Arbitration on the Rule of Law*, 29 ARB. INT'L. 327, 341 (2013).

The ICSID Convention's focus on procedural empowerment instead of substantive protection is based on the idea that procedural settings shape substantive outcomes,[19] without predetermining them. A neutral, law-based proceeding ensures that decisions are not reached in an environment of arbitrariness.[20] In the complex policy setting of investment disputes,[21] where decisions on investor-State claims are unlikely to ever satisfy all participants, the parties' buy-in largely depends on their confidence in the mechanism's fairness. The parties' acceptance of and compliance with an unfavorable award is more likely in the absence of doubts about procedural fairness.[22] Legitimacy, thus framed, does not lie in the outcome of a procedure, but in the perception of the award's procedural integrity.[23]

The procedural fairness of the arbitral system is primarily dependent on its decision-makers. Thus, the requirement of arbitrators' independence and impartiality is "obvious and imperative,"[24] and common to all major arbitration

19 Giacinto della Cananea, *Minimum Standards of Procedural Justice in Administrative Adjudication*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 39, 57 (Stephan W. Schill ed., 2010); Jan Wouters & Nicolas Hachez, *The Institutionalization of Investment Arbitration and Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 615, 618 (Marie-Claire Cordonier Segger, Markus W. Gehring, & Andrew Newcombe eds., 2011).

20 della Cananea, *supra* note 19, at 57.

21 Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3 CONTEMP. ASIA ARB. J. 237, 243 (2010).

22 JAN PAULSSON, THE IDEA OF ARBITRATION 17 (2013) [hereinafter PAULSSON, THE IDEA]; Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 214–215 (2007) [hereinafter Franck, *Integrating Investment Treaty Conflict*] (referencing empirical evidence which corroborates the positive effect procedural justice has on stakeholders' buy-in); Christopher Kee, *Judicial Approaches to Arbitrator Independence and Impartiality in International Commercial Arbitration*, *in* INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 181, 195 (Christina Knahr et al. eds., 2010).

23 THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990) (framing legitimacy as the acceptance of and compliance with rules or institutions, based on the belief that "generally accepted principles of right process" are observed); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7 (1995) [hereinafter FRANCK, FAIRNESS] ("To be effective, the system must be seen to be effective. To be seen as effective, its decisions must be arrived at discursively in accordance with what is accepted by the parties as right process."); David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 513 SUFFOLK TRANSNAT'L. L.J., 514 (2008) [hereinafter Caron, *Investor State Arbitration*].

24 Catherine A. Rogers, *The Ethics of International Arbitrators*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 621, 630 (Lawrence W. Newman &

systems. Its importance is further underscored by the absence of a rule of precedent and the lack of an appeals mechanism[25] in arbitration: The immense power which arbitrators wield[26] is only acceptable if it is exercised in accordance with the law, in an objective, rational and open-minded way. In the context of investor-State arbitration, this is even more true in light of the important public interests which are frequently at stake.[27] In the words of Van Harten:

> [I]f one asserts that investment arbitration offers a fair, rules-based, and thus superior method of decision-making, then the system is appropriately held to a high standard of independence.[28]

Whether investor-State arbitration under the ICSID Convention fulfills this expectation is a matter of contention. An increasing number of disqualification

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Richard D. Hill eds., 2d ed. 2008) [hereinafter Rogers, *Arbitrator Ethics*]. *See also* August Reinisch & Christina Knahr, *Conflict of Interest in International Investment Arbitration*, *in* CONFLICT OF INTEREST IN GLOBAL, PUBLIC AND CORPORATE GOVERNANCE 103, 104 (Anne Peters & Lukas Handschin eds., 2012); William W. Park, *Arbitration's Discontents: Between the Pernicious and the Precarious*, *in* LES RELATIONS PRIVÉES INTERNATIONALES. MÉLANGES EN L'HONNEUR DU PROFESSEUR BERNARD AUDIT 581, 609 (2014) [hereinafter Park, *Arbitration's Discontents*] ("The *raison d'être* of arbitrator ethics… remains to enhance confidence in cross-border economic cooperation by bolstering the reliability of dispute resolution when a deal goes sour."); Susan D. Franck, *The Role of International Arbitrators*, ILSA J. INT'L. & COMP. L. 1, 6–7 (2006) [hereinafter Franck, *The Role of International Arbitrators*].

25 Schreuer, *Dynamic Evolution*, *supra* note 5, at 19.

26 Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627, 627, 631, 637 (Stephan W. Schill ed., 2010) [hereinafter Van Harten, *Procedural Fairness*]; SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 139–140 (2009) (highlighting the legitimacy risk that *ad hoc* arbitration poses due to the inherent lack of coherence and consistency).

27 Charles N. Brower, *The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator* (*Keynote Address*), 5 BERKELEY J. INT'L. L. PUBLICIST 1, 3 (2010), *available at* http://bjil.typepad.com/brower_final.pdf; Rogers, *Arbitrator Ethics*, *supra* note 24, at 648–649; PAULSSON, THE IDEA, *supra* note 22, at 147; Luke A. Sobota, *Repeat Arbitrator Appointments in International Investment Disputes*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 293, 296, 312 (Chiara Giorgetti ed., 2015); Van Harten, *Procedural Fairness*, *supra* note 26, at 636–638.

28 Van Harten, *Procedural Fairness*, *supra* note 26, at 638.

requests[29] against ICSID arbitrators[30] have led numerous scholars to analyze the issue in the past years.

ICSID challenge decisions have been scrutinized in an attempt to bring clarity to the standard of independence and impartiality contained in the ICSID Convention and Arbitration Rules.[31] The standard and the threshold for challenges have been compared to corresponding standards in other dispute resolution mechanisms – in particular in commercial arbitration, less often in public international law adjudication – in the hope of coming up with an appropriate standard for ICSID arbitrators.[32] Empirical analyses of whether ICSID arbitrators are biased have been conducted, by measuring the effect of extra-legal factors on the outcome of the proceedings,[33] and by using specific

29 ICSID Convention art. 57. The referenced disqualification requests (also referred to hereinafter as arbitrator challenges or challenges) were based on allegations of a lack of independence or impartiality. *See infra* Chapter 2.

30 This book uses the term "ICSID arbitrators" to refer to arbitrators who are appointed to resolve disputes under the ICSID Convention.

31 *See* Markert, *supra* note 21, at 240; SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST 224–237 (2009); James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30 ARB. INT'L. 189, 210–246 (2014); Reinisch and Knahr, *supra* note 24.

32 *See* Fry and Stampalija, *supra* note 31, at 194–198; Chiara Giorgetti, *Challenges of International Investment Arbitrators : How Does it Work, and Does it Work?*, 7 WORLD ARB. & MEDIATION REV. 303 (2013) [hereinafter Giorgetti, *Challenges*]; Audley Sheppard, *Arbitrator Independence in ICSID Arbitration*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 131, 133–136 (2009); Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, *in* INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 153 (Christina Knahr et al. eds., 2010); Nathalie Bernasconi-Osterwalder, Lise Johnson & Fiona Marshall, *Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel*, IV ANNUAL FORUM FOR DEVELOPING COUNTRY INVESTMENT NEGOTIATORS, BACKGROUND PAPERS, 8–16 (2010).

33 Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L. L.J. 435 (2009) [hereinafter Franck, *Development and Outcomes*]; Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C.L. REV. 1 (2007) [hereinafter Franck, *Empirically Evaluating Claims*]; Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, 31 REV. LITIG. 267 (2012) [hereinafter Kapeliuk, *Collegial Games*]; Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010) [hereinafter Kapeliuk, *Repeat Appointment*].

indicators of potential bias, such as dissenting opinions[34] or jurisdictional rulings.[35] A social network analysis of all arbitrators appointed to ICSID tribunals between 1972 and 2014 has visualized the different roles and close connections between investment arbitrators, and pointed out the independence and impartiality tensions this might entail.[36]

The described scholarship has yielded varying conclusions and solutions for the issues which were diagnosed. Some scholars have suggested that a different standard of independence and impartiality should be applied within the existing institutional framework.[37] Others have detected a systemic bias in investment arbitrators which calls for fundamental reforms of ICSID arbitration.[38] A third group of scholars argue that systemic bias is inevitable in investment arbitration, and that the system should be abolished, in order to give way to a permanent international investment court.[39] For them, "[t]he most basic

34 Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821 (2010) [hereinafter van den Berg, *Dissenting Opinions*].

35 Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211 (2012).

36 Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L. L. 387 (2014) [hereinafter Puig, *Social Capital*]. *See also* Daphna Kapeliuk, Social Capital and Arbitral Decision Making, EJIL: Talk! Blog of the European Journal of International Law (Sept. 24, 2014), http://www.ejiltalk.org/social-capital-and-arbitral-decision-making/; Thomas Stchultz, Comments on Sergio Puig's "Social Capital in the Arbitration Market", EJIL: Talk! Blog of the European Journal of International Law (Sept. 23, 2014), http://www.ejiltalk.org/comments-on-sergio-puigs-social-capital-in-the-arbitration-market/; Sergio Puig, Social Capital in the Arbitration Market, EJIL: Talk! Blog of the European Journal of International Law (Sept. 22, 2014), http://www.ejiltalk.org/12168/.

37 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32; G.J. Horvath & R. Berzero, *Arbitrator and Counsel: the Double-Hat Dilemma*, 10 TRANSNAT'L. DISP. MGMT. (2013); PAULSSON, THE IDEA, *supra* note 22.

38 Wouters and Hachez, *supra* note 19, at 628; Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 J. INT'L. DISP. SETTLEMENT 553, 553 (2013); Sundaresh Menon, *Keynote Address*, *in* ICCA CONGRESS SERIES NO. 17: INTERNATIONAL ARBITRATION. THE COMING OF A NEW AGE? 6, 16 (Albert Jan van den Berg ed., 2013); PAULSSON, THE IDEA, *supra* note 22, at 348, 352.

39 VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 7, at 174–184 (highlighting that investment agreements emphasize host State obligations, but generally fail to clearly delineate the policy space that is left to host States, thereby reinforcing arbitrators' myopia in favor of investors); Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION 433, 445 (Michael Waibel et al. eds., 2010) [hereinafter Van Harten, *Perceived Bias*]. *Contra* Stephen M. Schwebel,

legal principle of any legal process, that justice must be blind, is clearly not at play here."[40] Due to inherent methodological limitations of empirical research, however, scholars were unable to reliably prove or disprove bias in arbitral decision-making.[41] Claims of actual dependence and bias therefore remain mere assumptions, which are based on perceptions, anecdotal evidence and individual experiences with extra-legal influences on arbitral decision-making.[42]

In summary, the existing scholarship on ICSID arbitrators' independence and impartiality has not managed to dispel concerns about procedural fairness, despite its remarkable recent growth. In particular, a workable standard of independence and impartiality is still not within reach.

This book therefore takes a different approach to the issue of ICSID arbitrators' independence and impartiality. It proposes two kinds of solutions. First, institutional reforms which would improve the effectiveness of tribunals' deliberations, reduce the number of challenges, and enhance the legitimacy of disqualification decisions are suggested. Second, the author recommends that a justifiable doubts standard should be applied to challenges of ICSID arbitrators, and makes proposals for the threshold's concrete application to potential conflict situations.

Structure of the Book

More specifically, this book approaches the topic as follows: Chapter 1 explores the ICSID Convention's provisions on arbitrators' independence and impartiality, arbitrators' disclosure obligations and the right of the disputing parties to remove unqualified arbitrators. It interprets the respective rules based on their regulatory intent and the drafting history, and clarifies vague expressions.

The Overwhelming Merits of Bilateral Investment Treaties, 32 SUFFOLK TRANSNAT'L. L. REV. 263, 268–269 (2009).

40 AARON COSBEY ET AL., INVESTMENT AND SUSTAINABLE DEVELOPMENT: A GUIDE TO THE USE AND POTENTIAL OF INTERNATIONAL INVESTMENT AGREEMENTS 13 (2004), http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf.

41 *See* Rogers, *Politics*, *supra* note 17, at 233. *See also* THOMAS M. FRANCK, THE STRUCTURE OF IMPARTIALITY. EXAMINING THE RIDDLE OF ONE LAW IN A FRAGMENTED WORLD 254 (1968) [hereinafter FRANCK, STRUCTURE] ("Statistics on the voting behavior of World Court Judges do not, of course, support definitive statements on the state of the judicial psyche....To use an index of votes cast against the state of the judge's nationality as a scale for measuring his fairness may be like accusing a magistrate of nepotism because he has never jailed his wife.").

42 Rogers, *Politics*, *supra* note 17, at 228.

Most importantly, the strained relationship between the requirement of independence and impartiality and the party-appointment of decision-makers is analyzed, and the scope of both concepts in the context of ICSID arbitration is delineated in abstract terms.

Chapter 2 examines how past disqualification decisions have delimited the requirement of ICSID arbitrators' independence and impartiality. As the parties' primary enforcement mechanism for their right to an independent and impartial decision-maker, arbitrator challenges are "essential to the integrity of the international arbitral process."[43] The burden of proof imposed on parties in this context is decisive for the effectiveness of their right. Thus, the question at the center of this Chapter is whether the challenge case law of ICSID tribunals has led to the crystallization of a clear and predictable threshold for arbitrator challenges. Such a uniform threshold might arise from the consistent use of the same terminology and the uniform application of the same abstract criteria. Or it might only manifest itself in its application to specific case categories. Both possibilities are examined in separate parts of Chapter 2.

Chapter 3 examines the rules and case law of other dispute resolution mechanisms relating to independence and impartiality. The comparative analysis of the standards applied and outcomes achieved in other fields, which are related to ICSID arbitration, serves firstly as a benchmark to further refine the evaluation of ICSID removal proceedings, and secondly as an inspiration for possible alternative approaches to improving procedural fairness. As in Chapter 2, the focus of the analysis is on the grounds for challenge and the threshold applied – in other words, the degree of independence and impartiality expected of arbitrators.[44] Unlike most other comparative studies, this work does not merely juxtapose the abstract standards and thresholds of other mechanisms to the ICSID rules and case law. Wherever case law on disqualification requests in these systems is available, such decisions are analyzed, and the handling of specific conflict categories is compared to their assessment in the ICSID system. This allows for an informed and detailed comparison of challenge outcomes in the examined systems at the end of Chapter 3.

A significant constraint on the research for Chapters 2 and 3 is the scarcity of published decisions on arbitrator disqualifications. Confidentiality as an important principle in arbitration means that many arbitration institutions do not publish challenge decisions, just like awards are not always

43 W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L. & COMP. L.Q. 26, 26 (1989).

44 Technicalities of the appointment, disclosure and challenge process (i.e. delays for challenges) are not examined.

published. Some institutions only publish the outcome of decisions on disqualification requests, and not the reasons, which significantly hinders the above-mentioned analysis. Furthermore, under all arbitration mechanisms, parties may confront potentially biased arbitrators before filing a challenge. Arbitrators sometimes resign upon such an informal "challenge."[45] Since no decision is rendered, resignations (and their reasons) are impossible to grasp. Despite these obstacles, the first two Chapters of this book offer a first comprehensive (subject to the just mentioned qualifications) analysis of existing challenge decisions in the examined dispute settlement mechanisms. As such, they facilitate a substantiated evaluation of the current criticism of ICSID disqualification proceedings, and of the solutions for improving procedural fairness hitherto proposed.

Chapter 4 evaluates reform proposals which have been made to date. It rejects the suggestion of abolishing party-appointments of arbitrators, or limiting the parties' choice of arbitrators to a roster. A prohibition of dual functions (serving both as an arbitrator and as a counsel to arbitration parties) is also dismissed. On the other hand, the author supports the call for a clarification of the threshold for arbitrator challenges, and corroborates why a justifiable doubts test is appropriate. The European Union's initiative for an Investment Court System as the most tangible reform proposal is outlined and scrutinized.

Acknowledging the need for more specific adjustments to bolster the perception of the ICSID system's legitimacy, Chapter 5 presents some novel proposals – both on the institutional level, and with regard to the handling of arbitrator challenges in specific conflict situations. On the institutional level, the appointment of the chairperson of the tribunal from a closed roster is suggested. This requirement aims to ensure the chairperson's experience, authority and demonstrated neutrality, which will foster her or his ability to effectively include both party-appointed arbitrators into the tribunal deliberations. Chapter 5 further suggests that ICSID arbitrators should continue to be nominated by the disputing parties, but require the institution's confirmation, which would be subject to the absence of certain (narrowly framed) compulsory grounds for disqualification. In the context of such a confirmation proceeding, parties should also be able to raise objections based on grounds

45 Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, DISP. RESOL. J. 61, 63 (2006); Markham Ball, *Probity Deconstructed: How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?* 21 ARB. INT'L. 323, 326 (2005); Marie Öhrström, *Decisions by the SCC Institute Regarding Challenge of Arbitrators*, STOCKHOLM ARBITRATION REPORT 35, 35 (2002).

which would entitle them to challenge the arbitrator later. Last but not least, the author proposes that disqualification requests filed after the commencement of the proceeding should be evaluated by the same institutional body, instead of the unchallenged arbitrators. In a second part of Chapter 5, the need for ICSID-specific conflict of interest guidelines is highlighted, and a first proposal for the assessment of specific conflict situations is made.

CHAPTER 1

Independence and Impartiality in the ICSID Convention and Arbitration Rules

This Chapter analyzes the ICSID Convention's rules and regulations on arbitrators' independence and impartiality, arbitrators' disclosure obligations and the right of the disputing parties to remove unqualified arbitrators. It sheds light on the discussions relating to these provisions during the drafting process of the Convention, and interprets the relevant provisions of the Convention in light of the drafters' regulatory intent.

The focus then shifts from the provisions of the ICSID Convention and Arbitration Rules to the meaning of the notions of independence and impartiality, and the crucial question whether and how the parties' ability to appoint a decision-maker of their choice and the requisite independence and impartiality of this arbitrator can be reconciled.

1 Legal Framework and Drafting History

1.1 *The Requirement of Independence and Impartiality*

ICSID arbitrators must be both independent and impartial. The requirement of independence is set forth in Article 14 para. 1 ICSID Convention, which states that arbitrators shall be "persons … who may be relied upon to exercise independent judgment."[46] Impartiality, which is usually paired with the obligation of independence, is not explicitly called for in either the English or the French[47] version of the Convention. The Spanish version of Article 14 para. 1 does however stipulate that arbitrators must be impartial.[48] Since all language versions of the ICSID Convention are equally authentic,[49] there is

46 ICSID Convention art. 14, para. 1 states the qualities required of members of the Panels of Conciliators and Arbitrators (ICSID Convention art. 12–16). ICSID Convention art. 40, para. 2 extends these requirements to arbitrators appointed from outside the panels.

47 ICSID Convention art. 14, para. 1 (French version): "Les personnes désignées pour figurer sur les listes doivent … offrir toute garantie d'indépendance dans l'exercice de leurs fonctions."

48 "Las personas designadas para figurar en las Listas deberán … inspirar plena confianza en su imparcialidad de juicio."

49 ICSID Arbitration Rule 56.

general consensus among scholars[50] and ICSID arbitration users that both requirements are mandatory. The same standard of independence applies to all arbitrators, whether party-appointed or chairpersons.[51]

The early drafts of the Convention,[52] in particular the Working Paper in the Form of a Draft Convention[53] and the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of other States,[54] did not address arbitrators' independence and impartiality at all. They merely mentioned the other qualities required of arbitrators under Article 14 para. 1 ICSID Convention: high moral character and recognized competence in the fields of law, commerce, industry or finance.[55] The prerequisite of independence was only inserted towards the end of the drafting process.[56] Several delegates had voiced the concern that conflicts of interest might arise in the context of a particular dispute,[57] and highlighted the significance of arbitrators' independence and impartiality for the legitimacy of the system.

A member of the Committee of the Whole on Settlement of Investment Disputes, which was set up to discuss the Working Paper, proposed that a requirement of independence should be added, due to its importance for the

50 Impartiality is also regarded as an implicit requirement for independent judgment. *See* Rubins and Lauterburg, *supra* note 32, at 157; SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 14, ¶ 5; Markert, *supra* note 21, at 243.

51 SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 40, ¶ 21; LUTTRELL, *supra* note 31, at 219; Markert, *supra* note 21, at 255; KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION ¶ 5–057 (2012). For examples of systems where "non-neutral arbitrators" are accepted, see PAULSSON, THE IDEA, *supra* note 22, at 154–155.

52 For an overview of the background of the drafting history, *see* Broches, *supra* note 4, at 345–348.

53 Working Paper in the Form of a Draft Convention, *reprinted in* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, HISTORY OF THE ICSID CONVENTION, VOL. II-1 19–46 (1968) [hereinafter Working Paper].

54 Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of other States, *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 184–235. [hereinafter Preliminary Draft].

55 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, HISTORY OF THE ICSID CONVENTION, VOL. I 72 (1970). *See also* SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 14, ¶ 2.

56 Draft Convention on the Settlement of Investment Disputes Between States and Nationals of other States, *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 617–618 [hereinafter Draft Convention].

57 SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 14, ¶ 5.

"effectiveness of the new machinery."[58] His proposal was later supported by most experts at the Consultative Meeting of Legal Experts in Geneva. In particular, the Dutch expert stated that arbitrators should not only be "capable of exercising independent judgment but also of acting with complete impartiality without accepting instructions from the parties appointing them." The Portuguese expert agreed, and added that "an express provision specifying that arbitrators must act with complete independence, would greatly enhance the international prestige and authority of arbitral awards."[59]

Other legal experts denied the need for such a provision, and questioned its potential scope. The Spanish delegate, for example, asked whether governments would be prevented from appointing their functionaries to the panels, and whether professional relationships between panelists and their appointing State would have to be taken into account. His questions remained unanswered, but the Portuguese expert conceded that independence and impartiality were not abstract and absolute. He insisted, nevertheless, that "persons of recognized standing could be found and relied upon in a given dispute to exercise their functions with complete impartiality in a given case."[60]

The report on the discussions in the Consultative Meeting of Legal Experts, which summarized the collective conclusions in detail, did not address the opponents' concerns. Instead, it stated that there were no serious substantive disagreements on the qualifications required of arbitrators.[61] As a consequence, the scope of the requirement of independence and impartiality was not further discussed during the drafting process.

A possible explanation for the lack of attention paid to the delimitation of independence and impartiality in the drafting process is that Article 14 para. 1 ICSID Convention only indirectly applies to arbitrators who are unilaterally or jointly appointed by the parties, from outside the Panel of Arbitrators.[62]

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58 *See* Memorandum of the meeting of the Committee of the Whole (Dec. 18, 1962), *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 56.

59 *See* Consultative Meeting of Legal Experts (Feb. 17–22, 1964), Summary Record of Proceedings, *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 386–388. *See also* DAELE, *supra* note 51, ¶ 5–027.

60 *See* Consultative Meeting of Legal Experts (Feb. 17–22, 1964), Summary Record of Proceedings, *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 387–388.

61 Regional Consultative Meetings of Legal Experts on Settlement of Investment Disputes, Chairman's Report on Issues Raised and Suggestions Made with Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (July 9, 1964), *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 562.

62 *See supra* note 46.

The delegates' discussions appear to have been focused on the room for maneuver left to States when nominating panel members (who may subsequently be appointed to arbitral tribunals by the Chairman of the ICSID Administrative Council, hereinafter the ICSID Chairman[63]). Apart from a mention of the inappropriateness of receiving instructions from an appointing party, references to the relationship between arbitrators and their appointing parties are conspicuously absent from the discussion record, as if the delegates had overlooked the applicability of Article 14 para. 1 ICSID Convention in that setting. Potential conflicts of interest are however much more numerous in the context of party-appointments on an *ad hoc* basis, and a clear delineation of the scope of independence and impartiality is therefore crucial. The delegates who participated in the drafting process of the ICSID Convention failed to acknowledge this. Quite possibly, they only had a fraction of the potential conflicts of interest in mind when they included the requirement of independence and impartiality in the Convention.

1.2 *The Disqualification of Arbitrators*

The procedural enforcement of the requirement of independence and impartiality can occur at two stages. First, a party can request the disqualification of an arbitrator at the appointment stage or during the proceedings.[64] Second, after the conclusion of the arbitration, a party can commence annulment proceedings.[65] This second option presupposes that the grounds for the challenge were properly raised during the proceedings leading up to the award, and that the lack of independence or impartiality is serious.[66] In practice, any sign of partiality constitutes a "serious departure from a fundamental rule of procedure."[67] This study focuses on the first option, namely challenge requests before the conclusion of the proceeding. They are the primary means for

63 The ICSID Chairman is – *ex officio* – the President of the World Bank. *See* ICSID Convention art. 5.

64 ICSID Convention art. 57. *See* LUTTRELL, *supra* note 31, at 220; SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 14, ¶ 8. Such requests are hereinafter referred to as arbitrator challenges, ICSID challenges, disqualification requests or proposals for disqualification. They initiate disqualification proceedings, which are hereinafter also referred to as removal proceedings or challenge proceedings.

65 ICSID Convention art. 52, para. 1 (d).

66 LUTTRELL, *supra* note 31, at 219.

67 Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, at 119 (May 3, 1985); SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 52, ¶¶ 294–304.

parties to enforce their right to independent and impartial decision-makers, while annulment proceedings are a last resort, and therefore subject to stricter requirements.

The prerequisites for a successful disqualification request are set out in Article 57 ICSID Convention:

> A party may propose to a ... 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.

While the requirement of independence and impartiality under Article 14 para. 1 ICSID Convention is not expressly limited in its scope, the removal of a dependent or biased arbitrator is subject to a manifest lack of these qualities. It is therefore important to determine what precisely qualifies as such a manifest lack, and how this precondition impacts the burden of proof of challenging parties. In order to gain insight on the meaning of the requirement, this book once more turns to the record of the drafting process, and any indication of a specific regulatory intent documented therein.

The requirement of a manifest lack of independence and impartiality was not originally contained in the Convention drafts, and only slipped in later. The Working Paper authorized parties to request the disqualification of an arbitrator "on the ground that he has an interest in the subject matter of the dispute or that he had, prior to his appointment, dealt with the dispute in any capacity whatever."[68] The Preliminary Draft removed these limitations, and allowed for disqualification proposals "on account of any fact whether antecedent or subsequent to the constitution of the Commission or Tribunal."[69] This unlimited ground for disqualification was criticized in two of the regional Consultative Meetings of Legal Experts. Two delegates desired a more specific provision.[70]

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68 Working Paper, *supra* note 53, art. VII, § 6 (1)–(2).

69 Preliminary Draft, *supra* note 54, art. V, § 2 (1).

70 *See* Consultative Meeting of Legal Experts (Feb. 17–22, 1964), Summary Record of Proceedings, *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 436 (intervention of the Turkish delegate, suggesting that the reasons for disqualification should be specifically enumerated); Consultative Meeting of Legal Experts (Apr. 27–May 1, 1964), Summary Record of Proceedings, *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 529 (intervention of the Lebanese delegate, noting that the grounds for disqualification are unclear, enquiring whether a party could challenge the arbitrator appointed by the counter-party, and suggesting a more specific provision, "lest proceedings be protracted indefinitely by successive challenges of arbitrators.").

The chairman acknowledged that there "seemed to be a strong feeling that the question of the qualifications and the disqualification of … arbitrators should be dealt with in greater detail," and clarified that the possibility of a "challenge [of the] arbitrator appointed by the other party … had … been the principal intent of the provision."[71]

Based on these comments, the Draft Convention was drawn up. In its Article 60, it contained a provision on arbitrator disqualification, which was already very similarly worded to today's Article 57. In particular, it included the requirement of a manifest lack of independence and impartiality.[72] In the subsequent meetings, the provision was not further discussed. Only the German delegation voiced its wish to revert to a more open and general rule, mainly driven by the concern that partiality and dependence should be grounds for disqualification. The chairman clarified that in his opinion, partiality and dependence constituted a lack of the qualities required under Article 14 para. 1 ICSID Convention.[73] With this statement, the discussions on the issue were closed.

It is striking that the meaning of the manifest lack requirement introduced in the Draft Convention was never discussed by the delegates. Most notably, the chairman's statement, according to which partiality and dependence constitute a lack of the qualities required under Article 14 para. 1 ICSID Convention, fails to answer the pivotal question when such a lack is manifest. The drafting history makes it abundantly clear, however, that the Convention never intended to impose a particularly heavy burden of proof on challenging parties. On the contrary, the general provision on arbitrator challenges was specifically replaced by today's wording in order to provide for the disqualification of biased or dependent arbitrators. While the chairman highlighted that mere allegations without a factual basis would be insufficient as a basis for a successful challenge,[74] the appropriate threshold for a challenge was

71 Consultative Meeting of Legal Experts (Apr. 27–May 1, 1964), Summary Record of Proceedings, *reprinted in* ICSID, HISTORY II-1, *supra* note 53, at 529.

72 Draft Convention, *supra* note 56, at 638.

73 Memorandum of the Meeting of the Committee of the Whole, February 23, 1965, *reprinted in* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, HISTORY OF THE ICSID CONVENTION, VOL. II-2 993 (1986).

74 Summary Proceedings of the Legal Committee Meeting (Nov. 30, 1964), *reprinted in* ICSID, HISTORY II-2, *supra* note 73, at 728 ("[A] very manifest lack of the qualities enumerated in Article 14 would be necessary for challenging a member of a panel."); Memorandum of the Meeting of the Committee of the Whole (Feb. 16, 1965), *reprinted in* ICSID, HISTORY II-2, *supra* note 73, at 970 ("[I]t was not enough, however, to allege that the arbitrator

never specified. In the absence of any reference to the burden of proof imposed on the challenging party, it must be assumed that the manifest lack requirement in Article 57 ICSID Convention does not raise the bar for arbitrator challenges.[75]

As Daele convincingly argues, the qualifying denotation of the term manifest in the context of other provisions of the ICSID Convention[76] does not apply *per analogiam* to Article 57.[77] All other provisions in which the term manifest is used describe exceptional circumstances in which the disputing parties' fundamental rights are constrained.[78] This is not the case in Article 57 ICSID Convention: Independence and impartiality are not exceptions to the parties' right to freely appoint their decision-makers. On the contrary, the right to an independent and impartial decision-maker itself is a fundamental right, which is procedurally enforced and safeguarded by means of disqualification requests. Accordingly, this remedy should only be limited as far as it is necessary to avoid its abuse and to ensure the effectiveness of arbitral proceedings.[79] The term manifest must be understood to have a more permissive acceptation in the context of arbitrator challenges pursuant to Article 57 ICSID Convention.

A request for the disqualification of an arbitrator must be made "promptly" in order to be admissible.[80] According to Article 58 ICSID Convention, disqualification requests are decided on by the unchallenged members of the arbitral

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was not of high moral character, but to establish facts indicating a manifest lack of that quality.").

75 *See also* DAELE, *supra* note 51, ¶ 5–027.

76 *E.g.*, ICSID Convention art. 36, para. 3 (requiring that it must be easily recognizable that a request is outside of ICSID's jurisdiction); ICSID Arbitration Rule 41, para. 5 (requiring the lack of legal merit to be established clearly and obviously, with relative ease and dispatch, but conceding that "successive rounds of written and oral submissions" might be necessary, and that "[t]he exercise may … be complicated, but it should never be difficult."); and ICSID Convention art. 52, para. 1 (b) (requiring an excess of power which is "self-evident, rather than the product of elaborate interpretations one way or another," "plain on its face and not susceptible of argument one way or another," "clear, plain, obvious, evident," so that "it should not take a hundred pages to explain," and "textually obvious and substantially serious," and "quite evident without the need to engage in an elaborate analysis."). *See* DAELE, *supra* note 51, ¶¶ 5–028 – 5–030.

77 *Id.* ¶¶ 5–031 – 5–032.

78 *Id.* ¶ 5–031.

79 *See also Id.* ¶ 5–032.

80 ICSID Arbitration Rule 9. *See* Kinnear and Nitschke, *supra* note 13, at 44; SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 57, ¶ 11.

tribunal, in the absence of their challenged colleague.[81] If they are equally divided, or if the disqualification proposal concerns a sole arbitrator or the majority of arbitrators of a tribunal, the ICSID Chairman decides. The decision on the disqualification of an arbitrator is final. There is no possibility of an appeal. This competence of the unchallenged co-arbitrators to decide on their colleague's disqualification is unusual and subject to doctrinal criticism. The main argument brought forward against this system is that it might incentivize arbitrators to raise the threshold for challenges.[82]

1.3 *Arbitrators' Disclosure Obligation*

In order to enable parties to exercise their right to independent and impartial decision-makers, appointed arbitrators are required to share certain information about their personal and professional background with them. Not only "past and present professional, business and other relationships (if any) with the parties," but "any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party" are covered by the disclosure obligation.[83] In this context, the relevant threshold is whether a particular circumstance is likely to give rise to justifiable doubts as to an arbitrator's independence and impartiality.[84]

Scholars have repeatedly highlighted that this threshold does not impact the burden of proof required for arbitrator challenges. ICSID Arbitration Rule

81 ICSID Arbitration Rule 9, para. 4. *See* SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 58.

82 Markert, *supra* note 21, at 248–250 (including further references); Fry and Stampalija, *supra* note 31, at 257–258; Krista Nadakavukaren Schefer, *Judicial ethics in international economic law: what standards of independence and impartiality apply to arbitrators and panelists?*, *in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW 215, 233 (Joanna Jemielniak, Laura Nielsen, & Henrik Palmer Olsen eds., 2016) ("In the small world of international arbitrators, disqualifying a fellow arbitrator on 'mere appearances' may not be well-regarded.").

83 ICSID Arbitration Rule 6, para. 2.

84 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, SUGGESTED CHANGES TO THE ICSID RULES AND REGULATIONS, WORKING PAPER OF THE ICSID SECRETARIAT 12 (May 12, 2005), *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf; SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 40, ¶¶ 19–20; LUTTRELL, *supra* note 31, at 222; Rubins and Lauterburg, *supra* note 32, at 160; REED, PAULSSON, AND BLACKABY, *supra* note 13, at 133; Sheppard, *supra* note 32, at 155 (outlining the ICSID Secretariat's proposal to amend Arbitration Rule 6, para. 2, so as to explicitly require justifiable doubts, consistently with other arbitration rules).

6 para. 2 has a different regulatory purpose from Article 57 ICSID Convention: It aims at avoiding bias rather than eliminating biased arbitrators, and is therefore designed to be more comprehensive.[85] Out of numerous disclosures, only very few will give rise to a challenge.

The failure to disclose relevant circumstances has repeatedly served as a basis for disqualification requests. Its sufficiency as a prima facie basis for disqualification has however consistently been denied in decisions on ICSID arbitrator challenges.[86] Chapter 2 therefore focuses on invoked disqualification grounds other than the breach of the disclosure obligation.

2 Delimiting Independence and Impartiality in a System of Party-appointments

2.1 *The Notions of Independence and Impartiality*

The ICSID Convention neither defines nor delimits the concepts of independence and impartiality. While the definition of these notions remains difficult,[87] most scholars agree on the following characteristics of independence and impartiality:

Independence is generally defined as the absence of an actual, identifiable relationship with one of the disputing parties, or with someone closely connected to a party.[88] The mere existence of such a connection calls the adjudicator's independence into question, irrespective of the effect the relationship has on the arbitrator. Where the arbitrator is familiar with counsel for one of the disputing parties, the question is more difficult. Such relationships are only contrary to the requirement of independence if they exceed a certain *de minimis* threshold, for example if an arbitrator's financial tie to a counsel is significant or if a social relationship goes beyond a remote acquaintance or sporadic encounters.[89] The point at which an insignificant connection

85 Rogers, *Arbitrator Ethics*, *supra* note 24, at 638; Fatima-Zahra Slaoui, *The Rising Issue of "Repeat Arbitrators": A Call for Clarification*, 25 ARB. INT'L. 103, 118 (2009).

86 *See* Kinnear and Nitschke, *supra* note 13, at 41.

87 Rubins and Lauterburg, *supra* note 32, at 153; Kee, *supra* note 22, at 181 ("Independence and Impartiality [sic] are two very important words for international arbitration. Yet for all their importance they are two words whose precise meanings are frequently shrouded in mystery and surrounded by controversy."); ERIC A. SCHWARTZ & YVES DERAINS, GUIDE TO THE ICC RULES OF ARBITRATION 115 (2nd ed. 2005).

88 Kee, *supra* note 22, at 183; Markert, *supra* note 21, at 243; Rubins and Lauterburg, *supra* note 32, at 155; Tupman, *supra* note 43, at 29; Reinisch and Knahr, *supra* note 24, at 106.

89 Kee, *supra* note 22, at 183–184.

becomes significant is not defined in abstract terms. Because an arbitrator's independence is assessed purely on the basis of the existence of a connection to a party or counsel, it is said to be an objective criterion. Whether the arbitrator (or the appointing party) believes to be capable of independently and fairly forming an opinion, despite the connection, is irrelevant.[90]

Impartiality, on the other hand, calls for the absence of a subjective, internal predisposition towards one of the parties and their argument.[91] This assessment is more abstract and difficult to quantify, since it concerns the arbitrator's state of mind.[92] Thus, the burden of proof for a challenge based on partiality is usually reduced. Under most arbitration rules (as in most other dispute resolution systems), the appearance of bias or justifiable doubts as to the arbitrator's impartiality are sufficient for a disqualification.[93]

As logical and intuitive as the portrayal of independence and impartiality as dualistic concepts (objective and subjective)[94] appears, it is inevitably simplistic. On the one hand, not all connections to a party impair an arbitrator's independence, and justify a disqualification.[95] The relevance of

90 Schreuer et al., Commentary, *supra* note 16, Art. 40, ¶ 21 (considering the arbitrator's general moral character to be equally unsubstantial); Rubins and Lauterburg, *supra* note 32, at 155; Nigel Blackaby et al., Redfern and Hunter on International Arbitration ¶ 4.77 (6th ed. 2015); Schwartz and Derains, *supra* note 87, at 117.

91 Kinnear and Nitschke, *supra* note 13, at 50–51; David D. Caron & Lee M. Caplan, The uncitral Arbitration Rules 213 (2nd ed. 2013); Markert, *supra* note 21, at 243; Kee, *supra* note 22, at 184; Blackaby et al., *supra* note 90, ¶ 4.78; Tupman, *supra* note 43, at 29; Reinisch and Knahr, *supra* note 24, at 106.

92 Kee, *supra* note 22, at 184; Blackaby et al., *supra* note 90, ¶ 4.78; Rubins and Lauterburg, *supra* note 32, at 155; Schwartz and Derains, *supra* note 87, at 117.

93 Kee, *supra* note 22, at 184; Blackaby et al., *supra* note 90, ¶ 4.78; Schwartz and Derains, *supra* note 87, at 117.

94 *See also* Kinnear and Nitschke, *supra* note 13, at 50; Caron and Caplan, *supra* note 91, at 213 (applying a different terminology by distinguishing independence as the freedom from external control, and impartiality as the absence of internal predispositions. Substantively, the connotation of these terms is synonymous with the differentiation between objective and subjective concepts.).

95 Schwartz and Derains, *supra* note 87, at 119 ("[T]he essential feature of independence [is] the absence of a 'close, substantial, recent and proven relationship' between a party and a prospective arbitrator. How close is 'close', how substantial is 'substantial' and how recent is 'recent', however …. Thus, no matter how much more objective the notion of 'independence' may be than that of 'impartiality', 'independence' nonetheless remains a vague concept."); Schreuer et al., Commentary, *supra* note 16, Art. 40, ¶ 22 (listing the kinds of relationships which might affect an arbitrator's independence); Kee, *supra* note 22, at 183 (referring to "offending relationships.").

any given relationship depends on how likely it is to affect the arbitrator's free decision-making. Thus, assumptions regarding the arbitrator's state of mind – subjective, internal criteria – complement the otherwise objective evaluation.[96] On the other hand, challenges based on an arbitrator's alleged lack of impartiality are generally required to be tied to a factual (objective) basis.[97] As a consequence, the concepts of independence and impartiality are both somewhat subjective, and therefore vague. The advantage of this vagueness is that it allows for the circumstances of a particular case to be taken into consideration. Its disadvantage is that in the absence of a clarification of the abstract terms of independence and impartiality, the practical meaning of those notions (and the outcome of disqualification requests) is unpredictable.[98]

In practice, distinctions between independence and impartiality are often overlooked, and the terms are used interchangeably.[99] This considerably complicates the interpretation of challenge decisions. Terminologically distinguishing the terms, however, is less important and conducive to determining the scope of the concepts, than defining their common purpose. Looking beyond linguistic and conceptual differences, the notions of independence and impartiality are complimentary, and pursue the same goal: At their core, independence and impartiality aim to ensure parties' equality of arms, fair trial and procedural justice[100] – factors which are crucial for the perceived legitimacy of the ICSID system.[101] In more concrete terms, independence and impartiality

96 Horacio A. Grigera Naón, *Factors to Consider in Choosing an Efficient Arbitrator*, *in* ICCA Congress Series No. 9: Improving the Efficiency of Arbitration Agreements and Awards. 40 Years of Application of the New York Convention, 286, 288 (Albert Jan van den Berg ed., 1999) ("[T]he objectiveness of the independence test should not be exaggerated.... [T]he test [requires] an evaluation of ... 'closeness' ... and cannot then be exclusively objective. It [is] permeated with subjective value judgments highly influenced by the cultural and legal background [of] those applying the independence test.").

97 Kee, *supra* note 22, at 184.

98 Catherine A. Rogers, Ethics in International Arbitration ¶¶ 6.69–6.74 (2014).

99 Kee, *supra* note 22, at 183; Rogers, Ethics, *supra* note 98, ¶ 2.53 ("To the extent some logical or linguistic distinction can be made, however, in practical terms it appears to be largely a distinction without a difference. These terms are used more or less interchangeably by institutions and courts, and their true meaning is determined more in their application than in their phraseology."); Tupman, *supra* note 43, at 29.

100 Nadakavukaren Schefer, *supra* note 82, at 217–218.

101 Franck, Fairness, *supra* note 23, at 7 ("To be effective, the system must be seen to be effective. To be seen as effective, its decisions must be arrived at discursively in accordance

guarantee the arbitrator's capacity to evaluate the merits of each case open-mindedly, rationally, and objectively, without relying on extraneous factors.[102] It is precisely this ability that should guide parties' appointments, arbitrators' decisions whether to accept specific appointments, as well as the adjudication of disqualification requests.

2.2 *Party-appointments and Independence and Impartiality*

Arbitrator independence and impartiality is often described in broad and far-reaching terms, because it is "framed in reference to concepts of judicial [independence and] impartiality."[103] In light of the adjudicatory function performed by arbitrators, the analogy appeals to intuition: If it were not for the parties' arbitration agreement, the same disputes would be settled by judges. Besides this obvious functional similarity, however, there are also fundamental differences between arbitrators and judges, which justify a more differentiated approach to the obligation of independence and impartiality.

The most important difference between judges and arbitrators is that judges are institutionally insulated from the parties, and are assigned cases on a more or less random basis. The judicial office is designed for contacts between decision-makers and litigants (as well as decision-makers and the subject-matter of a case) to be avoided. In the rare event in which such a connection does exist, it is an unusual and coincidental anomaly, which justifies a judge's recusal from the specific case.[104] Arbitrators, on the other hand, are characteristically appointed by the parties, on an *ad hoc* basis, for the resolution of

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with what is accepted by the parties as right process."); Caron, *Investor State Arbitration*, *supra* note 23, at 514; Paulsson, The Idea, *supra* note 22, at 17; Franck, *Integrating Investment Treaty Conflict*, *supra* note 22, at 214–215; Kee, *supra* note 22, at 195.

102 Kinnear and Nitschke, *supra* note 13, at 51 ("[T]hese 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.'"); Gary B. Born, International Arbitration: Law and Practice 129 (2012) ("[I]ndependence and impartiality … are fundamental to the arbitral process, which is an adjudicatory procedure requiring a neutral and objective tribunal."); Sobota, *supra* note 27, at 311 ("If parties want to appoint their own arbitrator, they also want the other side's arbitrator to be open to reason."); Richard Woolley, Is arbitrator impartiality a myth?, Global Arbitration Review (June 9, 2015), http://globalarbitrationreview.com/news/article/33,866/ (quoting Mark Beckett highlighting that impartiality requires the arbitrator to have an open mind, not to be a blank slate).

103 Rogers, *Arbitrator Ethics*, *supra* note 24, at 631.

104 *Id.* at 633–634.

a specific dispute. It is not their exclusive (and often not even their main) occupation to serve as arbitrators.[105]

The tension between party-appointments and the idea of independence and impartiality as it derives from the judicial context is apparent:[106] If the parties' ability to participate in the setup of the decision-making body is to be meaningful at all, they must be able to select a suitable arbitrator, based on this person's qualifications. This logically presupposes some degree of familiarity between the nominee and the appointing party, or counsel for the party – be it based on the candidate's academic publications on particular legal questions, or in virtue of the expertise the person has acquired as a counsel or arbitrator in a particular field.[107] The best guarantee for the arbitrator's competence is the party's prior professional experience with the person. None of the described bases for an appointing party's selection would hold up to scrutiny based on judicial standards of independence. The European Court of Human Rights, for example, views independence as a function of the manner of the decision-maker's appointment, the term of office, the guarantees against outside pressures, and the appearance of independence generated by these factors.[108] This precludes pre-existing connections between the decision-maker and the disputing parties. Not only unilaterally designated, but also jointly appointed arbitrators would therefore generally fail to fulfill judicial standards of independence.

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105 Luttrell, *supra* note 31, at 239; Thomas J. Stipanowich & Zachary P Ulrich, Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators 19–23 (2014) (providing empirical data on the work time utilization of commercial arbitrators).

106 Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 Loy. L.A. Int'l. & Comp. L. Rev. 473, 488 (2008); Daele, *supra* note 51, ¶ 6–191; Kee, *supra* note 22, at 182 and 193; Rogers, *Arbitrator Ethics*, *supra* note 24, at 632; Axel H. Baum, *Editorial: Maintaining the Essence of Arbitration*, 4 J. Int'l. Arb. 4, 5 (1987) ("An arbitrator, as opposed to a professional judge, by the nature of his background is more vulnerable to criticism or challenge."). *Contra* Rubins and Lauterburg, *supra* note 32, at 153.

107 *See* Markert, *supra* note 21, at 255; Luttrell, *supra* note 31, at 226; Schreuer et al., Commentary, *supra* note 16, Art. 57, ¶ 22; Rachel Bendayan, *Interview with a Leading International Arbitrator: L Yves Fortier*, 18 IBA Arb. News 18, 20 (2013) ("The expertise of the lawyers appointed as arbitrators as opposed, in general, to the pot-luck selection of national judges is another distinct advantage of arbitration over litigation.").

108 Rubins and Lauterburg, *supra* note 32, at 155 (referencing Findlay v. United Kingdom, echr 22,107/93 (Feb. 25, 1997), para. 73). *See also* Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed*, 45 Cornell Int'l. L.J. 77, 111–112 (2012).

Three conclusions could be drawn from the described situation: First, that party-appointments are incompatible with the fundamental principle of independence and impartiality and should therefore be abolished. Second, that parties who have entered into an arbitration agreement have waived their right to an independent and impartial decision-maker (at least to some extent), in favor of their right to freely appoint their decision-maker. Or, third, that the tension between independence and impartiality and party-appointments requires a differentiated approach, rather than a radical solution. Namely, that arbitrators' independence and impartiality should be clearly delimited, so as to facilitate the benign and legitimate interests pursued by the system of party-appointments, while effectively preventing dependence and bias.

The abolishment of party-appointments by virtue of their incompatibility with independence and impartiality has been advocated by various distinguished scholars, and is analyzed below, in Chapter 4, Part 1.

The second conclusion mentioned above is refuted by the provision for arbitrators' independence and impartiality in Article 14 para. 1 ICSID Convention, and in all major arbitration rules.[109] The drafting history of the ICSID Convention illustrates that ensuring the independence and impartiality of the decision-makers was a priority for the delegates.[110] Nowhere in the drafting record have they expressed the intention to cut back on independence and impartiality, in order to allow parties to freely appoint their decision-makers. On the contrary, Article 40 para. 2 ICSID Convention has been conceived to limit the parties' choice, and is an expression of the precedence given to the parties' right to an independent and impartial decision-maker.[111]

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109 United Nations Commission on International Trade Law Rules on Transparency in Treaty -based Investor-State Arbitration and Arbitration Rules, art. 11, G.A. Res. 68/109, U.N. Doc. A/RES/68/109 (Dec. 16, 2013) [hereinafter UNCITRAL Arbitration Rules (2013)]; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, art. 14, para. 1 [hereinafter SCC Arbitration Rules]; Rules of Arbitration of the International Chamber of Commerce, art. 11, para. 1 [hereinafter ICC Arbitration Rules].

110 *See supra* Part 1.1.

111 *See also* DAELE, *supra* note 51, ¶ 5–111 (stating, at first, that "[t]he right to appoint an arbitrator … is indeed qualified by the requirement that the entire Tribunal is independent and impartial," but clarifying in the subsequent section that the Convention and Rules "provide that each of the arbitrators shall be independent and impartial."); SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 37, ¶ 2 (listing the requirement of arbitral independence and impartiality pursuant to ICSID Convention art. 40, para. 2 as a limit to the parties' freedom of choice in the constitution of tribunals).

This prioritization is also expressed in Article 39 ICSID Convention, which provides that "[t]he majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute." The drafting history of this provision reveals that the appointment of national arbitrators was restricted in order to avoid a situation where the chairperson would be the only independent and impartial decision-maker on the tribunal.[112] Clearly, the delegates did not believe, as is now often argued,[113] that the independence and impartiality of one arbitrator could balance out potential dependencies or preconceptions of the other two. On the contrary, they highlighted the importance of the independence and impartiality of all arbitrators, including the ones unilaterally appointed by the parties. Otherwise, the president of the tribunal would have no other choice than to side with one of the partisan arbitrators, in order to achieve a majority.[114] Although Article 39 ICSID Convention concerns the nationality of the arbitrators, this reasoning also applies to their independence and impartiality. It confirms that the provision for the independence and impartiality of all arbitrators, regardless of their appointing party, is not a mere platitude, but a serious guarantee, based on valid interests.

By submitting to arbitration under the ICSID Convention, parties subscribe to this prioritization.[115] Thus, their ability to appoint the decision-makers is limited by the requirement of independence and impartiality, and not the other way around. It is not an option to "acknowledge … an appearance of partiality … but [to] let it pass on the assumption that this is what the parties have chosen."[116] The repercussions of awards in investor-State arbitration

112 SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 39, ¶ 2.

113 Franck, *The Role of International Arbitrators*, *supra* note 24, at 12; Alexis Mourre, Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration, Kluwer Arbitration Blog (Oct. 5, 2010), http://kluwerarbitrationblog.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/ (explaining that party-appointed arbitrators sometimes defend their appointing parties' interests with such fervor that a strong chairperson will ignore them, and draft an award without paying attention to their tactics).

114 SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 39, ¶ 7.

115 PAULSSON, THE IDEA, *supra* note 22, at 17 (arguing that the parties assign decision-making authority to three arbitrators, and therefore expect all three to be impartial, but conceding that this is at least the case *ex ante*, for as the proceedings evolve, parties might lose sight of the goal of resolving a dispute, and "most of all care about winning."); Franck, *The Role of International Arbitrators*, *supra* note 24, at 5–6.

116 Sobota, *supra* note 27, at 310–311.

are often not only borne by the disputing parties, but also by the citizens of the Respondent State. Accordingly, disputing parties must not be allowed to waive their right to independent and impartial decision-makers, and to consent to a certain degree of dependence or bias. The procedural integrity of the decision-making process is of utmost importance for the legitimacy of individual decisions,[117] as well as the institution as a whole. This precludes the possibility of such waivers.

Last but not least, the third proposition set out above is the one supported by this author. Namely, there is not an incompatibility, but merely a tension between independence and impartiality on the one hand, and party-appointments on the other hand. This tension calls for a clear delimitation of independence and impartiality in the context of ICSID arbitration, tailored to the function of its arbitrators, and in variance with the judicial standard of independence and impartiality.[118] The benign and legitimate interests pursued by the system of party-appointments should not be hindered, but situations in which the familiarity with a participant (a party or a counsel) or with the subject-matter of the proceeding would inhibit the arbitrator's capacity to evaluate the merits of the case open-mindedly, rationally, and objectively, without relying on extraneous factors, must be prevented.

Party-appointments pursue a legitimate goal to the extent they ensure the parties' buy-in into a system which would otherwise be fraught with uncertainties and unpredictability.[119] In the eyes of the parties, their control over the appointment of the decision-makers attenuates the uncertainty caused by the arbitrators' high degree of discretion (mainly due to the absence of a rule of binding precedent, and the lack of an appeals mechanism), and their varied ideological, political, and national backgrounds.[120] It improves the palatability

117 PAULSSON, THE IDEA, *supra* note 22, at 147.

118 Shany, *supra* note 106, at 488; DAELE, *supra* note 51, ¶ 6–191; Kee, *supra* note 22, at 182 and 193; Rogers, *Arbitrator Ethics*, *supra* note 24, at 632. *Contra* Rubins and Lauterburg, *supra* note 32, at 153.

119 ERIC A. POSNER & JOHN C. YOO, A THEORY OF INTERNATIONAL ADJUDICATION UC BERKELEY PUBLIC LAW RESEARCH PAPER NO. 146 6 (2004); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 7 (2005) [hereinafter Posner and Yoo, *Judicial Independence*]; ROGERS, ETHICS, *supra* note 98, ¶ 2.39; Park, *Arbitration's Discontents*, *supra* note 24, at 593.

120 *See* FRANCK, STRUCTURE, *supra* note 41, at 247–248; Park, *Arbitration's Discontents*, *supra* note 24, at 593. *See also* Adam M. Smith, *"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT'L. L.J. 197, 203 (2005) (stating, in the context of ICJ *ad hoc* judges, that they are permitted to participate in the decision-making "[b]ecause States …would have it no other way.").

of awards, since parties are assured that their arguments were heard[121] and that the decision was made by a competent and qualified body.[122]

The parties' desire for such control manifests itself in several dispute resolution mechanisms: Article 12 para. 5 ICC Arbitration Rules provides for the appointment of the chairperson of the arbitral tribunal by the ICC Court, unless the parties agree upon another procedure. The parties, however, derogate from this default mechanism in almost sixty percent of all cases,[123] and agree on a chairperson, or have the party-appointed arbitrators agree on one. The Arbitration Rules of the London Court of International Arbitration (LCIA)[124] provide for the institutional appointment of all arbitrators, unless the parties agree to nominate them.[125] Despite the flawless reputation of the LCIA for arbitrator appointments, parties depart from this default rule in over fifty percent of all cases.[126] The China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center (CIETAC) is also moving away from its roster system, and towards unrestricted party-appointments, in order to "accommodate the expectations of foreign parties."[127] In the International Court

121 Franck, *The Role of International Arbitrators*, *supra* note 24, at 12 (highlighting that such a better understanding of the parties must not necessarily turn into bias, and does not predispose the outcome of the proceeding).

122 *See* Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson – Van Den Berg Presumption That Party-Appointed Arbitrators are Untrustworthy is Wrong-Headed*, 29 ARB. INT'L. 7, 25 (2013) ("Parties may find it difficult to complain if they themselves had an active role in the constitution of the tribunal."); Mourre, *supra* note 113. In the context of national judges in international adjudication, *see* Smith, *supra* note 120, at 231 ("keep[ing] nationality as a factor in judicial nominations … provides some psychic 'ownership' to states in the ICJ process and can potentially promote compliance with Court decisions."); Stephen M. Schwebel, *National Judges and Judges Ad Hoc of the International Court of Justice*, 48 INT'L. COMP. L.Q. 889, 891–892 (1999) [hereinafter Schwebel, *National Judges*]; Il Ro Suh, *Voting Behavior of National Judges in International Courts*, 63 AM. J. INT'L. L. 224, 234 (1969); Dannenbaum, *supra* note 108, at 114 and 169; Park, *Arbitration's Discontents*, *supra* note 24, at 593.

123 Mourre, *supra* note 113.

124 Arbitration Rules of the London Court of International Arbitration [hereinafter LCIA Arbitration Rules].

125 LCIA Arbitration Rules art. 5.6, 5.7 and 7 (providing for a similar mechanism as under the ICC Arbitration Rules).

126 Mourre, *supra* note 113.

127 Ank A. Santens, The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?, Kluwer Arbitration Blog (June 28, 2011), http://kluwerarbitrationblog.com/2011/06/28/the-move-away-from-closed-list-arbitrator-appointments-happy-ending-or-a-trend-to-be-reversed/ [hereinafter Santens, Move Away].

of Justice (ICJ), parties who do not have a national on the court may appoint an *ad hoc* judge when they are involved in a case.[128] Last but not least, in the ICSID system, parties apparently "go to great lengths to avoid ICSID making the appointment of the chair from its roster"[129] – approximately seventy-one percent of all arbitrator appointments are made by the parties alone, without any assistance from ICSID.[130]

Posner and Yoo even go so far as to consider the parties' control over the appointment of the decision-makers the main driver of an international dispute resolution mechanism's legitimacy. Not independence creates legitimacy in international dispute settings, they argue,[131] but the parties' control over the composition of the decision-making body, which ensures the parties' confidence in the relative predictability of the proceeding. Without party-appointments, the respective dispute resolution mechanisms would fall into desuetude, and would thus forfeit their legitimacy.[132]

It is the view of this author that the proposition of Posner and Yoo goes too far. The parties' control over the decision-makers, taken to its extreme, does not foster the parties' confidence and trust: As soon as the counterparty

128 Statute of the International Court of Justice art. 31, para. 2–3, June 26, 1945, I.C.J. Acts & Docs. 59 [hereinafter ICJ-Statute]. *See* Suh, *supra* note 122, at 236 ("However appealing the theoretical objections raised against the system of national judges may seem, to abolish it would probably be impossible, since States still attach much importance to having one of their subjects on the bench when they appear before a court of justice."); Pieter Hendrik Kooijmans, *Article 31*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 530, ¶ 2 (Andreas Zimmermann et al. eds., 2nd ed. 2012) ("[G]iving both parties the right to have a judge of their nationality on the bench could be instrumental in overcoming the traditional mistrust of States towards a permanent judicial body, in particular, since the future of such a body would depend ultimately on the willingness of individual States to utilize it for the settlement of their disputes.").

129 Caron, *Investor State Arbitration*, *supra* note 23, at 519.

130 Kinnear and Nitschke, *supra* note 13, at 39.

131 Posner and Yoo, *Judicial Independence*, *supra* note 119, at 12–13 ("International law scholars have transferred the logic of independence from the domestic arena to the international sphere.... [T]he conventional wisdom overlooks the profound differences between the settings in which domestic and international courts operate.").

132 *Id.* at 73. *But see* Douglas Earl McLaren, *Party-Appointed vs List-Appointed Arbitrators: A Comparison*, *in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 161, 163 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (suggesting, based on a survey on user preferences for party-appointed or list-appointed arbitrators, that "the perceived difference between the party-appointed and list-appointed methods of arbitrator selection may not be as stark ... as previously imagined.").

visibly exercises more control over the arbitrator it has appointed, the ideal of control transforms into a perception of bias, and confidence turns into distrust towards a system which condones partiality.[133] After all, "the corollary of being able to pick your own arbitrator is that so can the guy on the other side."[134] Thus, as has been set out above, independence and impartiality must have priority over and delimit the parties' autonomy to appoint their decision-makers.

The definition of independence and impartiality in the context of ICSID arbitration must strike a careful balance. It must be tailored to the system's functions, without unnecessarily constraining party-appointments.[135] This balance should be determined by the purpose of the guarantee of independence and impartiality, as identified above: The arbitrator's capacity to evaluate the merits of each case open-mindedly, rationally, and objectively, without relying on extraneous factors.

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133 *See* PAULSSON, THE IDEA, *supra* note 22, at 162.

134 See David Samuels, Rees's rules for complex disputes, Global Arbitration Review (July 7, 2011), http://www.globalarbitrationreview.com/news/article/29,614/reess-rules-complex-disputes/.

135 *See also* ROGERS, ETHICS, *supra* note 98, ¶ 8.10 ("Ethical regulation of adjudicator impartiality … is not about prohibiting all forms of partiality or bias. It is instead about selecting what types of partiality or bias are appropriate to the particular system and devising structures and procedures that harness those biases and prevent other undesirable ones."), ¶ 7.30 (highlighting that different dispute resolution designs serve different goals and communities, and therefore entail a different prioritization of ethical obligations: "In crafting these different adjudicatory models, architects of various systems calibrate differently the specific roles assigned to adjudicators in relation to parties and advocates, and as a consequence, adjudicators' professional ethical obligations in these systems differ.").

CHAPTER 2

Disqualification Decisions under the ICSID Convention and Arbitration Rules

This Chapter aims to distill a consistent approach to arbitrators' independence and impartiality from past decisions on disqualification requests. In a first part, the interpretation of the manifest lack requirement provided for in Article 57 ICSID Convention is scrutinized. The definition of this threshold (i.e. the burden of proof imposed on the challenging party) is crucial, because it determines the effectiveness of the right to an independent and impartial decision-maker. The second part of the Chapter inquires how specific categories of alleged conflict are dealt with. It seeks to derive consistency and predictability from the outcome or reasoning of disqualification decisions in particular constellations.

All disqualification decisions which have been published or discussed in scientific literature prior to December 1, 2016 are covered, provided that they make reference to the applicable threshold for arbitrator disqualification, or offer insight into the assessment of certain categories of challenge grounds.[136]

136 Despite improvements in the transparency of ICSID proceedings, a significant number of challenge decisions remain unpublished. Chapter 2, Part 1 analyzes all decisions which offer insight into the interpretation of the manifest lack requirement. Unpublished decisions and requests which were dismissed because they were belated, or because the arbitrator had resigned in the meantime, are generally not taken into consideration. Chapter 2, Part 2 also takes unpublished decisions into account, provided that at least the grounds for the challenge and its outcome have been reported. Unpublished disqualification decisions which have been discussed on reporting websites which are not openly accessible, such as Investment Arbitration Reporter (www.iareporter.com) or Global Arbitration Review (www.globalarbitrationreview.com), are taken into account to the extent the author was able to access such reports.

For a comprehensive overview of all challenge decisions (including unpublished ones) and resignations, *see* Kinnear and Nitschke, *supra* note 13, at 61–79 (Annex 1); DAELE, *supra* note 51.

1 Formally Inconsistent Interpretations of the Disqualification Threshold

1.1 *Requirement of Strict Proof under* Amco Asia

The first arbitrator challenge under the ICSID Convention was made in *Amco Asia*.[137] Indonesia requested the disqualification of Edward W. Rubin, the Claimant-appointed arbitrator in the case. Prior to his appointment as an arbitrator (but after the initiation of arbitration proceedings),[138] Rubin had given tax advice to the controlling shareholder of the corporate Claimant. Furthermore, his law firm had shared office space and administrative services with counsel for Claimant for about half a year into the arbitration proceedings. A long-standing profit-sharing arrangement between the firms had been discontinued before the arbitration was initiated. Indonesia argued that these circumstances affected the arbitrator's independence.[139]

The unchallenged arbitrators dismissed the challenge for lack of a strict proof of actual bias. They required proof not only of the facts that indicated a lack of independence, but also of the arbitrator's actual lack of independence, which had to be "'manifest' or 'highly probable', not just 'possible' or 'quasi-certain.'"[140] Justified doubts regarding the arbitrator's independence, based on the above-mentioned facts, were not considered to be sufficient.[141]

They elaborated that arbitrators could not be disqualified based solely on their relationship with the appointing party – irrespective of its character and extent – since the system of party-appointments inherently presumed such acquaintances.[142] The indiscriminate nature of this position is irreconcilable with the tribunal's insistence on the importance of "an absolute impartiality … of all the members of an arbitral tribunal" in the same decision.[143]

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137 Amco Asia Corporation and others v. Republic of Indonesia (*Amco Asia*), ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982), cited in Tupman, *supra* note 43, at 45. *See also* LUTTRELL, *supra* note 31, at 226.

138 Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (*Vivendi*), ICSID Case No. ARB/97/3, Decision on Challenge to the President of the Committee (Sept. 24, 2001), ¶ 21.

139 Tupman, *supra* note 43, at 45.

140 *Id.* at 45; LUTTRELL, *supra* note 31, at 225.

141 *See* LUTTRELL, *supra* note 31, at 226; SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 57, ¶ 22.

142 Tupman, *supra* note 43, at 45.

143 *Id.* at 45 (based on this reasoning, the unchallenged arbitrators dismissed the Claimant's argument that party-appointed arbitrators should be subject to a more lenient standard of independence and impartiality). *See also* DAELE, *supra* note 51, ¶ 5–006.

1.2 *Requirement of Reasonable Doubts under* Vivendi *and* SGS

The second arbitrator challenge under the ICSID Convention was made in *Vivendi*.[144] Argentina challenged the president of the *ad hoc* Annulment Committee, Yves Fortier Q.C. One of the partners at his law firm had previously provided tax advice to the corporate predecessor of one of the Claimants (Vivendi Universal S.A.). Fortier was not personally involved in the tax advice, which was furthermore unrelated to the claim against Argentina.

The challenge was dismissed by Fortier's fellow committee members, who strongly criticized the *Amco Asia* decision,[145] but who would not uphold a challenge that was based on "mere speculation or inference."[146] For the request for disqualification to succeed, the entirety of the circumstances had to raise reasonable doubts[147] about the committee member's impartiality.

The test applied by the committee members required the challenging party to establish, in a first step, the factual basis of its challenge, i.e. circumstances serious enough to put the independence or impartiality of the challenged arbitrator into question. In this first step, the reliance on mere speculation or inference was precluded. If the party succeeded at proving the factual basis of its challenge, however, inferences based on these facts were allowed in the second step. Namely, if the proven facts were to cast clear and reasonable doubt on the appearance of independence and impartiality or cause a reasonable apprehension of a "real risk" of bias, the challenge would be upheld.[148]

Because the decision commingles different standards of independence and impartiality which contradict each other, it is sometimes held to be of limited usefulness.[149] The commonalities of the standards mentioned by the Annulment Committee members, however, deserve more attention than nomenclature: Under none of the invoked standards does the challenging party need to prove the challenged arbitrator's actual bias. Inferences from the established facts are allowed, and have an influence on the success of the challenge. This interpretation of the manifest lack requirement considerably lowers the threshold for arbitrator challenges, and approximates it to the threshold applied in most other dispute resolution mechanisms.[150]

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144 *Supra* note 138.

145 *Vivendi*, ¶ 22.

146 *Vivendi*, ¶ 25.

147 *Vivendi*, ¶ 25; Fry and Stampalija, *supra* note 31, at 211.

148 *Vivendi*, ¶ 25; LUTTRELL, *supra* note 31, at 228; SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 57, ¶ 25.

149 LUTTRELL, *supra* note 31, at 229.

150 *See infra* Chapter 3.

The challenge decision in *SGS*[151] is even clearer in this respect: It states that an inference of manifest bias is sufficient as a basis for disqualification, as long as it is anchored to facts – as opposed to speculations or inferences – established by the challenging party.[152] Furthermore, the facts must only reasonably[153] – not compellingly – generate the inference that "clearly, the person challenged is not to be relied upon for independent judgment, or that a readily apparent and reasonable doubt as to that person's reliability for independent judgment has arisen."[154] The challenging party does not need to prove actual bias under this standard. A real risk or reasonable apprehension of bias is sufficient.[155]

Summing up, the early case law on arbitrator challenges does not provide a clear-cut answer to the question what distinguishes an ordinary lack of qualities from a manifest lack. The challenging party's burden of proof ranges from the need to prove actual bias to having to prove facts from which bias can reasonably be inferred, or which justify doubts about the arbitrator's independence and impartiality. In light of the wide-spread criticism of *Amco Asia*,[156] and the tendency toward a more lenient threshold in *Vivendi* and *SGS*, one might expect that a lower threshold was forthwith applied to arbitrator challenges. The analysis of the challenge decisions rendered in the wake of *Amco Asia*, *Vivendi* and *SGS*, however, indicates that this is not the case.

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151 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (*SGS*), ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002). Claimant challenged the Respondent-appointed arbitrator, Mr. J. Christopher Thomas. In several unrelated prior investor-State arbitration proceedings, Mr. Thomas and counsel for Respondent (Mr. Jan Paulsson) had been involved simultaneously, in reversed roles. In one case, in which Mr. Thomas represented Respondent, and Mr. Paulsson presided over the tribunal, all claims against the Respondent were dismissed. Claimant argued that Mr. Thomas might feel indebted to Mr. Paulsson and therefore not approach the case with the required open-mindedness.

152 LUTTRELL, *supra* note 31, at 230 (arguing that the real contribution of *SGS* was the determination of an objective, "reasonable person" vantage point. Luttrell does not pay further attention to the facts-inference test established in *SGS*, claiming that it conflicts with *Amco Asia* and *Vivendi*.).

153 *SGS*, ¶ 21 ("There must … be a clear and reasonable relationship between the constituent facts and the constituent inference they generate.").

154 *Id.* ¶ 21.

155 SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 57, ¶ 29.

156 *See, e.g.*, Tupman, *supra* note 43, at 51 ("[T]he tribunal imposed a standard that would tolerate virtually any prior business or professional relationship.").

1.3 *Inconsistency of the Disqualification Threshold in Subsequent Decisions*

The challenge decisions rendered following *SGS* can be subdivided into three categories, pursuant to the burden of proof imposed on the challenging party. The first group of cases follows in the footsteps of *Amco Asia* and requires the challenging party to furnish strict proof of the arbitrator's actual lack of independence and impartiality. The second category of cases applies a more lenient threshold, as previously set out in *Vivendi* and *SGS*: An arbitrator may be disqualified if the challenging party proves circumstances from which bias can reasonably be inferred, or which lead to justified doubts regarding the arbitrator's independence or impartiality. Finally, in a third group of cases, the standards applied in *Amco Asia* and in *Vivendi* are both referred to, and the challenges are dismissed.

A Challenge Decisions Applying the *Amco Asia* Standard

Suez II[157] merely hints at *Amco Asia* by stating that the lack of independence must be "highly probable," and not just "possible."[158] Apart from that, the decision mainly provides practical indicators for a case-by-case appraisal of connections between an arbitrator and a party,[159] instead of abstractly defining the term "manifest lack." The significance of the reference to *Amco Asia* is therefore doubtful.

In *PIP*,[160] the ICSID Chairman required the challenging party to establish the facts on which its request was based, and to demonstrate that those facts

157 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), Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19), AWG Group v. Argentine Republic (UNCITRAL) (*Suez II*), Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008). In *Suez II*, Argentina challenged Professor Kaufmann-Kohler based on her position as a director of UBS. UBS was a shareholder of two of the Claimants and made recommendations with respect to investments in the sector in which they operated. As a director of UBS, Professor Kaufmann-Kohler received a portion of her compensation in UBS stock. Argentina argued that this would cause her to have a personal (economic) interest in the outcome of the proceeding, and prevent her from adjudicating the case independently and impartially.

158 LUTTRELL, *supra* note 31, at 235.

159 *Suez II*, ¶ 35. *See also* LUTTRELL, *supra* note 31, at 235.

160 Participaciones Inversiones Portuarias SARL v. Gabonese Republic (*PIP*), ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator (Nov. 12, 2009).

prove a manifest lack of impartiality.[161] Apart from this rather general reference to the *Amco Asia* standard, the ICSID Chairman also referred to *Vivendi* and *SGS*,[162] but did not include the parts of the *Vivendi* standard which depart from *Amco Asia* in his analysis. In particular, the ICSID Chairman did not as much as mention the terms "inference" or "reasonable doubts."

The unchallenged arbitrators dealing with the *Tidewater*[163] challenge highlighted that the ICSID standard "differs from the 'justifiable doubts' test formulated in the IBA Guidelines,"[164] without however explaining wherein precisely said difference lies. In fact, their definition of a manifest lack – "if the facts or circumstances … are of such gravity … as to call into question the ability of the arbitrator to exercise independent and impartial judgment"[165] – is reminiscent of the "justifiable doubts" standard. Later in the decision, however, the threshold appears to be higher, requiring that the circumstances "justify reaching the conclusion that Professor Stern manifestly lacked independence or impartiality."[166] The request for disqualification was dismissed arguing *ad maiorem minus*: Since the challenge would not be upheld under the (inapplicable) IBA Guidelines, it was even less promising under the ICSID Convention. The unchallenged arbitrators thereby elegantly evaded taking a stand on the ICSID standard.

In *OPIC*,[167] the challenging party was required to clearly and objectively "establish a manifest lack" of independence, and not just an appearance

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Professor Ibrahim Fadlallah, appointed to the tribunal by Claimant, had previously chaired a tribunal in a proceeding against Gabon. Gabon had requested the annulment of the award, and the annulment proceeding was pending.

161 *PIP*, ¶ 23.

162 *PIP*, ¶ 22.

163 Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela (*Tidewater*), ICSID Case No. ARB/10/5, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Dec. 23, 2010). Professor Brigitte Stern's disqualification was requested based on her repeat appointments by Venezuela and its counsel in four investor-State disputes.

164 *Id.* ¶ 43 (referring to the IBA Guidelines on Conflicts of Interest in International Arbitration, approved on May 22, 2004 by the Council of the International Bar Association, hereinafter the IBA Guidelines).

165 *Id.* ¶ 40.

166 *Id.* ¶ 47. *See also* the reference to *Suez II*, ¶ 39.

167 OPIC Karimum Corporation v. Bolivarian Republic of Venezuela (*OPIC*), ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands (May 5, 2011). Professor Philippe Sands was challenged because of his repeat appointments by Venezuela and its counsel (Curtis, Mallet-Prevost, Colt & Mosle LLP). His previous two appointments by Venezuela had however never materialized – they had in fact concerned

thereof.[168] In their examination of the Claimant's arguments, however, the unchallenged arbitrators explained that "multiple appointments of an arbitrator by a party or its counsel is [sic] a factor which … may lead to the conclusion that it is manifest that the arbitrator cannot be relied upon to exercise independent judgment."[169] Such a conclusion would logically be an inference from the established facts (i.e. multiple appointments), an impression or appearance created thereby. The standard so starkly phrased in abstract terms is therefore mitigated in its differentiated application to the facts. Ultimately, the unchallenged arbitrators do not appear to expect a strict proof of the challenged arbitrator's state of mind.

In *Universal Compression*,[170] the challenge of a majority of the tribunal triggered the competency of the ICSID Chairman, who dismissed the request applying the strict standard established in *Amco Asia*: The challenging party was expected to establish objective facts which would suggest that the arbitrators' independence or impartiality was manifestly impacted.[171]

The *Amco Asia* standard was further applied in *ConocoPhillips I*, where the unchallenged arbitrators required objective evidence of an obvious, evident and highly probable, not just possible lack of independence and impartiality.[172]

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the same dispute, which was filed in several fora. The respective tribunals had either rejected their jurisdiction, or never been constituted to begin with.

168 *Id.* ¶¶ 44–45.

169 *Id.* ¶ 50.

170 Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela (*Universal Compression*), ICSID Case No. ARB/10/9, Decision on the Proposal for the Disqualification of two Members of the Arbitral Tribunal (May 20, 2011). Claimant requested the disqualification of Professor Brigitte Stern based on her repeat appointments by Venezuela and its counsel (Curtis, Mallet-Prevost, Colt & Mosle LLP) in four cases. Respondent challenged Professor Tawil, the Claimant-appointed arbitrator. Allegedly, Professor Tawil had entertained a professional relationship with counsel for Claimant (King & Spalding LLP) for over ten years, acting as their co-counsel in at least three ICSID proceedings. One of King & Spalding LLP's attorneys had been employed in Professor Tawil's law firm for four years, and had as such worked with him personally.

171 *Id.* ¶ 72 and 77.

172 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (*ConocoPhillips I*), ICSID Case No. ARB/07/30, Decision on the Proposal for the Disqualification of L. Yves Fortier, Q.C. (Feb. 27, 2012), ¶ 56. *ConocoPhillips I* marks the beginning of a series of challenges of the Claimant-appointed arbitrator Yves Fortier, Q.C. by Venezuela. Mr. Fortier's law firm (Norton Rose LLP) was about to merge with Macleod Dixon LLP, the single most adverse law firm to Respondent's interests, whose case portfolio relied heavily on disputes against Venezuela (according to Respondent). As a reaction to Venezuela's request for

In *ConocoPhillips IV*,[173] the unchallenged arbitrators provided no explanations on the applicable standard, but dismissed the challenge because Venezuela had "not established that Mr. Fortier manifestly lacks the ability to act independently and impartially." The allegations on which Venezuela based its challenge would have to be established, and would have to "[give] rise to a manifest lack of independence and impartiality in this case."[174] The requirement of proving a manifest lack of independence and impartiality is reminiscent of the *Amco Asia* standard, even if the term "strict proof" was not used.

In *ConocoPhillips V*,[175] the unchallenged arbitrators specified that what mattered was whether "a reasonable third person, with knowledge of all the facts, would conclude, on an objective basis, that the arbitrator is manifestly lacking in the ability to act impartially."[176] In their application of this standard

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disqualification, Mr. Fortier announced that he would resign from Norton Rose LLP on the day before the merger. Until then, ethical screens would ensure his impartiality. Venezuela adhered to its request, arguing that neither ethical screens (which allegedly did not function), nor Mr. Fortier's resignation could rule out that he would be influenced by his former firm's interests in the dispute.

173 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (*ConocoPhillips IV*), ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (Dec. 15, 2015). Venezuela's fourth challenge of Yves Fortier, Q.C. was motivated by the arbitrator's ongoing relationship with Norton Rose LLP, specifically his continued use of members of Norton Rose as tribunal assistants. For example, Mr. Martin Valasek (a partner at Norton Rose LLP) served as an assistant to the *Yukos* tribunal, which was presided over by Mr. Fortier (Hulley Enterprises Limited (Cyprus) v. Russian Federation (PCA Case No. AA 226), Yukos Universal Limited (Isle of Man) v. Russian Federation (PCA Case No. AA 227), and Veteran Petroleum Limited (Cyprus) v. Russian Federation (PCA Case No. AA 228)). Allegedly, Valasek had even written the historic USD 50 billion award in lieu of the arbitrators. Respondent reiterated that the continued close professional relationship between Mr. Fortier and Norton Rose raised doubts about his independence and impartiality.

174 *Id.* ¶ 40.

175 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (*ConocoPhillips V*), ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (Mar. 15, 2016). Venezuela's fifth request for the disqualification of Yves Fortier, Q.C. was based on inaccuracies in his disclosure regarding the service of a Norton Rose lawyer as an assistant on a tribunal he chaired. These inaccuracies were argued to create "an impression of 'lesser ties to Norton Rose than actually existed'" (*id.* ¶ 25), and to thereby raise doubts regarding his independence and impartiality.

176 *Id.* ¶ 33.

to the specific facts at hand,[177] the unchallenged arbitrators imposed a high threshold, which resembles the *Amco Asia* standard, rather than a reasonable doubts approach.

B Challenge Decisions Applying the *Vivendi* Standard

Although the terminology used in *EDF*[178] differs from *Vivendi*, the standard is the same: The lack of independence and impartiality must be easily perceptible, and the test is whether a reasonable observer would find it credible that the arbitrator's "independence would … fluctuate" under the given circumstances.[179] In other words, a reasonable third person would have reasonable or justifiable doubts regarding the arbitrator's reliability to exercise independent judgment.[180]

In *Alpha Projektholding*,[181] the unchallenged members of the tribunal required Respondent to establish facts which would give rise to the inference that "clearly, the person challenged is not to be relied upon for independent judgment, or that a readily apparent and reasonable doubt as to that person's reliability for independent judgment has arisen from the facts established."[182]

In *Urbaser*,[183] Claimants requested Professor McLachlan's disqualification, based on his academic publications. The unchallenged co-arbitrators held that

177 *Id.* ¶ 35.

178 EDF International S.A., SAUR International S.A., Léon Participaciones Argentinas S.A. v. Argentine Republic (*EDF*), ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (June 25, 2008). Argentina challenged Professor Kaufmann-Kohler based on her position as a director of UBS. UBS had recommended investments in the parent company of one of the Claimants and had a common interest in several companies with EDF. Argentina argued that since Professor Kaufmann-Kohler received a portion of her compensation in UBS stock, she had a personal (economic) interest in the outcome of the proceeding, which would prevent her from adjudicating the case independently and impartially.

179 *Id.* ¶¶ 65, 68 and 74.

180 *Id.* ¶ 64.

181 Alpha Projektholding GmbH v. Ukraine (*Alpha Projektholding*), ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010). The Ukraine requested the disqualification of Dr. Yoram Turbowicz (the Claimant-appointed arbitrator) because he had studied together with counsel for Claimant at Harvard Law School twenty years earlier. Allegedly, Dr. Turbowicz lacked any prior experience and expertise in transnational investment or commercial arbitration.

182 *Id.* ¶ 37 (referencing *SGS*).

183 Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia ur Partzuergoa v. Argentine Republic (*Urbaser*), ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (Aug. 12, 2010).

since everyone is embedded in a "moral, cultural, and professional" setting, unbiased decision-making was to be defined as the "ability to consider and evaluate the merits of each case without relying on factors having no relation to such merits." The reliance on irrelevant criteria, however, would not have to be proven by the challenging party – its "appearance … from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality."[184]

In another case, *Blue Bank*,[185] the test applied was whether "a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts."[186] According to the ICSID Chairman, the cumulation of several facts resulted in a manifest appearance of a lack of impartiality.[187]

The request for the disqualification of two arbitrators in *Repsol*[188] was denied in application of the *Vivendi* standard. The ICSID Chairman clearly stated

184 *Id.* ¶ 43.

185 Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela (*Blue Bank*), ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal (Nov. 12, 2013). Respondent requested the disqualification of José María Alonso, the arbitrator appointed by Claimant, and a partner at Baker & McKenzie Madrid. While Mr. Alonso served as an arbitrator in *Blue Bank*, attorneys in the New York and Caracas offices of his firm advised Claimant on an ongoing unrelated proceeding against the same Respondent, which concerned similar issues. In his function as an arbitrator, Mr. Alonso would have been in a position to decide issues relevant to the parallel proceeding in which his colleagues were involved. Mr. Alonso was also a member on Baker & McKenzie's international arbitration steering committee, and his remuneration was partially dependent on the results achieved by firms other than Baker & McKenzie Madrid.

186 *Id.* ¶ 69.

187 *Id.* ¶¶ 67–69.

188 Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic (*Repsol*), ICSID Case No. ARB/12/38, Decision on the Proposal for the Disqualification of a Majority of the Tribunal (Dec. 13, 2013). Respondent requested the disqualification of both Dr. Claus von Wobeser (the chairman of the tribunal) and Professor Francisco Orrego Vicuña (the Claimant-appointed arbitrator). Dr. von Wobeser had collaborated with counsel for Claimant (Freshfields Bruckhaus Deringer LLP) as co-counsel in a commercial arbitration nine years earlier, and he was appointed in one other ICSID proceeding against Argentina, which allegedly concerned the same emergency measures as those at issue in *Repsol*. Professor Orrego Vicuña was challenged based on his repeat appointments against Argentina. Argentina claimed that the annulment of three ICSID awards previously rendered in its detriment by tribunals presided by Professor Orrego Vicuña caused him to bear a manifest animosity against Argentina. Furthermore, *Repsol* would concern the same emergency measures as the previous three cases, and the same legal questions (notably

that no strict evidence of an actual dependence or predisposition is required, but that it is sufficient to establish an appearance of such a state of mind, from the perspective of a reasonable third person.[189] The term "manifest" was held to mean obvious or evident and to refer to the facility with which the alleged lack of qualities could be perceived.[190]

Using exactly the same terminology to describe the ICSID challenge standard, the ICSID Chairman upheld the challenge in *Burlington*[191] on the same day.

Caratube[192] marks the first (published) ICSID challenge in which an arbitrator was disqualified by his co-arbitrators.[193] The unchallenged arbitrators went to great lengths to emphasize that they did not doubt Mr. Boesch's

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the defense of necessity). Professor Orrego Vicuña's attempts to justify his position in the annulled cases in academic writing were argued to be further proof of his prejudice.

189 *Id.* ¶ 71–72 ("Los Artículos 57 y 58 del Convenio del CIADI no requieren evidencia de dependencia o predisposición real, sino que es suficiente con establecer la apariencia de dependencia o predisposición. … El estándar legal aplicable es un 'estándar objetivo, basado en una evaluación razonable de la prueba, realizada por un tercero.'").

190 *Id.* ¶ 73 ("[El] adjetivo 'manifiesta'… significa 'obvia o evidente' y … se refiere a la 'facilidad con la que la supuesta falta de cualidades puede percibirse.'").

191 Burlington Resources, Inc. v. Republic of Ecuador (*Burlington*), ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013), ¶¶ 66–68. Ecuador challenged Professor Francisco Orrega Vicuña because of his repeat appointments by Freshfields in seven prior ICSID proceedings, and his "blatant lack of impartiality to the detriment of Ecuador in the course of the arbitration." Professor Orrega Vicuña reacted to the challenge by reprimanding counsel for Respondent (Dechert LLP): He claimed that in one of its submissions, Dechert LLP had disclosed information from another proceeding which was confidential, and that accordingly, not his own behavior, but that of counsel for Respondent posed "the real ethical question." This criticism resulted in his disqualification.

192 Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (*Caratube*), ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch (Mar. 20, 2014). Mr. Boesch was appointed by Kazakhstan in a parallel proceeding, in which the facts and the law were essentially identical, and the parties relied on the same witnesses, experts and evidence. Counsel for Respondent (Curtis, Mallet-Prevost, Colt & Mosle LLP) had appointed Mr. Boesch in at least two additional cases, although he allegedly lacked prior experience with ICSID arbitration.

193 Chiara Giorgetti, Caratube v. Kazakhstan: For the First Time Two ICSID Arbitrators Uphold Disqualification of Third Arbitrator, American Society for International Law INSIGHTS (Sept. 29, 2014), http://www.asil.org/insights/volume/18/issue/22/caratube-v-kazakhstan-first-time-two-icsid-arbitrators-uphold [hereinafter Giorgetti, Caratube v. Kazakhstan].

assurances regarding his objectivity and open-mindedness, and that his "actual independence and … impartiality, his state of mind, his ethical or moral strength" were undisputed.[194] They explained that they did not base their decision on his actual impartiality, but on its perception from an objective point of view:[195] The decisive question was whether a reasonable third party would find that there is an evident or obvious appearance of lack of impartiality or independence,[196] a risk of unconscious bias.[197] His appointment in closely related cases, they held, would create an "evident or obvious appearance of lack of impartiality."[198]

In *ConocoPhillips II*[199] *and ConocoPhillips III*,[200] the ICSID Chairman applied the *Vivendi* standard, echoing the terminology of *Repsol* and *Burlington*.

The same standard was applied in *Ickale*: The unchallenged arbitrators reiterated that proof of actual dependence or bias was not required, but that the challenging party had to establish facts which indicate a lack of independence

194 *Caratube*, ¶ 64.

195 *Id.* ¶ 75.

196 *Id.* ¶ 64 and 75.

197 *Id.* ¶ 89 ("[T]here is an evident or obvious appearance of lack of impartiality as this concept is understood without any moral appraisal: a reasonable and informed third party observer would hold that Mr. Boesch, even unwittingly, may make a determination in favor of one or as a matter of fact the other party that could be based on such external knowledge.").

198 *Id.* ¶¶ 89–91.

199 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (*ConocoPhillips II*), ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal (May 5, 2014), ¶¶ 47 and 52–53. Venezuela based its request for disqualification on the refusal of Judge Keith and Yves Fortier Q.C. to reconsider their decision on jurisdiction, which was allegedly premised on improper inferences from falsely represented facts.

200 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (*ConocoPhillips III*), ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal (July 1, 2015), ¶ 83. Venezuela's third challenge of Yves Fortier, Q.C. was motivated by the arbitrator's ongoing relationship with Norton Rose LLP, specifically his continued use of members of Norton Rose as tribunal assistants. Respondent claimed that Mr. Martin Valasek (a partner at Norton Rose LLP) served as an assistant to the Yukos tribunal (Hulley Enterprises Limited (Cyprus) v. Russian Federation (PCA Case No. AA 226), Yukos Universal Limited (Isle of Man) v. Russian Federation (PCA Case No. AA 227), and Veteran Petroleum Limited (Cyprus) v. Russian Federation (PCA Case No. AA 228)), which was chaired by Mr. Fortier, and that Valasek had even written the award in said proceeding in lieu of the arbitrators.

and impartiality which "can be perceived on the face of the evidence submitted."[201]

C Challenge Decisions Referring to Both Standards

In this third category of cases, the unchallenged arbitrators referred to both the standard applied in *Amco Asia* as well as the standard applied in *Vivendi*, and dismissed the challenges. The significance of these decisions for the ICSID case law on arbitrator challenges is debatable. In some of the cases, previously defined standards are reproduced only in fragments, thereby effectively elevating the threshold for a successful challenge. In other cases, inherently contradictory terms which were previously used in the context of dissimilar standards are combined, creating an opaque and ambiguous description of the requirements for a successful challenge. Instead of clarifying the applicable standard and making policy choices transparent, these decisions add to the confusion about the pertinent threshold for arbitrator challenges and obscure the reasons for the dismissal of the challenges.

In *Suez I*,[202] the unchallenged arbitrators held that a manifest lack of independence or impartiality had to be proven by objective evidence, and that the mere belief of such a lack was insufficient.[203] Citing the first leg of the test applied in *SGS*, requiring the challenging party to establish facts which could give rise to the inference that "clearly, the person challenged is not to be relied upon for independent judgment,"[204] the unchallenged arbitrators concluded that the "mere appearance of partiality was not a sufficient ground."[205] Had they, however, not cut off the *SGS* test in mid-sentence, its irreconcilable conflict with *Amco Asia* would have been obvious: According to the second

201 İçkale İnşaat Limited Şirketi v. Turkmenistan (*Ickale*), ICSID Case No. ARB/10/24, Decision on the Proposal to Disqualify Philippe Sands (July 11, 2014), ¶ 117. Professor Philippe Sands was challenged because of his repeat appointments by Turkmenistan and its counsel (Curtis, Mallet-Prevost, Colt & Mosle LLP). Turkmenistan had appointed him in two other cases; counsel for Respondent had appointed him in three other proceedings.

202 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, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, AWG Group v. Argentine Republic (UNCITRAL) (*Suez I*), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007). Argentina requested the disqualification of Professor Gabrielle Kaufmann-Kohler based no her involvement in the allegedly flawed decision in *Vivendi* (*supra* note 138).

203 *Suez I*, ¶ 40.

204 *SGS*, ¶ 21.

205 *Suez I*, ¶¶ 40–41 (corresponding with *Amco Asia*).

leg of the *SGS* test, the inference of "a readily apparent and reasonable doubt as to that person's reliability for independent judgment" is sufficient for the challenge to succeed.[206] Hence, in contrast to *Amco Asia*, the appearance of bias may well be sufficient for a disqualification under *SGS*. It is regrettable that the unchallenged arbitrators did not seize the opportunity to address this disaccord and to provide a transparent explanation of their preference for the *Amco Asia* standard. By not taking a stand, and instead commingling the different standards in the decision, they introduced unnecessary inconsistencies and contradictions into the *Suez I* decision, adding confusion to the arbitrator challenge jargon. For example, the requirement of "objective evidence" which directly proves a manifest lack of independence or impartiality[207] excludes the admissibility of the inference of a manifest lack,[208] contrary to the unchallenged arbitrators' explicit statements in the same decision.[209] The confusion caused by *Suez I* is all the more regrettable considering that the unchallenged arbitrators' statements are obiter dicta – the request was dismissed because it was belated.[210]

The unchallenged arbitrators in *Electrabel*[211] made no reference to *Amco Asia* or *Vivendi*, but instead derived an intermediate standard of review from the interpretation of the term "manifest" in the context of Article 52 para. 2 (b) ICSID Convention. Thereunder, "manifest" means "self-evident, clear, plain on its face or even certain, rather than the product of elaborate interpretations one way or another or susceptible of argument one way or another or being necessary to engage in elaborate analyses."[212] It refers to "the ease with which it is perceived" and "the cognitive process that makes it apparent."[213] This explanation does not use the terms "strict proof," "doubts" or "appearance," which

206 *SGS*, ¶ 21.

207 *Suez I*, ¶ 40.

208 *See* LUTTRELL, *supra* note 31, at 232.

209 *Suez I*, ¶ 30 (implying that the actual existence of a manifest lack must not be proven, since "[i]ndependence and impartiality are states of mind [which] can only be inferred from conduct.") and ¶ 40 (citing *SGS*).

210 *Id.* ¶ 26; *see also* LUTTRELL, *supra* note 31, at 232.

211 Electrabel S.A. v. Republic of Hungary (*Electrabel*), ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal (Feb. 25, 2008). Professor Brigitte Stern was challenged because of her parallel appointment by Hungary and counsel for Respondent (Arnold & Porter LLP) in another proceeding, which concerned the same agreements, the same government action, and the same treaty.

212 *Id.* ¶ 36 (internal quotation marks omitted).

213 *Id.* ¶ 36.

usually signal the threshold referred to. As a consequence, it leaves a lot of room for speculation.

In *Nations Energy*,[214] Claimant requested the disqualification of one of the *ad hoc* Committee members, based on his past professional relationship with counsel for Respondent.[215] The unchallenged *ad hoc* Committee members dismissed the request in application of the *Amco Asia* standard, requiring objective proof of a manifest lack of independence or impartiality,[216] i.e. the proof of facts indicating an evident and highly probable, not just possible, lack of the arbitrator's reliability for independent and impartial judgment.[217] They did, however, include a passage from *Vivendi* for good measure, stating that the entirety of the circumstances had to be taken into account to determine whether the circumstances justified reasonable doubts regarding the arbitrator's ability to render a free and independent decision.[218]

The challenge decision in *Abaclat I*[219] was based on a recommendation by the Secretary-General of the Permanent Court of Arbitration (PCA).[220] Respondent argued that several procedural decisions of the majority of the tribunal were so manifestly flawed that they could only be explained by a lack of

214 Nations Energy, Inc. and others v. Republic of Panama (*Nations Energy*), ICSID Case No. ARB/06/19, Decision on a Proposal to Disqualify Dr. Stanimir Alexandrov (Sept. 7, 2011).

215 One of Respondent's attorneys had previously been employed by Sidley Austin LLP, where Dr. Alexandrov allegedly supervised him in his work on several ICSID proceedings.

216 *Nations Energy*, ¶ 56 ("carencia manifiesta de las cualidades exigidas [que] debe ser demostrada con pruebas objetivas") and ¶ 68 („información … que objetivamente demuestre o sugiera que la existencia de dicha relación puede influenciar el juicio del Dr. Alexandrov.").

217 *Id.* ¶ 65 ("probar los hechos que hagan evidente y sumamente probable, *y no solamente possible*, que [el árbitro] sea una persona en quien no se puede confiar para pronunciarse en forma independiente e imparcial.").

218 *Id.* ¶ 67 ("[T]odas las circunstancias deben tomarse en cuenta para poder determinar *si la relación es sufisamente significativa* para justificar la presencia de dudas razonables en cuanto a la capacidad del árbitro o miembro de alcanzar una decisión libre e independientemente [sic].").

219 Abaclat and others v. Argentine Republic (*Abaclat I*), ICSID Case No. ARB/07/5, Rejection of Request for Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg (Dec. 21, 2011).

220 Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, Recommendation on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg, PCA Case No. IR 2011/1 (Dec. 19, 2011). The majority of the tribunal was challenged and Respondent requested a recommendation from the Secretary-General of the PCA, which the ICSID Chairman granted.

independence and impartiality.[221] According to the Secretary-General of the PCA, adverse decisions alone could never be considered a sufficient indication of bias, even if they were wrong in fact or in law.[222] In such cases, the challenging party would always have to prove that the arbitrator was in fact influenced by irrelevant factors, or establish additional facts from which a lack of independence or impartiality could be inferred.[223] In other words, if the party based its challenge on the wrongfulness of the award, or procedural flaws, the *Amco Asia* standard would apply, requiring strict proof of bias.[224] In the alternative, the challenge could be based on other "objective facts," from which a lack of independence or impartiality could reasonably be inferred, as stipulated in *Vivendi*.[225]

In *Getma*,[226] Guinea requested the disqualification of the Claimant-appointed arbitrator, whose brother simultaneously acted as an arbitrator in a proceeding involving the same Claimant and concerning the same facts. These circumstances were obviously considered delicate: The unchallenged arbitrators could not agree on the request, prompting the ICSID Chairman to deal with the challenge. As in *Abaclat I*, the request was dismissed, referencing both *Amco Asia* and *Vivendi*. The ICSID Chairman required Guinea to establish facts which would establish a manifest lack of independence[227] and highlighted that mere speculation, presumption, belief, opinion or interpretation were insufficient.[228] The Respondent's inference of bias (or an apprehension thereof) from the involvement of the challenged arbitrator's brother in a parallel proceeding was dismissed as speculative. While the ICSID Chairman did not

221 *Abaclat I*, ¶ 72.

222 *Id.* ¶¶ 64–65 and 84. Understandably, the admission of wrongful decisions as a basis for arbitrator challenges would turn ICSID Convention art. 57 into an extension of the grounds for annulment. Any claim of manifest wrongness of a decision would have to be examined as to its severity. This would open the door for undesirable delaying tactics. On the other hand, it is inherent in the concept of bias that it occurs in the decision-maker's mind. The challenging party is hardly ever able to adduce additional facts to prove its existence.

223 *Id.* ¶¶ 156–157.

224 *Id.* ¶ 50 (requiring the challenging party to "prove not only facts indicating the lack of independence, but also that the lack is 'manifest' or highly probable, not just possible.").

225 *Id.* ¶¶ 53 and 63.

226 Getma International and others v. Republic of Guinea (*Getma*), ICSID Case No. ARB/11/29, Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades (June 28, 2012).

227 *Id.* ¶ 58.

228 *Id.* ¶ 60.

accept the inference of a lack of independence from the brothers' family ties, it appears that he would have accepted such an inference based on a different factual basis, in accordance with the *Vivendi* standard.[229]

In *Saint-Gobain,*[230] the unchallenged arbitrators explicitly stated that there is "no unequivocal answer" to the question when a lack of independence and impartiality becomes manifest.[231] However, they held that since Claimant failed to present facts that would cast reasonable doubts on the challenged arbitrator's independence and impartiality, *ad maiorem minus*, the established facts did not indicate a manifest (i.e. obvious and highly probable) lack of such qualities.[232] The request would therefore have to be dismissed irrespective of the interpretation of the terms "manifest lack."

In *Abaclat II*,[233] the ICSID Chairman unambiguously used the terms associated with *Vivendi* to describe the applicable challenge standard.[234] In his application of that standard to the facts, however, he slipped back into the mindset of *Amco Asia*, stating that the established circumstances "do not prove a manifest lack of impartiality."[235] Whether they would have created the requisite appearance of bias remains unanswered.

A strict intermediate standard was applied by the unchallenged arbitrators in *Total*.[236] They referenced several challenge decisions, most of which had

229 *Id.* ¶¶ 68–72.

230 Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela (*Saint-Gobain*), ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify an Arbitrator (Feb. 27, 2013). Claimant requested the disqualification of Gabriel Bottini (the arbitrator appointed by Venezuela). In his previous function as National Director of International Matters and Disputes for the Office of the Attorney General of Argentina, Bottini had allegedly defended Argentina against claims very similar to the ones at hand. Furthermore, Bottini had been under direct supervision of Mr. Osvaldo Guglielmino, who now represented Venezuela in a parallel proceeding. The simultaneous involvement of the former colleagues in parallel proceedings was claimed to raise doubts regarding Mr. Bottini's independence and impartiality.

231 *Id.* ¶¶58–59 (referencing *Amco Asia* and *Vivendi*).

232 *Id.* ¶ 78.

233 Abaclat and others v. Argentine Republic (*Abaclat II*), ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014). Argentina challenged Pierre Tercier and Albert Jan van den Berg based on procedural decisions which it perceived to be unfair, and an indicator of their predisposition to its detriment.

234 *Id.* ¶¶ 71 and 76–77.

235 *Id.* ¶ 81.

236 Total S.A. v. Argentine Republic (*Total*), ICSID Case No. ARB/04/01, Decision on the Proposal to Disqualify Teresa Cheng (Aug. 26, 2015). Respondent challenged Teresa Cheng based on her connections to counsel for Claimant (Freshfields). Ms. Cheng had given

applied the *Vivendi* standard, but avoided the terms "doubts" or "appearance." Highlighting that the standard of review under the ICSID Convention is strict and relatively high, they required the challenging party to prove facts which, if assessed by a reasonable third person in the light of the available evidence, would lead to the inference that the challenged arbitrator obviously cannot exercise his or her function independently.[237] This is very different from proving that the facts give rise to justifiable doubts as to the arbitrator's independence and impartiality, or that they cause an appearance of bias.[238]

In *ConocoPhilipps VI*,[239] the unchallenged arbitrators seemed to relinquish the strict proof of bias required in two of their previous disqualification decisions.[240] They stated that "[a]rticles 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."[241] Their seemingly unequivocal support for an appearance-based standard, however, stands in stark contrast to the requirement – set up in the same decision – that a reasonable third person must not only conclude that the arbitrator appears biased, but must conclude "that the challenged arbitrator is manifestly lacking in the ability to act impartially."[242]

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legal advice and acted as a legal counsel for clients of Freshfields in two isolated instances, had acted as a Claimant-appointed arbitrator in a commercial arbitration against a party represented by Freshfields, and her son had completed a summer internship in the Paris office of the law firm.

237 *Id.* ¶ 105 ("La parte que recusa debe … demostrar (a) los hechos que dan lugar a la recusación; y (b) que tales hechos, valorados razonablemente por un tercero a la luz de la evidencia disponible, tienen un carácter, naturaleza o entidad tales que puedan dar lugar a inferir que es manifiesto, que es obvio, que la persona recusada no puede ejercer un juicio independiente en el proceso particular en el que se presenta la recusación.").

238 *See* Tom Jones, Cheng survives first of challenges over Freshfields links, Global Arbitration Review (Sept. 3, 2015), http://globalarbitrationreview.com/news/article/34108/cheng-survives-first-challenges-freshfields-links/.

239 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (*ConocoPhillips VI*), ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (July 26, 2016). In its sixth proposal for disqualification, Venezuela substantiated its allegation of Mr. Fortier's continued involvement with Norton Rose LLP by showing that his secretaries received insurance and other benefits from an entity set up by Norton Rose LLP (Services OR LP/SEC). Furthermore, Venezuela produced the LinkedIn profile of Mr. Fortier's secretary (Myriam Ntashamaje), according to which she worked for Norton Rose LLP.

240 *ConocoPhillips IV* and *V*.

241 *ConocoPhillips VI*, ¶ 12a.

242 *ConocoPhillips VI*, ¶ 12b.

Finally, the unchallenged arbitrators in *Favianca II*[243] and *III*[244] understood "manifest" to refer to the ease with which the alleged lack of qualities can be perceived. Similarly to the decision in *Electrabel*, they held that the lack of independence or impartiality must be evident and obvious for an objective third person. While the unchallenged arbitrators avoided the terms "strict proof," "doubts" or "appearance," they cited several decisions, which applied both the *Amco Asia* and (predominantly) the *Vivendi* standard.[245] It is therefore unclear which one of those thresholds was considered pertinent.

1.4 *Conclusion*

This overview of the threshold applied in past challenge decisions allows for two conclusions.

First, a uniform interpretation of the manifest lack requirement provided for in Article 57 ICSID Convention has still not crystallized. This is remarkable, considering that more than thirty-four years have passed since the first ICSID challenge decision. Between 2013 and 2015, a series of eight decisions[246] seemed to signal a more consistent application of the reasonable doubts threshold established in *Vivendi*; in particular, six disqualification decisions

243 Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela (*Favianca II*), ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (Mar. 28, 2016). The challenge in *Favianca II* was based on arguments similar to those in *ConocoPhillips V*. The formal engagement by Mr. Fortier of a Norton Rose lawyer (Alison Fitzgerald) as tribunal assistant, after his resignation from Norton Rose LLP, and despite his assurances that he would sever all ties with the firm upon his resignation, was claimed to raise doubts as to his independence and impartiality. In Respondent's view, Mr. Fortier's inaccurate disclosure in this context further exacerbated such doubts.

244 Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela (*Favianca III*), ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (Sept. 12, 2016). The facts underlying the challenge in *Favianca III* are the same as those invoked in *ConocoPhillips VI*. Respondent showed that Mr. Fortier's secretaries receive insurance and other benefits from an entity set up by Norton Rose LLP (Services OR LP/SEC) for the purpose of providing it with staff and administrative support services, and that one of his secretaries (Myriam Ntashamaje), according to her LinkedIn profile, is employed by Norton Rose LLP.

245 *Favianca II*, note 10; *Favianca III*, ¶ 45.

246 *Blue Bank*, *Burlington*, *Repsol*, *Abaclat II*, *Caratube*, *ConocoPhillips II*, *Ickale*, and *ConocoPhillips III*. *Abaclat II* appears to ultimately have been dismissed based on a standard reminiscent of *Amco Asia* (*see supra* Part 1.3 C.); since the ICSID Chairman only referenced the *Vivendi* standard, however, it is herein counted as one of the eight cases applying said standard.

penned by the ICSID Chairman described the relevant threshold in unusually standardized and clear language. The most recent disqualification decisions, however, have put an end to (or interrupted) this sequence.[247] At this time, it is uncertain which stance future disqualification decisions will take, and the burden of proof which will be imposed on challenging parties is unpredictable.[248]

The described inconsistency can only be explained by the lack of a formal rule of binding precedent in arbitration.[249] Arbitrators appear to be so used to deciding individual disputes without having to situate their considerations in a system of existing case law that even when deciding challenges, they do not feel bound by previous disqualification decisions and the threshold established therein. This is evidenced by the decisions rendered in the wake of *Vivendi* and *SGS*, of which several applied the older *Amco Asia* standard, without justifying their departure from *Vivendi* and *SGS*. The recent divergence from the *Vivendi* standard in *Total*, *ConocoPhillips IV*, *V* and *VI*, and in *Favianca II* and *III* is even more striking. The reasonable doubts standard had been

247 *Total*, *ConocoPhillips IV*, *V* and *VI*, and *Favianca II* and *III*. It is worth highlighting, however, that five of these decisions concerned the same arbitrator, and that the challenging parties based their requests for disqualification on the same arguments. Thus, the weight to be given to each individual disqualification decision is questionable.

248 *See also* DAELE, *supra* note 51, ¶ 5–004. *Contra* Kinnear and Nitschke, *supra* note 13, at 60 ("With the increased number of challenges and decisions on challenges in investment arbitration, the applicable standards and outcomes are becoming increasingly predictable."); Rubins and Lauterburg, *supra* note 32, at 161 ("To justify the removal of an arbitrator, the petitioner's doubts must be justifiable on some objective basis, reasonable by the standard of a fair minded, rational, objective observer."); LUTTRELL, *supra* note 31, at 225, 242; Fry and Stampalija, *supra* note 31, at 248, 257 (arguing that the jurisprudence is becoming more stable, but heading in a direction opposed to modern arbitration rules); REED, PAULSSON, AND BLACKABY, *supra* note 13, at 134; Markert, *supra* note 21, at 224 (requiring strict proof of dependence or bias).

249 Caron, *Investor State Arbitration*, *supra* note 23, at 516–517; Rubins and Lauterburg, *supra* note 32, at 164; Howard Mann, *The Emperor's Clothes Come Off: A Comment on Republic of Ghana v. Telekom Malaysia Berhard, and the Problem of Arbitrator Conflict of Interest*, 2 TRANSNAT'L. DISP. MGMT. 3 (2005); Park, *Arbitration's Discontents*, *supra* note 24, at 602; Jan H. Dalhuisen, LEGAL REASONING AND POWERS OF INTERNATIONAL ARBITRATORS 29–30 (Draft Mar. 03, 2015), http://dx.doi.org/10.2139/ssrn.2393705 ("[I]nternational arbitrators in international commerce and finance … need not worry about the impact on the system whilst a search for consistency is also inappropriate beyond the obvious.").

applied so rigorously in prior decisions that the applicable threshold appeared to be settled.[250] Yet, since the decision in *Total*, a much heavier burden of proof has been imposed on challenging parties, without any explanation for the abrupt change of direction.

Leaving aside the delicate question whether a formal rule of binding precedent should apply, and coherence should be pursued in substantive matters of investment law,[251] it is imperative that the requirement of arbitrators' independence and impartiality be interpreted consistently. Arbitral independence and impartiality as a fundamental element of a fair and rules-based proceeding is not subject to party autonomy, and must apply uniformly to all arbitrators deciding cases under the ICSID Convention. The current unpredictability of the relevant threshold for arbitrator challenges is a significant source of legal uncertainty, which impairs the parties' confidence in the mechanism's fairness, and endangers the system's legitimacy.

The second observation is that the challenge threshold applied in the examined disqualification decisions is seldom indicative of the outcome of a proceeding. The vast majority of all disqualification requests were dismissed, even when the more lenient threshold established in *Vivendi* was applied. If challenges were rejected for lack of a proof of bias under the *Amco Asia* standard, proposals to which the *Vivendi* standard was applied frequently failed because the challenging party could not prove facts from which a lack of independence could reasonably be inferred, or because the inference of bias based on such facts was qualified as speculation.

Getma (where two brothers were appointed by the same party to serve as arbitrators in parallel proceedings) perfectly illustrates that the wording of the threshold for arbitrator challenges is not necessarily decisive. Whether a challenge fails because the challenging party does not furnish strict proof of bias where its inference from established facts is excluded, or whether it is

250 *See* Kinnear and Nitschke, *supra* note 13, at 48 ("The … standard of proof … is an objective one based on how a reasonable third party would evaluate the evidence. 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."). Chiara Giorgetti, Towards A Revised Threshold for Arbitrators' Challenges Under ICSID?, Kluwer Arbitration Blog (July 3, 2014), http://kluwerarbitrationblog.com/2014/07/03/towards-a-revised-threshold-for-arbitrators-challenges-under-icsid/.

251 *See* Thomas Schultz, *Against Consistency in Investment Arbitration*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 297 (2013).

unsuccessful because the challenging party's prima facie admissible inference of bias is qualified as speculation, is not of consequence. Furthermore, if inferences are in principle admissible, but arbitrators faced with challenge requests increasingly carve out exceptions to their admissibility (for example where inferences are based on family ties, or on the wrongness of a decision in fact or in law), the *Vivendi* standard will converge more and more with the *Amco Asia* standard.

Ultimately, the threshold applied to a request for disqualification may not determine whether an arbitrator remains on the tribunal or not. The focus of challenge decisions on this threshold, despite its apparent irrelevance for the outcome of disqualification proposals, may therefore give the impression that there are other, undisclosed reasons for the predominant dismissal of arbitrator challenges. To outsiders, the focus of challenge decisions on a seemingly inconsequential threshold may even look like the disguise of value judgments in legal jargon. Such an impression could severely harm the perceived legitimacy of international investment arbitration.

The following graph illustrates both the inconsistency of the threshold applied, and the lack of correlation between the applied test and the outcome of challenge proceedings (Fig. 1).

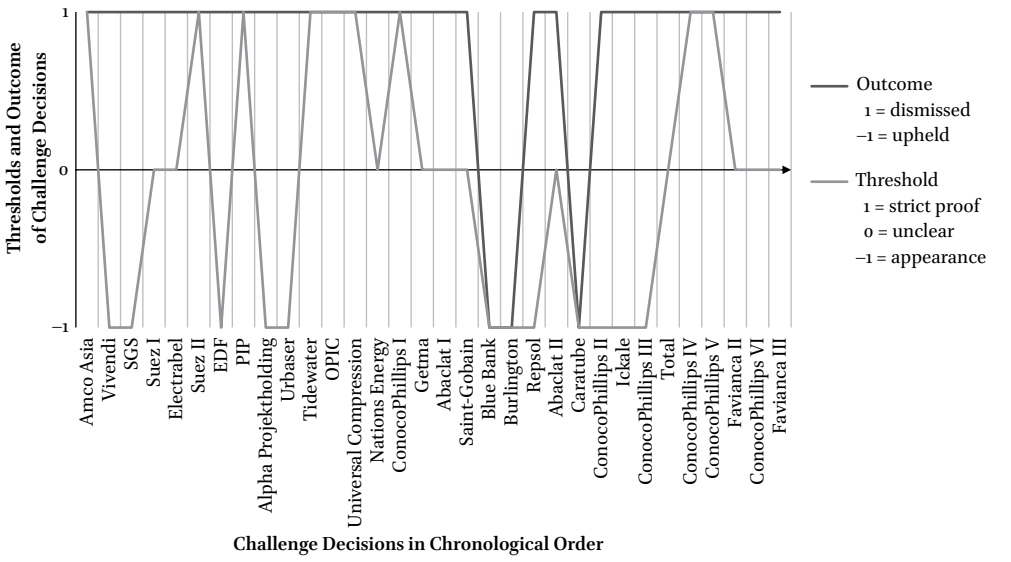

FIGURE 1 *Thresholds and outcome of past ICSID challenge decisions*

The potential effect of the described deficiencies on the perceived legitimacy of the ICSID system warrants the clarification of the threshold for arbitrator challenges. Detailed suggestions for such a clarification are made in Chapter 4, Part 3 and Chapter 5.

2 Application of the Standard to Specific Categories of Alleged Conflict

This Part categorizes past challenge decisions based on the grounds for disqualification invoked by the challenging parties.[252] ICSID arbitrators have in the past either been challenged based on their behavior in the relevant proceeding, or based on their background. By background, this book refers to the social connections of an arbitrator, but also to the issues an arbitrator has dealt with in the past. This category will be further split up into three sub-categories, namely an arbitrator's familiarity with another participant in the proceeding, an arbitrator's familiarity with the subject-matter, and an arbitrator's connection to an adverse third party.

2.1 *Behavior in Current Proceeding*

In five of the examined challenge decisions, arbitrators were challenged because of their behavior in the current proceeding. In particular, the challenging parties argued that their decisions were so fundamentally flawed that they could only be explained by the arbitrators' manifest lack of independence and impartiality. Four of the challenges were dismissed.

252 For categorizations based on different criteria, *see, e.g.*, Sheppard, *supra* note 32, at 138–155 (listing relationships between an arbitrator and a party or counsel and issue conflicts as the most common grounds for arbitrator challenges); LUTTRELL, *supra* note 31, at 238–241 (identifying role/issue conflicts as a particularly problematic category); Caline Mouawad, *Issue Conflicts in Investment Treaty Arbitration*, 5 TRANSNAT'L. DISP. MGMT. 1–2 (2009) (distinguishing "classic" conflicts of interest, such as an arbitrator's relationship with one of the parties or its counsel, and issue conflicts, which arise from lawyers' dual roles as counsel and arbitrator, from repeat appointments, and from academic publications on issues which are subsequently brought up in a proceeding); Markert, *supra* note 21, at 254–268 (distinguishing social contacts, business contacts and business relationships as sources of potential hazard for arbitrator independence, and views expressed in academic publications or in awards in past arbitral proceedings, public statements regarding a proceeding, or role conflicts (concurrent roles as counsel and arbitrator in related cases) as risks to impartiality).

In *Abaclat I* and *II*, Argentina challenged Pierre Tercier and Albert Jan van den Berg based on procedural decisions which it perceived to be unfair, and an indicator of their predisposition to its detriment.[253] The Secretary-General of the PCA (who made a recommendation on the disqualification request in *Abaclat I*[254]) and the ICSID Chairman (who decided the challenge in *Abaclat II*) both held that defects in a ruling alone could not be a valid basis for a disqualification.[255] The challenging party would have to adduce additional evidence to prove that the members of the tribunal were influenced by criteria other than their analysis of the parties' arguments.[256] The Respondent's objections were interpreted as "expressions of dissatisfaction"[257] with the tribunal's conduct of the case, and mere assertions or speculations, at best.[258] The reasoning of the challenge decision in *Abaclat II* is extremely short, considering the gravity of the accusations raised against the arbitrators. The ICSID Chairman did not even analyze the procedural failures alleged by Argentina, seemingly holding that irrespective of the seriousness of a flaw in the substantive or formal decisions of a tribunal, bias would always need to be proven with additional facts. *Abaclat I* supports this reading of the decision:

> [A] finding of an arbitrator's lack of independence or impartiality requires evidence other than the making of a decision which is considered to be adverse to one party or, indeed, wrong in law or insufficiently supported by reasons.[259]

In *Burlington*, Ecuador's allegation of Professor Orrega Vicuña's "blatant lack of impartiality to the detriment of Ecuador in the course of the arbitration"[260] was not even considered, but dismissed because it was belated.[261] The challenge

253 *Abaclat I*, ¶ 3; *Abaclat II*, ¶ 48–49.

254 The majority of the tribunal was challenged and Respondents requested a recommendation from the Secretary-General of the PCA, which the ICSID Chairman granted.

255 *Abaclat I*, ¶ 127; *Abaclat II*, ¶ 80.

256 *Abaclat I*, ¶¶ 80, 99.

257 *Id.* ¶¶ 82, 98, 102, 126. Even the issuance of the majority award without the dissenting opinion of arbitrator Abi-Saab (which was only communicated to the parties three months later) was considered a decision within the tribunal's discretion, which the Respondent was dissatisfied with. *See id.* ¶ 139.

258 *Id.* ¶ 129.

259 *Id.* ¶ 83.

260 *Burlington*, ¶ 20.

261 *Id.* ¶ 75.

was instead upheld on the basis of comparatively minor transgressions of the arbitrator: In his comments on the request for his disqualification, Professor Orrega Vicuña admonished the challenging counsel for Respondent (Dechert LLP). He claimed that in one of its submissions, Dechert disclosed information from another proceeding which was confidential. Accordingly, he claimed, not his own behavior, but that of Dechert posed "the real ethical question."[262] The ICSID Chairman upheld the challenge based on this statement, holding that it did not serve any purpose and that a third party might view it as an indication of the arbitrator's manifest lack of impartiality toward Ecuador and its counsel.[263]

In *ConocoPhillips II*, Venezuela criticized the refusal of Judge Keith and Yves Fortier Q.C. to reconsider their decision on jurisdiction, which was allegedly based on improper inferences from falsely represented facts.[264] Respondent argued that the arbitrators had an "unwavering determination" to maintain their finding, irrespective of the circumstances and the truthfulness of the basis of their decision.[265] As in *Abaclat II*, the reasoning of the dismissal of the request is very brief, in particular in light of the seriousness of Venezuela's accusations: The ICSID Chairman held that Venezuela's objections were a mere expression of its dissatisfaction with the tribunal's refusal to reconsider the case, but that said decision was within the tribunal's discretion.[266]

An allegedly flawed decision was also invoked as a basis for the challenge in *ConocoPhillips III*. Judge Keith and Yves Fortier Q.C. had refused to consent to the resignation of the third arbitrator on the tribunal, Professor Abi-Saab, arguing that it was untimely.[267] Venezuela held this refusal to be an indication of the arbitrators' bias: Firstly, it questioned the arbitrators' right to make such a decision while the proceeding was suspended;[268] and secondly, it denied the

262 *Id.* ¶ 79.

263 *Id.* ¶ 79.

264 *ConocoPhillips II*, ¶¶ 17–18.

265 *Id.* ¶ 22.

266 *Id.* ¶¶ 54–56.

267 *ConocoPhillips III*, ¶ 14–25. As had been agreed with the other arbitrators, Professor Abi-Saab resigned after submitting his dissenting opinion in the case, in order to allow for a replacement arbitrator to be appointed. His dissenting opinion (and, consequently, his resignation) was however delayed, because of serious health issues he faced, and was only received seven weeks before the quantum hearing. His co-arbitrators therefore considered the resignation untimely.

268 *Id.* ¶ 43. Before Professor Abi-Saab's resignation, the challenge at issue had been submitted (only against Mr. Fortier, and on different grounds). In light of the suspension of the

rightfulness of the decision, in the light of Professor Abi-Saab's serious health problems.[269] The ICSID Chairman dismissed the challenge, holding that the parties' disagreement with the procedural and substantive modalities and requirements for the decision was not sufficient to demonstrate "apparent or actual bias" on the part of the two arbitrators.[270]

In summary, these decisions suggest that allegations of an arbitrator's (or even an entire tribunal's) objectionable behavior and ensuing flawed decision alone are not a sufficient basis for a disqualification request. Challenging parties must substantiate by what other factors the relevant arbitrator is influenced and bring additional proof for such influence.

This strict approach is reasonable in cases where the challenging party argues that the tribunal's decisions are flawed, lest the legal remedy of arbitrator challenges be used to disguise the substantive review of arbitral decisions and awards. Such a possibility to appeal does not exist in ICSID arbitration, and should not be allowed through the back door, under the guise of disqualification requests.[271]

Objectionable behavior by an arbitrator, however, should not *per se* be excluded as a basis for disqualification requests. There may arguably be cases in which a party has no insight into the reasons for an arbitrator's aversion, and is unable to produce any proof for the arbitrator's state of mind. If, in such cases, the arbitrator's behavior would cause a reasonable third person to justifiably doubt their independence or impartiality, the challenge should be upheld. There is no prevailing interest to justify categorically carving out arbitrators' behavior as a valid basis for disqualification requests.

2.2 *Familiarity with Another Participant in the Proceeding*

An overwhelming majority of the examined ICSID challenges was based on a pre-existing familiarity between an arbitrator and another participant in the proceeding. Disqualification requests were based on such circumstances in twenty-five instances. Hereinafter, challenges based on an arbitrator's prior or ongoing social or professional relations with a party or a counsel, role switching and repeat appointments are examined separately.

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proceeding this entailed, it was questioned whether Judge Keith and Mr. Fortier were entitled to refuse to consent to the resignation.

269 *Id.* ¶ 86.

270 *Id.* ¶ 90.

271 *See* Lee M. Caplan, *Arbitrator Challenges at the Iran-United States Claims Tribunal, in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 115, 124–125 (Chiara Giorgetti ed., 2015).

A Previous Contacts with a Party or Counsel

Disqualification requests were based on (direct or indirect) relations between the challenged arbitrator and counsel on six occasions.

In *Amco Asia*, Indonesia challenged the Claimant-appointed arbitrator Edward W. Rubin. It argued that the relationship between Rubin and his law firm on the one hand, and Claimant's law firm on the other hand impaired his independence: Rubin's law firm had shared office space and administrative services with counsel for Claimant for about half a year into the arbitration proceedings. A long-standing profit-sharing arrangement between the firms had been discontinued before the arbitration was initiated.[272] Setting a very high threshold for arbitrator challenges, the unchallenged arbitrators held that although the same degree of independence and impartiality was required of all arbitrators – whether party-appointed or presiding – acquaintances of arbitrators and parties or counsel could not, by themselves, constitute a valid basis for a disqualification request, because they were inherent in the system of party-appointments. Irrespective of the nature and extent of said relations, the challenging party would have to substantiate their request with additional facts, and prove that the arbitrator's lack of independence is "highly probable."[273]

In *Alpha Projektholding*, the Ukraine claimed that the shared educational history of the Claimant-appointed arbitrator and counsel for Claimant gave rise to justifiable doubts about the arbitrator's independence and impartiality. Dr. Turbowicz and counsel for Claimant had both studied at Harvard Law School twenty years earlier. Although the burden of proof imposed on the challenging party was much lighter than in *Amco Asia*, requiring the proof of facts that would at least give rise to "a readily apparent and reasonable doubt"[274] about the arbitrator's reliability for independent judgment, the unchallenged arbitrators held that the facts furnished by Respondent were too meager to raise such doubts.[275] Even combined with Dr. Turbowicz's lack of prior experience and expertise in transnational investment or commercial arbitration, which could arguably create the appearance that counsel for Claimant sought to appoint a puppet to the tribunal,[276] the prior acquaintance was not considered a sufficient ground for disqualification.

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272 Tupman, *supra* note 43, at 45.

273 *Amco Asia*, ¶¶ 7–8, reported in Tupman, *supra* note 43, at 45.

274 *Alpha Projektholding*, ¶ 37.

275 *Id.* ¶ 41.

276 The unchallenged arbitrators' explanation of those circumstances, namely that "prior arbitral experience in an ICSID case is not a sine qua non to appointment as an ICSID arbitrator because, if it were, there would never be a first time for anyone" (*id.* ¶ 70) is

In *Universal Compression*, Venezuela challenged the Claimant-appointed arbitrator, Professor Tawil. He had allegedly entertained a professional relationship with King & Spalding LLP (representing Claimant in the case) for over ten years, acting as their co-counsel for different investors in at least three ICSID proceedings. Furthermore, one of King & Spalding LLP's attorneys had been employed as an associate in Professor Tawil's law firm for four years, and had as such worked with Professor Tawil personally.[277] In Respondent's view, the relationship between counsel for Claimant and Professor Tawil was very significant: It afforded Claimant privileged insight into the arbitrator's viewpoints and legal thinking, thereby putting Respondent at a disadvantage in the proceeding, and created an appearance of impropriety in his appointment.[278] Claimant countered that Professor Tawil's collaboration with King & Spalding LLP was not as important and extensive as portrayed, and that counsel for Respondent equally employed former team-members of Professor Tawil.[279] The ICSID Chairman rejected the proposal for disqualification, holding that the challenging party had failed to establish objective facts proving the arbitrator's manifest lack of independence or impartiality.[280] In particular, there was no ongoing relationship between Professor Tawil and counsel for Claimant, and the cases on which they had collaborated involved different parties, different facts, and possibly different legal issues.[281] Professor Tawil's acquaintance with an attorney on the team of counsel for Claimant was considered unproblematic since the attorney had only been one of several junior associates on the team, and had switched law firms five years earlier.

In *Nations Energy*, Dr. Alexandrov, a member of the *ad hoc* Committee constituted for the annulment proceeding, was challenged by Claimant. One of Respondent's counsel had previously worked directly together with him: During the attorney's seven year employment with Sidley Austin LLP, Dr. Alexandrov allegedly supervised him in his work on several ICSID proceedings.[282] The argumentation of Claimant was similar to that of Respondent in *Universal Compression*, alleging that the former co-worker's privileged insight into Dr. Alexandrov's views would put Claimant at a disadvantage. The unchallenged

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implausible, in light of how long-winded the career path of arbitration professionals generally is. This path hardly ever starts on an arbitration panel.

277 *Universal Compression*, ¶¶ 15 and 50.

278 *Id.* ¶¶ 51–53 and 97–98.

279 *Id.* ¶ 56.

280 *Id.* ¶ 77.

281 *Id.* ¶ 102.

282 *Nations Energy*, ¶ 22.

arbitrators rejected the disqualification proposal. They held that the establishment of a non-exclusive relationship of unproven extent and intensity between the two was by itself insufficient proof of a manifest lack of independence and impartiality.[283] Claimant would have had to furnish objective evidence of the influence of said relationship on Dr. Alexandrov's judgment, namely the arbitrator's ensuing predisposition in favor of Respondent[284] – an extremely high burden of proof.

Another arbitrator challenge was dismissed in *Repsol*. Argentina requested the disqualification of Dr. Claus von Wobeser on the basis of his previous collaboration with the law firm Freshfields Bruckhaus Deringer LLP (hereinafter Freshfields), as a co-counsel in a commercial arbitration. Freshfields represented the Claimant in *Repsol*. The ICSID Chairman held that the commercial arbitration case, which was decided nine years earlier, was unrelated to the present dispute, and that Dr. von Wobeser's role in the case was limited to his expert testimony on Mexican law. Accordingly, this circumstance did not suffice as a ground for disqualification.[285]

Teresa Cheng was equally challenged based on her connection to Freshfields in *Total*, where Freshfields represented the Claimant. Ms. Cheng had given legal advice and acted as a legal counsel for clients of Freshfields in two isolated instances, had acted as a Claimant-appointed arbitrator in a commercial arbitration against a party represented by Freshfields, and her son had completed a summer internship in the Paris office of the law firm.[286] The two unchallenged Annulment Committee members held that Argentina failed to substantiate the existence of a relationship of dependency between Ms. Cheng and Freshfields, since the contacts were sporadic and informal.[287] The mere existence of some sort of professional relationship with another participant in the proceeding, they stressed, was not an automatic ground for disqualification. Instead, the connection had to be important enough – in the light of the circumstances as a whole – to raise doubts regarding the decision-maker's ability to decide freely and independently.[288] They denied that this was the case in *Total*. The isolated events invoked by Argentina had occurred over the course of many years, and were unrelated to each other or to the proceeding at

283 *Id.* ¶¶ 66–67.

284 *Id.* ¶ 68.

285 *Repsol*, ¶¶ 85–86. *See infra* Part 2.2 C. for the Chairman's position on the repeat appointments of Dr. von Wobeser and Professor Orrego Vicuña.

286 *Total*, ¶¶ 35–36.

287 *Id.* ¶¶ 112–115 and 122.

288 *Id.* ¶ 123.

issue.[289] Whether they were viewed independently or as a whole, these events did not reasonably indicate the existence of a bond which would manifestly impede Ms. Cheng's ability to decide independently and impartially.[290]

In *Vannessa Ventures*, the chairman of the tribunal, V.V. Veeder, Q.C., handed in his resignation without being challenged, when his co-counsel in another, unrelated but ongoing arbitration appeared as counsel for Claimant at the jurisdictional hearing.[291]

In six cases, the (direct or indirect) connection between the challenged arbitrator and one of the parties was invoked as a basis for the request for disqualification.[292]

In *Amco Asia*, the Claimant-appointed arbitrator Edward W. Rubin had for several years personally advised a controlling shareholder of the corporate Claimants on tax matters before being appointed as an arbitrator (but after the arbitration proceedings were initiated).[293] As has been stated above, the unchallenged arbitrators dismissed the request for disqualification. They held that in contrast to a regular attorney-client relationship, the provision of legal advice in a single matter would not impact the reliability of the arbitrator for independent and impartial judgment.[294]

In *Vivendi*, Argentina requested the disqualification of Mr. Yves Fortier, Q.C., the president of the *ad hoc* Committee, based on an ongoing attorney-client relationship between one of the partners in Mr. Fortier's law firm and a corporate predecessor of one of the Claimants. The unchallenged *ad hoc* Committee members rejected the challenge, highlighting that Mr. Fortier had immediately and fully disclosed the mandate, although he was not personally involved in it, and although it was unrelated to the dispute at hand.[295] The specificity of the mandate (which concerned a soon to be closed transaction) seemed to play a role in the decision – the matter may have been resolved differently if the partner had given general legal or strategic advice to the company.[296]

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289 *Id.* ¶ 127.

290 *Id.* ¶ 125.

291 Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela (*Vannessa Ventures*), ICSID Case No. ARB(AF)/04/6 (reported in Sheppard, *supra* note 32, at 149.).

292 A challenge was obviated in the very first ICSID arbitration, Holiday Inns S.A. and others v. Morocco (ICSID Case No. ARB/72/1), when Claimant-appointed arbitrator John Foster resigned upon becoming one of the corporate Claimants' directors. Tupman, *supra* note 43, at 44; Sheppard, *supra* note 32, at 138–139.

293 *Vivendi*, ¶ 21.

294 Tupman, *supra* note 43, at 45.

295 *Vivendi*, ¶ 15; Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 23.

296 *See Vivendi*, ¶ 26.

A successful proposal for disqualification was made by Venezuela in *Blue Bank*, based on the attorney-client relationship of the arbitrator's firm with the Claimant. The Claimant-appointed arbitrator (José María Alonso) was a partner at Baker & McKenzie Madrid. Baker & McKenzie New York and Baker & McKenzie Caracas simultaneously advised the Claimant on an ongoing unrelated proceeding[297] against the same Respondent, which concerned similar issues. In his function as an arbitrator in *Blue Bank*, Mr. Alonso would have been in a position to decide issues relevant to the parallel proceeding led by his colleagues. Respondent claimed that "any reasonable person would have justifiable doubts as to whether an arbitrator that coordinates the global arbitration practice of a firm could sign an award rejecting arguments that are being defended by other partners of the same firm against the same Respondent."[298] The ICSID Chairman upheld the challenge of Mr. Alonso based on an appearance of a lack of impartiality resulting from the cumulation of several facts.[299] Mr. Alonso's membership on Baker & McKenzie's international arbitration steering committee, and the partial dependency of his remuneration on the results achieved by firms other than Baker & McKenzie Madrid seem to have affected the Chairman's decision.

Three of the challenges were dismissed in unpublished decisions. In *Zhinvali*, the unchallenged arbitrators held that in the absence of a professional or business relationship, or any other facts, it was purely speculative to "suggest that a merely occasional personal contact could manifestly affect the judgment of an arbitrator."[300] In *Generation Ukraine*,[301] Claimant requested the disqualification of Dr. Jürgen Voss, alleging that he had developed personal connections with Ukrainian officials in his role as Deputy General Counsel of the Multilateral Investment Guarantee Agency (MIGA).[302] The challenge was rejected based on a recommendation of the Secretary-General of the PCA,[303]

297 Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/5.

298 *Blue Bank*, ¶ 31.

299 *Id.* ¶¶ 67–69.

300 Zhinvali Development Ltd. v. Republic of Georgia (*Zhinvali*), ICSID Case No. ARB/00/1, Decision on a Proposal to Disqualify an Arbitrator (Jan. 19, 2001), unpublished, referenced in *Vivendi*, ¶ 23. *See* Sheppard, *supra* note 32, at 139; Markert, *supra* note 21, at 254; LUTTRELL, *supra* note 31, at 226.

301 Generation Ukraine Inc. v. Ukraine (*Generation Ukraine*), ICSID Case No. ARB/00/9.

302 LUTTRELL, *supra* note 31, at 230.

303 The unchallenged arbitrators were divided on the proposal and left it for the ICSID Chairman to decide. Because a decision of the latter on the disqualification of Dr. Voss might have been considered a breach of the principle of *nemo judex in sua causa* (the ICSID Chairman is the President of the World Bank, and Dr. Voss was challenged based on his

for reasons which have not been made public. Finally, in *Lemire*, the Ukraine challenged the arbitrator it had itself appointed, Jan Paulsson. His law firm (Freshfields) simultaneously represented the Ukraine in an unrelated investment arbitration.[304] The unchallenged arbitrators' arguments for the dismissal of the challenge are unknown. In any event, the case is not representative, considering that Mr. Paulsson was challenged by his appointing party, whom his firm represented in a parallel proceeding.[305]

In summary, ten of the eleven challenges based on previous (direct or indirect) contacts between an arbitrator and a party or counsel were dismissed. In one decision, the prior acquaintance of an arbitrator with counsel was generally carved out as a valid ground for disqualification. In most other decisions, the circumstances were held not to be so grave as to prove bias or raise doubts about the arbitrator's independence and impartiality – even where the arbitrator had a long-standing relationship with her or his appointing party or counsel.

As has been previously stated, the meaningful exercise of the parties' right to appoint their decision-makers requires them to be able to evaluate the candidate's suitability and qualifications. This, in turn, presupposes a certain degree of familiarity with the arbitrator. It does not, however, justify the tolerance of any and all relations, irrespective of their duration and intensity. On the contrary, it is important for the legitimacy of the ICSID system that a clear demarcation line be drawn between permitted and improper relationships between an arbitrator and another participant in the proceedings.

The circumstances which were invoked in the only disqualification request that was upheld were extraordinary. Members of the same firm (although in different offices) were concurrently dealing with similar issues in a dispute

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relationship with a World Bank agency), the President of the ICSID referred the challenge to the Secretary-General of the PCA. *See* LUTTRELL, *supra* note 31, at 230.

304 Joseph C. Lemire v. Ukraine, ICSID Case No. ARB(AF)/98/1, reported in Luke Eric Peterson, ICSID Arbitrators Reject Challenge to Third Member of Tribunal in Lemire v. Ukraine Arbitration, Investment Arbitration Reporter (Oct. 1, 2008), http://iareporter.developerspace.co.vu/icsid-arbitrators-reject-challenge-to-third-member-of-tribunal-in-lemire-v-ukraine-arbitration/ [hereinafter Peterson, Lemire]; Sheppard, *supra* note 32, at 143–144.

305 Reportedly, the Ukraine preemptively challenged Mr. Paulsson, because Claimant did not provide the requested assurances not to seek annulment of a potentially unfavorable arbitral award. In fact, however, both Claimant and its counsel assured the Ukraine that they would not seek an annulment – just not in the exact format requested. Against this background, the Ukraine's pursuance of challenge proceedings appears to have been a mere delaying tactic. *See* Peterson, Lemire, *supra* note 292.

between the same parties. The challenged arbitrator could have prejudged issues relevant for his colleagues, who represented the Claimant in the second case. The appearance of a lack of impartiality was undeniable.

B Role Switching between an Arbitrator and Counsel

In three instances, requests for the disqualification of an arbitrator were based on the interchanging roles of the same arbitrators and counsel in several proceedings.

One of those challenge proceedings was *SGS*. The professional paths of the arbitrator appointed by Respondent (Mr. J. Christopher Thomas) and counsel for Respondent (Mr. Jan Paulsson) had crossed on several occasions in the past, where the roles were reversed: Mr. Thomas had acted as counsel for Respondent in two proceedings[306] in which Mr. Paulsson presided over the tribunals.[307] In one of these proceedings, the tribunal dismissed all claims against the Respondent State (Mexico) represented by Mr. Thomas. As evidenced by a previously disclosed retainer of Mr. Thomas with Mexico, the latter was a very important client of his firm. Accordingly, Claimant in *SGS* argued that it was concerned that Mr. Thomas might – consciously or subconsciously – feel indebted to Mr. Paulsson and therefore not approach the case with the required open-mindedness.[308] The unchallenged arbitrators dismissed the Claimant's doubts out of hand, labelling its concerns as mere supposition and speculation. If the Claimant meant to imply that Mr. Thomas and Mr. Paulsson would favor each other's clients, it would have to furnish proof for such "reciprocal partisanship."[309]

In another set of cases, the challenged arbitrator (Dr. Andres Rigo Sureda) presided over two disputes, *Azurix* and *Siemens*.[310] Counsel for Claimant in those disputes (Guido Santiago Tawil) simultaneously acted as the Claimant-appointed arbitrator in a third dispute, *Duke Energy International*,[311] in which

306 GAMI Investments, Inc. v. The Government of the United Mexican States, *see GAMI Investments Inc. v. United Mexican States*, U.S. DEPARTMENT OF STATE, http://www.state.gov/s/l/c7119.htm (last accessed on Dec. 30, 2016); Robert Azinian and others v. United Mexican States, ICSID Case No. ARB(AF)/97/2.

307 *SGS*, ¶¶ 9 and 12.

308 *Id.* ¶ 13.

309 *Id.* ¶¶ 25–26.

310 Azurix Corp. v. Argentine Republic (*Azurix*), ICSID Case No. ARB/01/12; Siemens A.G. v. Argentine Republic (*Siemens*), ICSID Case No. ARB/02/8.

311 Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28.

Dr. Rigo Sureda's law firm (Fulbright & Jaworski LLP) represented Claimant.[312] Mr. Tawil thus pleaded two cases before Mr. Sureda, while Mr. Sureda's law firm argued a claim before Mr. Tawil. Argentina requested the disqualification of Mr. Sureda in both *Azurix* and *Siemens*. While the challenge proceedings were ongoing, Mr. Sureda terminated his employment with Fulbright & Jaworski LLP.[313] In *Azurix*, the challenge was dismissed by the unchallenged arbitrators. The reasons for the rejection are unfortunately unknown, since the decision was not published.[314] In *Siemens*, the ICSID Chairman rejected the challenge without giving reasons, after the unchallenged arbitrators failed to agree on the request.[315]

It is regrettable that the reasons for the dismissal of the disqualification requests in two out of three challenges based on role switching are unknown. The burden of proof imposed on the challenging party in the only reasoned decision, *SGS*, is remarkably heavy, and virtually impossible to fulfill. *SGS*, which was decided over ten years ago, can hardly provide an authoritative benchmark for challenges based on role switching. The lack of agreement among the unchallenged arbitrators in *Siemens* on the disqualification of Dr. Sureda suggests that the ICSID arbitration community does not perceive role switching to be *per se* unproblematic and harmless.

C Repeat Appointments

In thirteen instances, arbitrators were challenged based on their repeated appointment by the same party or law firm in successive or parallel proceedings, or in proceedings against the same Respondent.

In *Electrabel*, Professor Brigitte Stern was challenged because of her parallel appointment by Hungary and Arnold & Porter LLP in another proceeding.[316] The unchallenged arbitrators dismissed the challenge, arguing that the parallel

312 International Institute for Sustainable Development, ICSID Tribunals diverge over independence of arbitrator to hear Argentine claims, INVEST-SD: Investment Law and Policy News Bulletin (Mar. 24, 2005), http://www.iisd.org/pdf/2005/investment_investsd_mar24_2005.pdf.

313 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 26.

314 Sheppard, *supra* note 32, at 145–146.

315 *Id.* at 145–146 (explaining that "Professor Domingo Bello Janeiro thought Dr. Rigo Sureda's resignation from Fulbright was implicit of his lack of independence; while Judge Brower thought that it acted 'to silence any conceivable lingering doubts' as to his independence.").

316 The parallel proceeding was AES Summit Generation v. Republic of Hungary, ICSID Case No. ARB/07/22. *See Electrabel*, ¶¶ 29 and 37; Sheppard, *supra* note 32, at 154.

appointment by the same party and law firm, in a case concerning the same agreements, the same government action, and the same treaty, were harmless.[317] The only potential red flag, they held, was if the cases really arose from similar factual circumstances. Whether this was the case, however, could not be ascertained at this stage of the proceedings.[318]

The Claimant-appointed arbitrator in *PIP*, Professor Ibrahim Fadlallah, had served as the chair of the tribunal in a previous proceeding against Gabon,[319] in which an award was rendered one year earlier. Said award was received with much opposition from Gabon, and the annulment proceeding was ongoing.[320] Gabon requested Professor Fadlallah's disqualification, arguing that the cases referred to similar questions of fact and of law, and that the arbitrator's role in the previous case raised reasonable doubts about his ability to approach *PIP* with the required objectivity and open-mindedness.[321] Furthermore, the knowledge he acquired in the context of *Transgabonais* was alleged to endanger the balance of information on the tribunal.[322] The ICSID Chairman highlighted that neither the prior adjudication of Gabon's rights by Professor Fadlallah, nor Gabon's initiation of an annulment proceeding in the case presided over by him were sufficient grounds for disqualification.[323] In other words, the repeat appointment of an arbitrator against a particular Respondent is presumed to be unproblematic, even if the Respondent is still challenging the previous award in an annulment proceeding. Furthermore, the ICSID Chairman held that it was not established that *Transgabonais* and *PIP* concerned the same facts and the same legal issues; accordingly, the risk of an imbalance of information on the tribunal was not manifest,[324] and the proposal was rejected.

In *Tidewater* and *Universal Compression*, Respondent-appointed arbitrator Professor Brigitte Stern was challenged based on her repeat appointments[325]

317 *Electrabel*, ¶ 39 ("0^7 remains 0 and not 7. Two or more factors which do not satisfy the test required under Article 57 cannot, be mere 'combination,' meet that test.").

318 *Id.* ¶ 40.

319 Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic (*Transgabonais*), ICSID Case No. ARB/04/5.

320 *PIP*, ¶ 15.

321 *Id.* ¶ 14.

322 *Id.* ¶ 15.

323 *Id.* ¶¶ 28 and 30.

324 *Id.* ¶¶ 32–33.

325 Aside from *Tidewater* and *Universal Compression*, Venezuela had appointed her to the tribunals in *Vannessa Ventures* and Brandes Investment Partners LP v. The Bolivarian Republic of Venezuela (*Brandes*), ICSID Case No. ARB/08/3.

by Venezuela and its outside counsel Curtis, Mallet-Prevost, Colt & Mosle LLP. The challenging parties' disqualification requests were largely based on the same argument: They claimed that Professor Stern's repeated appointment by the same actors created the appearance of undue influence and an advantage for the appointing party. In particular, they feared that her previous role in cases which were based on overlapping facts and legal questions[326] might (even unconsciously, and despite her experience and standing[327]) cause her to approach the present disputes in a less open-minded way.[328] The fact that she would hear Venezuela's explanations for a third or fourth time by the time of the hearings, but only learn the Claimants' positions once, was alleged to cause an unfair imbalance between the parties.[329] The *Tidewater* challenge was adjudicated by the unchallenged co-arbitrators, while the disqualification request in *Universal Compression* was decided by the ICSID Chairman, due to the simultaneous challenge of Professor Tawil.[330] Both instances viewed the circumstances through a very similar lens, and dismissed the proposals. Multiple appointments by the same party or counsel were held not to be sufficient indicators of a manifest lack of independence or impartiality.[331] In *Tidewater*, the unchallenged arbitrators clarified:

> 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.[332]

The conclusion of both decisions seemed to be the observation that Professor Stern serves as an arbitrator in so many disputes that she is not dependent on any one party. Her repeat appointment in three or four cases thus did not create an appearance of dependency.[333] With regard to Claimants' apprehension of an issue conflict or unconscious bias on the part of Professor Stern, both instances were reluctant to assume an overlap of the pertinent facts and

326 An overlap of the facts and the law was only argued in *Universal Compression*. In *Tidewater*, the challenging party merely pleaded that the tribunal would have to answer the same jurisdictional questions.

327 *Tidewater*, ¶ 15.

328 *Id.* ¶ 13; *Universal Compression*, ¶ 24.

329 *Tidewater*, ¶ 13; *Universal Compression*, ¶ 24.

330 *Supra* Part 2.2 A.

331 *Universal Compression*, ¶¶ 77 and 86.

332 *Tidewater*, ¶ 60.

333 *Id.* ¶ 64; *Universal Compression*, ¶¶ 77 and 87.

law before they were pleaded,[334] besides stressing that investment arbitration would become unworkable if arbitrators were not allowed to adjudicate "similar legal or factual issues in concurrent or consecutive arbitrations."[335] The intimation that Professor Stern might not be as open-minded about Venezuela's actions and defenses, after having been exposed to their repeated portrayal by the Respondent, was dismissed as speculative.[336]

In *OPIC* and *Ickale*, Professor Philippe Sands was challenged because of his repeat appointments by the respective Respondent States (Venezuela and Turkmenistan) and their counsel (Curtis, Mallet-Prevost, Colt & Mosle LLP). Aside from being directed against the same arbitrator, the disqualification proposals were quite dissimilar. In *OPIC*, the Claimant asserted a lack of independence of Professor Sands, arguing that his repeat appointment by Venezuela and its counsel in three cases created a potential for undue influence and for an unfair advantage. Claimant pleaded that Professor Sands's financial compensation as an ICSID arbitrator was impacted by the repeat appointments, and that he was therefore indebted to his appointers.[337] The disqualification proposal was dismissed because the facts did not quite lend themselves to an inference of bias,[338] but not without an important correction of the decision in *Tidewater*: The unchallenged arbitrators stressed that repeat appointments were not a neutral factor but an important element to be considered in the evaluation of a disqualification request, since the perceived legitimacy of investor-State dispute settlement depended on its users' impression of and belief in the arbitrators' independence.[339] The unchallenged arbitrators' approach to repeat appointments was surprisingly critical:

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334 *Tidewater*, ¶ 69; *Universal Compression*, ¶ 82. This objection misses the point that the facts and the law of the case will frequently not have been pleaded at the stage of a disqualification proposal – in many cases, the challenge would otherwise be belated.

335 *Tidewater*, ¶ 68; *see also Universal Compression*, ¶ 83.

336 *Universal Compression*, ¶ 78.

337 *OPIC*, ¶¶ 21–22.

338 The previous two appointments of Professor Sands by Venezuela had never materialized – they had in fact concerned the same dispute, which was filed in several fora. The UNCITRAL tribunal rejected its jurisdiction, and the tribunal under the Arbitration Rules of Nova Scotia was never constituted. The repeat appointments by counsel for Respondent were unrelated to the case at hand and concerned another Respondent State (Turkmenistan); hence they were considered unproblematic. Finally, allegations of a financial dependence were rejected based on Sands's "extensive independent income sources unrelated to fees derived from his appointments as arbitrator in investment arbitrations." (*OPIC*, ¶¶ 51, 53 and 55).

339 *OPIC*, ¶ 47.

> 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. In a dispute resolution environment, a party's choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute. In our view, multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.[340]

In *Ickale*, on the other hand, Turkmenistan invoked impartiality arguments: The prior exposure of Professor Sands to the same issues (in particular of fact, but also of law)[341] was claimed to result in his diminished objectivity and open-mindedness, as well as an imbalance of knowledge on the tribunal.[342] This appearance of partiality was said to be reinforced by Professor Sands's appointment by counsel for Respondent in two other cases, one of which was also directed against Turkmenistan, but concerned different issues.[343] The unchallenged arbitrators dismissed the challenge. They held that it was not enough that Professor Sands was exposed to the same threshold jurisdictional question in *Ickale* and in *Kilic* – an overlap of the facts relevant for the determination of the tribunal's jurisdiction (as opposed to facts relevant for the decision on the merits) could not indicate a manifest lack of impartiality.[344] The unchallenged arbitrators further stressed that Professor Sands had not made any statements that would put his impartiality into question, and that they trusted his assurances of approaching the case with an open mind.[345]

In two cases which were both decided by the ICSID Chairman on the same day (*Burlington* and *Repsol*), Professor Orrego Vicuña was challenged based on his repeat appointments against Argentina. In *Repsol*, Argentina argued that the annulment of three ICSID awards previously rendered in its

340 *Id.*

341 *Ickale*, ¶ 74.

342 *Id.* ¶¶ 72–73 (referring to Professor Sands's appointment by Turkmenistan and Curtis, Mallet-Prevost, Colt & Mosle LLP in Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan (*Kilic*), ICSID Case No. ARB/10/1).

343 Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9; and *OPIC*. *See Ickale*, ¶ 76.

344 *Ickale*, ¶ 120.

345 *Ickale*, ¶ 122.

detriment by tribunals presided by Professor Orrego Vicuña[346] caused him to bear a manifest animosity against Argentina. Never before in the history of ICSID had three awards signed by the same presiding arbitrator been annulled – let alone at the request of the same party. In the light of such a devastating verdict on an arbitrator's competence, it was unreasonable to expect him to impartially judge over Argentina.[347] Furthermore, Argentina claimed that *Repsol* would concern the same facts (emergency measures) and law (the defense of necessity) argued in the previous three cases, which would only reinforce its argument.[348] The arbitrator's attempt to justify his position in the annulled cases in academic writing[349] was said to be further proof of his prejudice and in itself a cause for disqualification.[350] The ICSID Chairman dismissed the challenge. He held that *CMS*, *Enron* and *Sempra* were based on different facts and law, and concerned State actions taken at different periods than those in *Repsol*. Argentina's successful requests for annulment in the past were deemed insufficient evidence of Professor Orrega Vicuña's manifest lack of impartiality.[351] His publication on the necessity defense was considered irrelevant, because no such provision was contained in the invoked legal instrument.[352]

In the same case, Claus von Wobeser was challenged based on his prior appointment in an ICSID proceeding against Argentina,[353] arguing that said (singular) appointment put him into a generally adverse position toward the

346 CMS Gas Transmission Company v. Argentine Republic (*CMS*), ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic (Sept. 25, 2007); Sempra Energy International v. Argentine Republic (*Sempra*), ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010); Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (*Enron*), ICSID Case No. ARB/01/3, Decision on Annulment (July 30, 2010).

347 *Repsol*, ¶¶ 25–26.

348 *Id.* ¶ 28.

349 Francisco Orrego Vicuña, *Softening Necessity*, *in* LOOKING TO THE FUTURE. ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 741 (Mahnoush H. Arsanjani et al. eds., 2010).

350 *Repsol*, ¶¶ 29–30.

351 *Id.* ¶¶ 77–78.

352 *Id.* ¶ 79. Considering that the defense of necessity is regularly invoked based on customary international law, this argument is difficult to grasp.

353 Von Wobeser was appointed by the investor in CIT Group Inc. v. Argentine Republic (*CIT*), ICSID Case No. ARB/04/9. In *Repsol*, he was also challenged based on his previous collaboration with counsel for Claimant (Freshfields). This aspect of the challenge is examined *supra* in Part 2.2 A.

country. Furthermore, the emergency measures adjudicated in *CIT* would again be relevant in *Repsol*.[354] The ICSID Chairman was not convinced by Argentina's arguments: *CIT* had concerned different facts and a different treaty, and had moreover been concluded by a settlement of the parties, and not by an award on the merits.[355]

Professor Orrego Vicuña's challenge in *Burlington* was brought by Ecuador. It was mainly based on his appointment by Freshfields in seven prior ICSID proceedings between 2007 and 2013.[356] Ecuador argued that the appointment by Freshfields in such a high number of cases undermined the Professor's independence.[357] The request for disqualification was dismissed as far as it relied on those grounds, because it had not been raised in a timely manner.[358] Accordingly, the challenge decision does not state whether the repeated appointment of an arbitrator by the same law firm in so many cases creates an appearance of dependence. The request for disqualification was however upheld on other grounds.[359]

The request for Bruno Boesch's disqualification in *Caratube* was upheld. Claimant had criticized his repeat appointment by Kazakhstan and its counsel (Curtis, Mallet-Prevost, Colt & Mosle LLP) in the highly similar parallel case *Ruby Roz*.[360] The facts and the law pleaded in *Ruby Roz* were essentially the same as in *Caratube*, and the parties relied on the same witnesses, experts and evidence.[361] In Claimant's view, Mr. Boesch's knowledge of the parties' arguments on jurisdiction and on the merits led to a "manifest risk of prejudgment," which could not be removed by his assurances to the contrary.[362] His appointment by Curtis, Mallet-Prevost, Colt & Mosle LLP in at least two

354 *Repsol*, ¶¶ 50–51.

355 *Id.* ¶ 83.

356 Eni Dación B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/4; Itera International Energy LLC and Itera Group NV v. Georgia, ICSID Case No. ARB/08/7; EVN AG v. former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/10; Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8; Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11; Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela (*Rusoro*), ICSID Case No. ARB(AF)/12/5, Decision on the Proposal for the Disqualification of Francisco Orrego Vicuña (June 14, 2013); *Repsol*.

357 *Burlington*, ¶ 24.

358 *Id.* ¶ 75.

359 *Id.* ¶ 79, see *supra* Part 3.1.

360 Ruby Roz Agricol and Kaseem Omar v. Kazakhstan (*Ruby Roz*), UNCITRAL.

361 *Caratube*, ¶¶ 25–26.

362 *Id.* ¶ 27.

additional cases was argued to raise serious doubts about his independence, in particular in light of his lack of prior experience with ICSID arbitration.[363] The unchallenged arbitrators, for the first time in the history of ICSID,[364] upheld the challenge of their co-arbitrator. They explained that nobody could realistically maintain a "Chinese wall" in their mind, and avoid their decision from being influenced by knowledge from previous proceedings. Accordingly, the repeat appointment of an arbitrator in very similar cases could lead to prejudgment.[365] Since there was such a strong overlap of the relevant facts and law in *Ruby Roz* and *Caratube*,[366] the unchallenged arbitrators concluded that a reasonable and informed third party would find it highly likely that Mr. Boesch could not be completely objective and open-minded, but would be prejudiced. Accordingly, they affirmed the existence of an "evident or obvious appearance of a lack of impartiality."[367] Upholding the challenge on this basis, the unchallenged arbitrators left open the question whether an imbalance of knowledge on the tribunal could constitute a free-standing ground for disqualification, or whether it was only an aggravating circumstance.[368] They did, however, consider whether repeat appointments by the same law firm were sufficient to infer a manifest lack of independence and impartiality, and answered in the negative. In a system of party-appointments, they thought it unavoidable that every side would appoint the "best" arbitrator, ideally someone they had previously successfully worked with.[369]

In *Suez I*, Argentina argued that Professor Gabrielle Kaufmann-Kohler's involvement in the allegedly flawed decision in *Vivendi* was evidence of her lack of independence and impartiality.[370] The unchallenged arbitrators dismissed the disqualification request as belated, but not without stating, in the form of obiter dicta, that the text of the unanimous decision in Vivendi did not furnish proof of bias and that stronger evidence than a mere difference in opinion or a wrong decision was required to substantiate a prejudgment.[371] Since the facts and the applicable law were distinctly different in *Vivendi* and *Suez I*, Argentina's request was rejected as based on mere belief, and not facts.

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363 *Id.* ¶¶ 31–32. The latter argument is reminiscent of *Alpha Projektholding*.

364 Giorgetti, Caratube v. Kazakhstan, *supra* note 190.

365 *Caratube*, ¶ 75.

366 *Id.* ¶ 78–88.

367 *Id.* ¶ 91.

368 *Id.* ¶ 96.

369 *Id.* ¶¶ 107–108 (citing *Tidewater*).

370 *Suez I*, ¶¶ 12–13.

371 *Id.* ¶¶ 35–36.

Beyond these published cases, disqualification requests based on repeat appointments were filed and dismissed in two unpublished cases:

In *Saba Fakes*,[372] the unchallenged arbitrators dismissed a request for the disqualification of Professor Laurent Levy. Turkey had already appointed him in a previous, unrelated proceeding which allegedly concerned similar facts. The reasons for the rejection of the challenge are unknown. *Rusoro* concerns another disqualification request aimed at Professor Francisco Orrega Vicuña, because of his repeat appointments by Freshfields. The challenge was rejected.[373]

In summary, only one of thirteen challenges based on repeat appointments was upheld. The circumstances in *Caratube* were extraordinary: Mr. Boesch was appointed in two parallel cases, which were essentially identical, making it difficult to deny an appearance of prejudgment. Accordingly, his disqualification was virtually unavoidable.

2.3 *Familiarity with the Subject-matter of the Proceeding*

In three instances, arbitrators were challenged because they had previously dealt with and issued statements on similar issues. Their familiarity with the subject-matter and expression of their views in different roles – be it as government officials or as scholars – was argued to impede their free and unaffected decision-making.

In *Saint-Gobain*, Gabriel Bottini (the arbitrator appointed by Venezuela) was challenged based on his previous employment as the National Director of International Matters and Disputes for the Office of the Attorney General of Argentina. In this role, Claimant argued, he defended Argentinian interests from claims based on "precisely the same or similar issues" as in the case at hand.[374] Accordingly, the Claimant questioned Mr. Bottini's ability to argue differently in his role as an arbitrator.[375] The unchallenged arbitrators held that it is not unthinkable that a lawyer who has taken a certain stance in the past would change his mind in a future case. Unless the challenging party could prove specific facts, which prove the arbitrator's prejudice, the assumption that "he is a legal professional with the ability to keep a professional distance" would act in his favor.[376]

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372 Saba Fakes v Turkey, ICSID Case No. ARB/07/20, *summarized in* Sheppard, *supra* note 32, at 154.

373 *Referenced in Repsol*, ¶ 23; *see also* Fry and Stampalija, *supra* note 31, at 246.

374 *Saint-Gobain*, ¶¶ 16 and 23.

375 *Id.* ¶ 25.

376 *Id.* ¶ 81.

The challenge in *Urbaser* was founded on the views Professor McLachlan had expressed in academic writings. His publications concerned the application of so-called most favored nation clauses to the dispute settlement provisions of a BIT, and the defense of necessity. In the Claimants' view, said publications proved that the arbitrator prejudged the issues at stake in the present case:[377] Because he would not realistically express an opinion contrary to his own writings for fear of being criticized as being inconsistent, Professor McLachlan was inherently unfree in his decision-making.[378] The unchallenged arbitrators dismissed the challenge. Framing the lack of independence and impartiality as the arbitrator's reliance on factors which have no relation to the merits of the case,[379] they held that the opinions expressed in academic writings would have to be so specific and clear that an arbitrator could rely on them for deciding the case, without giving the parties' submissions due consideration.[380] Otherwise, the academic debate on international investment law would be undesirably stifled and ICSID would be paralyzed by a multitude of challenges against arbitrators who have made contributions to the doctrinal discourse.[381] Professor McLachlan's publications were held not to be of such a detailed and conclusive nature as to prevent him from taking the arguments of the parties into account.[382]

In *Tanzania Electric*, Judge Charles N. Brower resigned from his position on the tribunal after one of his law clerks had discussed the legal questions at issue online. The unchallenged arbitrators had apparently been unable to agree on the disqualification request.[383]

In summary, none of the challenges based on an arbitrator's prior familiarity with the relevant subject-matter were successful. The arbitrators' previous statements (as government officials or academics) were held to leave enough room for a dutiful consideration of the parties' submissions.

2.4 *Connection to an Adverse Third Party*

In fourteen instances, arbitrators were challenged because of their (direct or indirect) connection to an adverse third party, which was argued to cause them to be predisposed against the challenging party.

377 *Urbaser*, ¶¶ 20–25.

378 *Id.* ¶ 41.

379 *Id.* ¶ 40.

380 *Id.* ¶ 44.

381 *Id.* ¶¶ 48 and 54.

382 *Id.* ¶ 54.

383 Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited (*Tanzania Electric*), ICSID Case No. ARB/98/8, unpublished but referenced in Markert, *supra* note 21, at 265 n.127.

In *ConocoPhillips I*, Venezuela requested the disqualification of Yves Fortier, Q.C. His firm (Norton Rose LLP, hereinafter Norton Rose) had targeted Macleod Dixon LLP (hereinafter Macleod Dixon) as a target for a merger. The Caracas office of Macleod Dixon acted as counsel for Claimant in several cases directed against Venezuela and its State owned petroleum company. It was portrayed as the single most adverse law firm to Respondent's interests, whose case portfolio relied heavily on disputes against Venezuela. Even after Mr. Fortier's resignation from Norton Rose, Venezuela upheld its proposal for disqualification.[384] It highlighted that Macleod Dixon's Caracas office and Mr. Fortier's arbitration expertise and practice were central assets in the merger, which could not be kept apart by ethical screens or by a resignation of Mr. Fortier. Respondent claimed that from the moment Norton Rose targeted Macleod Dixon as a merger partner, there was a risk of (conscious or unconscious) bias against Venezuela – irrespective of any ethical screens. Furthermore, the ethical walls were alleged not to function, since the two firms were apparently already working together on some files.[385] The unchallenged arbitrators dismissed the challenge. Although they recognized Macleod Dixon's adverse position towards Venezuela, they believed Mr. Fortier's assurances that he did not have any knowledge of and was not involved in any proceedings against Venezuela.[386] In the absence of sufficiently detailed knowledge about the merger and its target, Mr. Fortier could not possibly have been biased.

Mr. Fortier's relationship with Norton Rose has since given rise to seven more challenges. In *ConocoPhillips III*, *IV*, *V* and *VI*, Venezuela argued that Mr. Fortier's ongoing relationship with Norton Rose – in particular, his continued use of members of Norton Rose as tribunal assistants – casts doubts on his independence and impartiality.

To substantiate its allegation of an ongoing relationship, Venezuela referred to the notorious involvement of Mr. Martin Valasek (a partner at Norton Rose) in the *Yukos* arbitration,[387] presided over by Mr. Fortier, in *ConocoPhillips III* and *IV*. Russia's allegation that the historic USD 50 billion award in *Yukos* was not written by the tribunal, but by an assistant to the tribunal (namely

384 *ConocoPhillips I*, ¶¶ 11 and 15.

385 *Id.* ¶¶ 24–28 and 30–31.

386 *Id.* ¶¶ 63–65.

387 Hulley Enterprises Limited (Cyprus) v. Russian Federation (PCA Case No. AA 226), Yukos Universal Limited (Isle of Man) v. Russian Federation (PCA Case No. AA 227), and Veteran Petroleum Limited (Cyprus) v. Russian Federation (PCA Case No. AA 228).

Mr. Valasek), had caused an outcry in the international arbitration community.[388] While Mr. Valasek's role in *Yukos* was merely alleged in the third disqualification request,[389] it was corroborated by a report of a linguistics expert (filed by Russia in set-aside proceedings of the *Yukos* awards) in the fourth disqualification proceeding.[390] Venezuela reiterated that Norton Rose (including Mr. Valasek personally) represented companies adverse to Venezuela in cases involving the same critical issues as *ConocoPhillips*. Thus, the continued close professional relationship between Mr. Fortier and the law firm raised doubts about his independence and impartiality.[391]

Both challenges were dismissed. In *ConocoPhillips III*, the ICSID Chairman held that Mr. Fortier's continued use of Norton Rose employees as tribunal assistants had been disclosed in the context of the first disqualification proceeding, in 2011, and that the challenge was therefore untimely as far as it was based on this circumstance.[392] Mr. Valasek's role in *Yukos*, on the other hand, was brought up in a timely manner, but unsubstantiated, and even if it were proven, would be irrelevant to the determination of Mr. Fortier's independence and impartiality.[393]

In *ConocoPhillips IV*, the unchallenged co-arbitrators decided that Mr. Fortier could not repeatedly be challenged based on the same facts.[394] They did, however, seem to concede that Mr. Valasek's involvement in *Yukos* could be considered a new basis for a challenge, if it was established. Venezuela would then need to prove that "the particular collaboration with Mr. Valasek gives rise to a manifest lack of independence and impartiality in this case."[395]

In *ConocoPhillips V*, Venezuela argued that Mr. Fortier created "an impression of 'lesser ties to Norton Rose than actually existed,'"[396] by inaccurately disclosing the circumstances of a Norton Rose lawyer's appointment as an assistant to a tribunal he chaired. While he had only formally engaged Alison Fitzgerald

388 *See* Dmytro Galagan, The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal's Mandate?, Kluwer Arbitration Blog (Feb. 27, 2015), http://kluwerarbitrationblog.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/.

389 *ConocoPhillips III*, ¶ 94.

390 *ConocoPhillips IV*, ¶ 15.

391 *Id.* ¶ 25.

392 *ConocoPhillips III*, ¶ 66.

393 *Id.* ¶ 95.

394 *ConocoPhillips IV*, ¶¶ 36–37.

395 *Id.* ¶ 40.

396 *ConocoPhillips V*, ¶ 25.

as a tribunal assistant after he had left Norton Rose, he falsely disclosed that she was appointed prior to his resignation, "when she was a very junior lawyer with Ogilvy Renault."[397] Ogilvy Renault, the predecessor of Norton Rose, was renamed on June 1, 2011. Thus, Mr. Fortier's disclosure implied that Ms. Fitzgerald was appointed prior to that date, while her appointment effectively only took place in February 2012.[398] Venezuela did not explicitly accuse Mr. Fortier of misrepresenting or concealing these facts, but intimated that he had downplayed his continuing ties with Norton Rose, which had been at the core of the prior three disqualification requests.[399] The unchallenged arbitrators dismissed the request, considering the inaccuracies in Mr. Fortier's disclosure to be negligible: While his erroneous reference to Norton Rose as Ogilvy Renault is not mentioned in the decision, the appointment of Ms. Fitzgerald after Mr. Fortier's resignation from Norton Rose is regarded as insignificant, since the "substantive decision was made by the three arbitrators in December 2011."[400] The unchallenged arbitrators further recalled their decision in *ConocoPhillips IV*, denying the admissibility of repetitive challenges.[401] Thus, Mr. Fortier's ties to Norton Rose could not serve as a basis for the challenge. Looking into the appointment of a Norton Rose lawyer as a tribunal assistant nevertheless, they held that it amounted to such a minor connection to Norton Rose, that no reasonable third person would conclude that Mr. Fortier manifestly lacks the requisite independence and impartiality.[402]

In *ConocoPhillips VI*, Venezuela substantiated its allegation of Mr. Fortier's continued involvement with Norton Rose by showing that his secretaries received insurance and other benefits from an entity set up by Norton Rose (Services OR LP/SEC).[403] It argued that although Mr. Fortier reimbursed Services OR LP/SEC for the secretaries' salaries and benefits, the service arrangement provided him with substantial benefits,[404] and belied Mr. Fortier's promise

397 *Id.* ¶ 6.

398 *Id.* ¶ 7.

399 According to Venezuela, the "pattern of non-disclosure, or simply inaccurate disclosure" raised doubts as to Mr. Fortier's impartiality (*id.* ¶ 24), "because it created an impression of lesser ties to Norton Rose than actually existed'" (*id.* ¶ 25).

400 *Id.* ¶ 34.

401 *ConocoPhillips IV*, ¶ 37 ("a challenge based on the same facts cannot be presented again"). Since Mr. Fortier's continued use of Norton Rose employees as tribunal assistants had been disclosed in the first disqualification proceeding, in 2011, the Respondent was held not to have produced new facts.

402 *Id.* ¶ 35.

403 *ConocoPhillips VI*, ¶ 6.

404 *Id.* ¶ 6.

of severing all financial and professional ties to Norton Rose.[405] Moreover, Mr. Fortier had failed to disclose this continuing relationship with Norton Rose, thus (once more) raising doubts about his independence and impartiality.[406] Again, the unchallenged arbitrators dismissed the proposal for disqualification. They held that Respondent failed to show how the service arrangement – a purely administrative tie with Norton Rose – would affect Mr. Fortier's independence and impartiality in the specific case at hand.[407] The inadmissibility of repetitive challenges was highlighted once more,[408] serving as a basis to summarily dismiss the Respondent's proposal.[409]

The disqualification requests in *Favianca* were closely related to the *ConocoPhillips* challenges: Venezuela's request for a disqualification of Mr. Fortier in *Favianca I*[410] was based on the same circumstances as the challenges in *ConocoPhillips III* and *IV*. In particular, Venezuela pointed out the ongoing (informal) relationship between Mr. Fortier and his former law firm, Norton Rose, and the controversial role of one of Norton Rose's partners, Martin Valasek, in the *Yukos* case.[411] It further explained that Mr. Fortier continued to occupy offices in the same building as Norton Rose, "in the reception area" of the firm, that he still had a Norton Rose email address, and that he had publicly endorsed one of Norton Rose's lawyers in her political candidacy.[412] These circumstances, Venezuela argued, raised justifiable doubts about his ability to independently and impartially decide cases which would impact Norton Rose and its clients.[413] The ICSID Chairman dismissed the challenge as belated:

405 *Id.* ¶ 9.

406 *Id.* ¶ 6.

407 *Id.* ¶ 14–16.

408 *Id.* ¶ 17.

409 Mr. Fortier's unique position as the sole beneficiary of staff and administrative support services provided by Services OR LP/SEC (apart from Norton Rose) was not addressed by the unchallenged arbitrators. The same applies to his failure to sever all ties with Norton Rose, and the impact this has on his credibility.

410 Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela (*Favianca I*), ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify a Majority of the Tribunal (June 16, 2015). At the same time, Venezuela also challenged the arbitrator appointed by itself, Alexis Mourre, based on his consultancy agreement with Dechert LLP, a law firm which was at the time adverse to Venezuela in six unrelated litigation proceedings (*id.* ¶ 20). Mr. Mourre resigned, and the challenge became moot.

411 *Id.* ¶¶ 23–24.

412 *Id.* ¶ 26.

413 *Id.* ¶ 27.

Venezuela should have been aware of the relationship between Mr. Fortier and Mr. Valasek by July 2014. While it only learned of Mr. Valasek's controversial role in *Yukos* in January 2015, it was able to file its disqualification request in *ConocoPhillips III* on February 6, 2015. The challenge in *Favianca I*, however, was not filed until thirty-five days later, on March 13, 2015.[414]

The challenge in *Favianca II* was based on arguments similar to those in *ConocoPhillips V*: The engagement of a Norton Rose lawyer as a tribunal assistant, after Mr. Fortier's resignation from Norton Rose, and despite his assurances to sever all ties with the firm upon his resignation, was claimed to raise doubts regarding his independence and impartiality. These doubts were alleged to be further exacerbated by his inaccurate disclosure. The challenge was dismissed by the unchallenged arbitrators, who held that the understanding between Norton Rose and Mr. Fortier (which provided for the continued service of Norton Rose lawyers on tribunals, as well as their replacement by other Norton Rose lawyers[415]) was not of a nature or intensity to lead a reasonable third person to conclude that Mr. Fortier's interests were so aligned with those of Norton Rose that he would be unable to exercise free judgment.[416] Since the tribunal assistant's involvement was irrelevant for Mr. Fortier's independence and impartiality, its date was held to be *a priori* negligible, and the inaccuracy of Mr. Fortier's disclosure (which a reasonable third person would believe to be an oversight) thus forgivable.[417]

The facts underlying the challenge in *Favianca III* were similar to those invoked in *ConocoPhillips VI*: The Respondent showed that Mr. Fortier's secretaries received insurance and other benefits from an entity set up by Norton Rose (Services OR LP/SEC), and that one of them (Myriam Ntashamaje) was employed by Norton Rose, according to her LinkedIn profile. Like all other challenges of Mr. Fortier, the proposal for disqualification in this case was dismissed. The unchallenged arbitrators held that a reasonable third person in possession of Ms. Ntashamaje's LinkedIn page, as well as Mr. Fortier's clarifications (according to which she is not, and never was employed by Norton Rose), would believe him and conclude that the secretary committed an error.[418]

414 *Id.* ¶¶ 41–46.

415 *Favianca II*, ¶ 44.

416 *Id.* ¶49.

417 *Id.* ¶57.

418 *Favianca III*, ¶ 53–54 ("[W]ould a third party in possession of Ms. Myriam Ntashamaje's LinkedIn page and Mr. Fortier's subsequent clarification in relation to the information displayed on that LinkedIn page conclude that Ms. Myriam Ntashamaje had committed

The administrative handling of Mr. Fortier's secretaries' salaries and benefits by Services OR LP/SEC was held to be a financially neutral arrangement, which did not give the challenged arbitrator a direct financial interest in the activities of Norton Rose. While the arrangement was convenient for Mr. Fortier, it did not lead to an alignment of his interests with Norton Rose which would cause a reasonable third person to entertain serious doubts as to his reliability for independent and impartial judgment.[419]

In *Saint-Gobain*, Claimant challenged Gabriel Bottini based on his connection to Osvaldo Guglielmino, who now represented Venezuela in a parallel proceeding.[420] At the time of his appointment, the arbitrator was an employee of the Argentinian Attorney General, under direct supervision of Mr. Guglielmino. Now, the former co-workers found themselves involved in parallel unrelated proceedings involving the same Respondent, as arbitrator and as counsel. The unchallenged arbitrators did not consider this situation problematic, highlighting that Mr. Guglielmino had ceased to be Mr. Bottini's superior three years earlier, and that the two had not seen each other more than twice since.[421]

The challenge of Robert von Mehren in *Cemex* was dismissed by the unchallenged arbitrators because it was belated.[422] The request had been based on the connection between the arbitrator and a law firm adverse to Venezuela in a parallel proceeding. In particular, Robert von Mehren was a retired partner of the law firm Debevoise & Plimpton LLP. Even after his retirement,

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an error, or would that person conclude that Mr. Fortier has deliberately misrepresented the true state of affairs concerning Ms. Myriam Ntashamaje's employment to the Two Members, the Parties and ICSID in full knowledge that his clarification will be recorded in a decision that will be made public and that the contents of his representation are easily susceptible to verification by the public? … [T]here can be no doubt [that] a reasonable third person would conclude that Ms. Myriam Ntashamaje had committed an error on her LinkedIn page and that the true state of affairs is that she has been employed by Cabinet Yves Fortier throughout the relevant period.").

419 *Id.*, ¶ 59–60.

420 Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19.

421 *Saint-Gobain*, ¶ 87. *See supra* Part 2.3 for the unchallenged arbitrators' argumentation with regard to the pleaded "issue conflict".

422 CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (*Cemex*), ICSID Case No. ARB/08/15, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal (Nov. 6, 2009), ¶ 44.

he maintained offices and used secretarial services at the firm.[423] Debevoise & Plimpton LLP concurrently represented the Claimant in *Holcim,*[424] an investor-State action against Venezuela arising out of the same general set of facts.[425]

In *Getma*, the request for disqualification was based on the arbitrator's brother's simultaneous appointment in a parallel proceeding involving the same Claimant and concerning the same facts.[426] The unchallenged arbitrators dismissed the request for disqualification, stating that the apprehension of bias was based on mere speculations. Other than the family tie between the two brothers involved in the arbitrations, the challenging party would have to establish further facts from which a manifest lack of independence or impartiality could reasonably be inferred.[427] The root concern in this case appears to have been consistency with other challenge decisions: If the nomination of the same arbitrator in concurrent proceedings on similar issues was not challengeable,[428] the nomination of two brothers could not, *a fortiori*, be considered problematic.[429]

Romania's disqualification request in *S&T Oil* did not need to be resolved: With the consent of his co-arbitrators, Mr. Savage voluntarily resigned.[430] Romania had argued that the representation of a foreign investor in an unrelated proceeding against Romania by Mr. Savage's firm raised doubts about his independence and impartiality.[431]

In *EDF* and in *Suez II*, Argentina challenged Professor Kaufmann-Kohler based on her position as a director of UBS. UBS itself was not involved in the proceeding, but had recommended investments in the parent company of one of the Claimants in *EDF* and was a minority shareholder of two of the Claimants

423 *Id.* ¶ 21–22.

424 Holcim Limited, Holderfin B.V. and Caricement B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/09/3.

425 *See* Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 20.

426 *Getma*, ¶ 10. The parallel proceeding was initiated by Getma against Guinea in the Common Court of Justice and Arbitration (CCJA), a court and arbitration institution responsible for supervising the administration of arbitration proceedings in member States of the Organisation for the Harmonization of Business Law in Africa (Organisation pour l'Harmonisation en Afrique du Droit des Affaires, OHADA).

427 *Id.* ¶¶ 68–72.

428 *See Tidewater*, *supra* note 160.

429 *Getma,* ¶ 74.

430 S & T Oil Equipment and Machinery Ltd. v. Romania, ICSID Case No. ARB/07/13, Order of Discontinuance of the Proceeding (July 16, 2010), ¶ 14.

431 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 18.

in *Suez II*. Argentina argued that the arbitrator's position would cause her to have a personal (economic) interest in the outcome of the proceeding, and prevent her from adjudicating the case independently and impartially.

In *EDF*, the recommendation by UBS of investments in EDF's parent company and its common interest in several companies with EDF were central arguments brought forward by Argentina,[432] along with the partial dependence of Professor Kaufmann-Kohler's remuneration on the success of UBS.[433] An expert opinion submitted by Respondent explained that there was an economic incentive for UBS to favor Claimants, and that as a consequence, "Professor Kaufmann-Kohler's 'loyalty interests' will lead her to follow suit," irrespective of the relative size of UBS's holdings in EDF.[434] In other words, Argentina argued that Professor Kaufmann-Kohler's role as a director of UBS and her role as an arbitrator were irreconcilable, because she could not fulfill any one of her duties without breaching the other one. The co-arbitrators dismissed the challenge. They denied that Professor Kaufmann-Kohler had a financial interest or other benefit that would depend on the outcome of the case[435] and declared the Respondent's apprehension of her emotional solidarity or psychological identification with UBS, and thus with Claimants, to be "remote, tenuous and speculative."[436] A significant part of the case hinged on Professor Kaufmann-Kohler's failure to disclose the connection between UBS and EDF, which she apparently did not know of. Argentina argued that the arbitrator breached her duty to investigate potential conflicts of interest. The co-arbitrators dismissed this argument, reasoning (very cursorily) that "[w]hatever level of disclosure might be required under the ICSID Convention, a failure to inform the parties about this Board membership does not rise to that plane."[437]

In *Suez II*, the connection between UBS and Claimants was even more direct. In addition to recommending the investment in the companies as in *EDF*, UBS was a minority shareholder of two of the Claimants.[438] Again, a part of

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432 UBS was claimed to hold 5.32% of the shares of a company effectively controlled by Claimant through an intermediary; it further sold shares of another company (in a proportion of 17.3% and later another 17.32%) directly to Claimant. *EDF*, ¶ 12.

433 *EDF*, ¶ 28.

434 *Id.* ¶¶ 35–36.

435 *Id.* ¶¶ 71, 96.

436 *Id.* ¶ 73. *See also id.* ¶¶ 76, 121. The co-arbitrators held that the 1.5% stake of UBS in AEM was *de minimis*.

437 *Id.* ¶ 98.

438 Suez, Sociedad General de Aguas de Barcelona S.A. [hereinafter Suez] and Vivendi Universal S.A. [hereinafter Vivendi].

Professor Kaufmann-Kohler's remuneration was in UBS shares, and all of these facts remained undisclosed.[439] The unchallenged arbitrators held that the connection between the arbitrator and two of the Claimants was insufficient in and of itself, and that it had to be evaluated qualitatively, based on four criteria: proximity, intensity, dependence and materiality.[440] Applying those four criteria, and focusing on the market value of the shares in Suez and Vivendi held by UBS, compared to the total amount of assets it manages, the unchallenged arbitrators found that any potential effect of the connection between Claimants and UBS on the award was negligible, since the economic benefit for Gabrielle Kaufmann-Kohler was not material.[441] The Respondent's claim of a breach of the duty to investigate and disclose potential conflicts of interest was decided very similarly to *EDF*.[442]

In summary, none of the arbitrator challenges based on an arbitrator's connection to an adverse third party were upheld.

2.5 *Conclusion*

The above analysis of the presently available ICSID disqualification decisions indicates that a vast majority of arbitrator challenges is based on the arbitrators' familiarity with another participant in the proceeding. Repeat appointments by the same Respondent State or law firm, or against the same Respondent State are particularly frequently invoked as a basis for challenge.

Practically all of these disqualification requests are dismissed, irrespective of the standard of independence and impartiality applied. Throughout all case categories, the burden of proof imposed on the challenging parties is very high and rarely met. The "reasonable doubts regarding the appearance" standard established in *Vivendi* is often pared down with further requirements, effectively bringing it ever closer to the *Amco Asia* standard.

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439 In the case at hand (*Suez II*), UBS held a 2.1 / 2.38% interest in two of the corporate Claimants, Suez and Vivendi. *Suez II*, ¶¶ 12, 31.

440 *Id.* ¶¶ 32–35.

441 *Id.* ¶¶ 36–37. The co-arbitrators highlighted that there was no evidence that the award would impact the market price of the Claimant companies, and that the award's effect on the "fortunes of UBS" was likely negligible.

442 *Id.* ¶¶ 46–48. The failure to disclose the bank's interest in two of the Claimants in and of itself was not considered a sufficient ground for a challenge, because Professor Kaufmann-Kohler had instructed UBS to conduct a conflict check. UBS did not disclose its shareholdings in the Claimants, and the arbitrator relied on the information received. According to the co-arbitrators, such reliance was an "honest exercise of judgment and not part of a pattern of circumstances raising doubts about impartiality".

Challenges based on the familiarity of an arbitrator with another participant in the proceeding (in particular repeat appointments) or with the subject-matter at issue are generally dismissed, unless the parties, facts *and* legal issues of the relevant cases overlap to a significant degree. This requirement is an additional obstacle for challenging parties, which the *Vivendi* standard does not logically imply: Justifiable doubts as to an arbitrator's lack of independence and impartiality cannot only arise when an arbitrator has dealt with a virtually identical case in the past, but also (for example) where he or she has dealt with the same legal questions, arising from different legal sources, and if the facts were merely similar. Whether the parties were the same is secondary. Accordingly, this additional requirement appears excessive. Aside from being irreconcilable with the *Vivendi* standard, any such rigid prerequisite is unlikely to do justice to the particularities of every single case.

Furthermore, decision-makers have repeatedly been reluctant to assume an overlap of the pertinent facts and legal bases when these issues have not yet been pleaded, making it very difficult for the challenging party to properly time its request for disqualification and avoid its dismissal for being belated. This is another reason why the *Vivendi* standard should not be ratcheted up with additional requirements which can hardly ever be met.

Quite frequently, arbitrators' assurances of independence and impartiality, their experience and reputation, and their general character are referenced to justify the dismissal of disqualification requests. These factors, however, are not only irrelevant under widely accepted definitions of arbitrators' independence;[443] they should also be insignificant based on insights from the field of cognitive psychology.[444]

In a number of disqualification decisions, the circumstances set forth by a challenging party as a basis for the inference of a lack of independence or impartiality were considered insufficient, in and of themselves. Despite being

443 Independence is defined objectively, as the absence of certain critical relationships, irrespective of their actual effect on the arbitrator in question. *See* SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 40, ¶ 21 (considering the arbitrator's general moral character to be equally unsubstantial); Rubins and Lauterburg, *supra* note 32, at 155; BLACKABY ET AL., *supra* note 90, ¶ 4.77; SCHWARTZ AND DERAINS, *supra* note 87, at 117.

444 *See, e.g.*, ROGERS, ETHICS, *supra* note 98, ¶¶ 8.55–8.56 ("It is important to stress that the propensity to engage in Groupthink does not reflect on arbitrators' intelligence, earnestness, or diligence. It is a by-product of human decision-making in group settings .... [T]hese psychological phenomena are not generally a matter of choice. Studies indicate that we are all, to some degree, subject to ... shortcomings and shortcuts to decision-making.").

based on facts which were not refuted by the counterparty, the decision-makers often labelled such circumstances as "mere supposition and speculation," which should have been backed up with more evidence. Various categories of facts are being carved out as inadequate factual bases for disqualification requests (i.e. family ties, repeat appointments, and the acquaintance of an arbitrator with one of the counsel). This list is non-exhaustive and continually expanded, leading to a significant degree of legal uncertainty.

In general, decision-makers in arbitrator challenges are extremely reluctant to uphold disqualification requests. This does not only apply to the unchallenged co-arbitrators, but also to the ICSID Chairman and the Secretary-General of the PCA. Their reasoning suggests that the tight network and the centrality of certain arbitrators are generally considered to be inherent in the system.[445] As a consequence, previous contacts of an arbitrator with a party (including attorney-client relationships) or counsel (including law firm collaborations), the switching of roles between arbitrators and counsel, and repeat appointments[446] are presumed to be harmless. Only very rarely and under extraordinary circumstances are challenges based on such grounds ever successful.

Even in challenge decisions where the wording of the applicable challenge threshold would imply a lower burden of proof on the challenging party, and a stricter approach to arbitrators' independence and impartiality, the outcomes of the requests and the decision-makers' reasoning do not reflect the lower threshold. This raises the question whether the ICSID standard for arbitrator challenges has only ostensibly been aligned with other standards for arbitrator challenges[447] – as a response to doctrinal calls for a stricter standard of independence and impartiality.

To sum up, arbitrators are effectively unlikely to be disqualified unless the challenging party can prove their actual bias, even under the *Vivendi* standard. This expectation is incredibly high and unrealistic.[448] The few cases in which arbitrators were disqualified appear to be singular exceptions to this rule.

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445 *Tidewater*, ¶ 68; *see also Universal Compression*, ¶ 83.

446 Unless they are made by the same party, and in cases in which the facts and the law are essentially the same. *See Caratube*.

447 *See infra* Chapter 3.

448 LUTTRELL, *supra* note 31, at 220 and 224; SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 57, ¶ 19; Van Harten, *Procedural Fairness*, *supra* note 26, at 651; Van Harten, *Perceived Bias*, *supra* note 39, at 439; REED, PAULSSON, AND BLACKABY, *supra* note 13, at 134; Sheppard, *supra* note 32, at 138; Fry and Stampalija, *supra* note 31, at 256.

3 Factors Underlying the Prevalent Dismissal of Arbitrator Challenges

Three factors contribute to the strict approach to arbitrator challenges and their prevalent dismissal:

First, the uniqueness of the terminology used in Article 57 ICSID Convention, namely the requirement of a "manifest lack of the qualities required by paragraph (1) of Article 14," appears to suggest that disqualification proposals under the ICSID Convention are subject to a higher threshold than comparable requests in other dispute settlement mechanisms. While this interpretation appeals to intuition, it is wrong in light of contrary indications in the drafting history of the ICSID Convention. Although the meaning of the manifest lack requirement itself was never discussed during the drafting process, the drafting records document that the Convention did not intend to raise the bar for arbitrator challenges. On the contrary, Article 57 ICSID Convention was specifically introduced in order to provide for the disqualification of biased or dependent arbitrators.

Second, by default, disqualification requests are adjudicated by the unchallenged co-arbitrators. This could contribute to an elevation of the threshold in several respects. In particular, co-arbitrators might be overly protective of each other,[449] to the point that this raises concerns about cronyism.[450] In order to avoid disqualifying their colleagues, they might be tempted to impose additional requirements on disqualification proposals. Aside from the effect of such sympathies, the co-arbitrators may be so used to certain customs in the field of arbitration (such as role switching and repeat appointments), that they are unable to examine a disqualification proposal from the perspective of an (uninvolved) reasonable third person. They are more likely to find certain connections between arbitrators and other participants in the proceeding to be inherent in the system, or a necessary consequence of the characteristics of arbitration, and to dismiss doubts about an arbitrator's independence or impartiality on this basis.

This leads to the third factor for the predominant rejection of disqualification requests: Arbitrator challenges are often dismissed because their factual

449 Markert, *supra* note 21, at 248–250 (including further references); Fry and Stampalija, *supra* note 31, at 257–258; Tupman, *supra* note 43, at 32; Reinisch and Knahr, *supra* note 24, at 123; Nadakavukaren Schefer, *supra* note 82, at 233 ("In the small world of international arbitrators, disqualifying a fellow arbitrator on 'mere appearances' may not be well-regarded.").

450 Giorgetti, *Challenges*, *supra* note 32, at 316–317; Rubins and Lauterburg, *supra* note 32, at 163.

bases are perceived to be commonplace, inherent in the system, and inevitable in arbitration. This argument has been invoked to carve out entire categories as valid bases for inferences of bias.[451] While it is correct that accidental contacts or a minimal degree of familiarity between appointing parties (or their counsel) and arbitrators are inevitable in investment arbitration, this truism is often contorted in challenge decisions, and invoked to justify circumstances which surpass unavoidable, systemically intrinsic or necessary side effects of central characteristics of arbitration.

For example, characteristic features of investment arbitration – such as the small community of investment arbitration professionals, the dual roles of arbitrators, and the global operations of law firms – increase the likelihood of an arbitrator's coincidental prior contacts with a party or its counsel, and the characteristically repetitive legal issues heighten the chances that an arbitrator has dealt with the same legal question before. Such situations should not automatically lead to a disqualification, and cannot *per se* constitute incompatibilities. The examined challenge decisions, however, go further than this: By only considering an arbitrator's ties to a party or counsel, or her or his familiarity with the subject-matter of the proceeding a sufficient basis for removal in the most extraordinary cases, they effectively establish a presumption of the harmlessness of such connections.[452] This is wrong in light of Article 14 para. 1 ICSID Convention, which guarantees the parties' access to independent and impartial decision-makers.

Furthermore, in practice, only very few challenges are based on accidental overlaps of an arbitrator's past and current legal work or connections. Challenges are more often based on facts which the appointing party was well aware of, and which shaped its decision to appoint a particular arbitrator. An arbitrator's previous familiarity with a party or counsel, or with the subject-matter of the case, is usually a factor which is diligently considered (or even sought out) by the appointing party, which is believed to be indicative of the arbitrator's relatively predictable position, and in the appointing party's favor. Such circumstances are not coincidental and inevitable side effects of characteristic features of arbitration, but strategic factors in party-appointments.

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451 *See, e.g., Tidewater*, ¶ 68; *Universal Compression*, ¶ 83; *Amco Asia*, ¶¶ 7–8, referenced in Tupman, *supra* note 43, at 45 ("a party-appointing system inherently presumes some acquaintance between the party and its appointed arbitrator, and therefore 'leads necessarily to the consequence' that an arbitrator cannot be disqualified 'for the only reason that some relationship existed between that person and a party, whatever the character – even professional – or the extent of said relations.'").

452 *See also* DAELE, *supra* note 51, ¶ 5–034.

With regard to a majority of challenges, "inherent in the system" therefore does not refer to fortuitous consequences of the frequently invoked small size of the community, or the narrow set of legal issues. Instead, it points to the parties' purported right to freely appoint their decision-makers. As has been shown above, however, there is no such right.[453] The parties are only entitled to appoint their decision-makers within the limits of Article 14 para. 1 ICSID Convention, i.e. subject to the appointees' independence and impartiality. Thus, only prior familiarities which are necessary to assess an arbitrator's suitability and qualifications, and which do not impair the arbitrator's independence and impartiality are intrinsic to the system of party-appointments, and innocuous. In other words, the argument of system inherence does not justify the dismissal of arbitrator challenges, if the established facts raise justifiable doubts about an arbitrator's lack of independence and impartiality. The standard is not whether a connection is accidental, or whether a circumstance is built-in to the system, but whether it raises justifiable doubts about the arbitrator's ability to evaluate the merits of the case open-mindedly, rationally, and objectively.

In summary, the unique requirement of a manifest lack of qualities under Article 57 ICSID Convention, the unusual authority of the co-arbitrators to decide on challenges, and the tension between characteristic features of arbitration and the requirement of independence and impartiality have led to an overly exacting approach to disqualification requests under the ICSID Convention. The precedence accorded to the parties' autonomy to select their decision-makers, at the expense of the appearance of independence and impartiality, endangers parties' confidence in the fairness and legitimacy of the mechanism. A clarification of the challenge threshold, a reassignment of the authority to decide challenges, and a clearer definition of the requirement of independence and impartiality would improve the perception of ICSID arbitration as a fair and law-based dispute settlement mechanism.

453 *See* Chapter 1, Part 2.2.

CHAPTER 3

Alternative Standards of Independence and Impartiality

This Chapter analyzes how select dispute resolution mechanisms delimit arbitrators' independence and impartiality. The examined mechanisms are chosen based on their similarities with ICSID arbitration, which will be set out below, at the beginning of each Part. As in Chapter 2, the focus of the analysis is on the threshold for arbitrator challenges, and the application of the abstract requirement of independence and impartiality to specific conflict categories.[454] The analysis of the relevant rules, as well as the case law (where available) allows for an informed and detailed comparison of challenge outcomes at the end of the Chapter.

1 International Adjudication

1.1 *Relevance*

ICSID arbitration deals with States' obligations under public international law. Host States' substantive obligations derive from the BITs they have entered into, or from customary international law, while their consent to investment arbitration is usually formalized in the respective BIT.[455] Both the substantive and the procedural ramifications of investment disputes are therefore governed by public international law.[456] Similarly to the European Court of Human Rights in the context of individual applications,[457] ICSID arbitrators decide private parties' claims against States for the alleged breach of international obligations.

454 Technicalities of the appointment, disclosure and challenge process (i.e. delays for challenges) are not examined.

455 Eric De Brabandere, Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications 2 (2014).

456 Wouters and Hachez, *supra* note 19, at 618.

457 S*ee* European Convention on Human Rights, Nov. 4, 1950, ETS 5 (entered into force Sept. 3, 1953), as amended by Protocols No. 11 and 14, CETS 194 (entered into force June 1, 2010), art. 34.

Beyond resolving specific disputes, ICSID tribunals effectively have a governance function in the field of investment law.[458] Although their awards do not formally have the effect of precedents, in practice arbitrators often observe previous decisions, and decide in a way that preserves at least some degree of coherence.[459] This effect is facilitated and enhanced by three factors: the increased transparency of ICSID awards, the similarity of unrelated BITs, which often have a comparable structure and contain the same clauses, and the increase in the number of disputes filed based on such provisions.[460] As a consequence, there is an actual ICSID jurisprudence in some areas of investment law, although the disputes from which this case law emanates are (strictly speaking) based on unrelated BITs. Arbitral tribunals create largely uniform rules of investment law or interpretations thereof.

On the reverse side of the described crystallization of standards of investment protection, the scope within which States as sovereigns are free to regulate[461] public interests is increasingly standardized by arbitral tribunals.[462] As a consequence, ICSID arbitrators progressively become architects not only of the international investment environment, but also of public international law and domestic administrative law.[463] The influence they exert on States'

458 The concept of governance referred to herein is inspired by MONTT, *supra* note 26, at 133–135 and Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1499 (2006).

459 ROGERS, ETHICS, *supra* note 98, ¶ 6.50.

460 Wouters and Hachez, *supra* note 19, at 616.

461 It is true that awards aim at monetary compensation, as opposed to specific performance (*see* Martin Endicott, *Remedies in Investor-State Arbitration : Restitution, Specific Performance and Declaratory Awards*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 517 (Philippe Kahn & Thomas W. Wälde eds., 2007)), and therefore do not immediately restrict States' regulatory freedom. In practice, however, the scale of the threatened payment in damages has a chilling effect on regulatory initiatives in host States (*id.* at 632). The threatened claims are sometimes so high that they imperil the financial situation of the Respondent State, and arbitral tribunals have a reputation for showing less self-restraint when granting damages, compared to "other international judicial mechanisms directly accessible to individuals" (Wouters and Hachez, *supra* note 19, at 622).

462 Wouters and Hachez, *supra* note 19, at 616 (describing investor-State arbitration as "a mechanism of judicial review of the regulatory acts of the host State"); Rivkin, *supra* note 18, at 353.

463 Wouters and Hachez, *supra* note 19, at 625 (arguing that arbitral tribunals' de facto restrictions on host States' regulatory sovereignty give the tribunals a "quasi-constitutional" character); Rivkin, *supra* note 18, at 341; ALEXANDRA DIEHL, THE CORE STANDARD OF INTERNATIONAL INVESTMENT PROTECTION 5 (2012).

regulatory sovereignty in this function is not negligible: Arbitration tribunals effectively develop international law standards.[464] In the words of Sundaresh Menon, the former Chief Justice of Singapore:

> 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.[465]

In light of these far-reaching powers of investment arbitrators, the substance of international investment arbitration is said to be much more reminiscent of an administrative regulatory review mechanism, than of commercial arbitration.[466] Unlike commercial arbitration, investment arbitration was not conceived to preserve private parties' freedom to make private arrangements.[467] Instead, it aims to balance States' regulatory sovereignty and the legitimate expectations of foreign investors, in order to create the "common ground necessary to promote the security of transborder exchanges."[468] As such, it resembles an internationalized public law adjudication mechanism.[469]

Based on these similarities, the rules on the independence and impartiality of international adjudicators who are appointed by the parties, on an *ad hoc* basis, lend themselves particularly well for a comparison with the standards applicable to ICSID arbitrators.[470] Not only do their functions (i.e. the qualification of the substantive questions they decide) coincide; their appointment by the parties, for the purpose of deciding a specific case, is likely to give rise to similar potential conflicts of interest as those invoked in the ICSID system.

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464 MONTT, *supra* note 26, at 126; Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L. 357, 373 (2007); James Crawford, *International Protection of Foreign Direct Investments: Between Clinical Isolation and Systemic Integration*, *in* INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 17, 22 (Rainer Hofmann & Christian J. Tams eds., 2011) ("[I]n some very important way investment law, like human rights law is about the state and not just about corporations or individuals. It is about the way in which we bring the state under some measure of control, which is the main aspiration of general international law."); Rivkin, *supra* note 18, at 346.

465 Menon, *supra* note 38, at 13.

466 Wouters and Hachez, *supra* note 19, at 625 and 630.

467 See PAULSSON, THE IDEA, *supra* note 22, at 24 in the context of commercial arbitration.

468 PAULSSON, THE IDEA, *supra* note 22, at 137.

469 Brower and Rosenberg, *supra* note 122, at 28; Rivkin, *supra* note 18, at 352.

470 DE BRABANDERE, *supra* note 455, at 2.

Insight might thus be gained from the different approaches of these systems to the same issues.

The rules applicable to the permanent members of the relevant decision-making bodies will be mentioned hereinafter, but are analyzed in less detail. Institutional guarantees insulate these "international judges" from the parties, making conflicts of the nature as they arise in ICSID arbitration both less frequent and less suspect. Any potential predispositions of these decision-makers are coincidental, and not specifically sought out by one of the disputing parties, in order to gain an advantage in the dispute. Thus, the need to distinguish the benign and legitimate exercise of a party's autonomy to appoint its decision-maker on the one hand, and improper dependence and bias on the other hand does not arise with regard to the permanent members of international adjudication mechanisms.

1.2 *The International Court of Justice*

The International Court of Justice (hereinafter the ICJ or the Court) is the "principal judicial organ of the United Nations."[471] It was established by the U.N. Charter in 1946, and functions according to the rules of the Statute of the International Court of Justice (ICJ-Statute)[472] and its Rules of Court (ICJ Rules).[473] The ICJ's main function is to settle interstate disputes under international law.[474]

As a permanent court, the ICJ consists of fifteen judges from different countries. The judges are elected by the United Nations General Assembly and the Security Council, from a list of persons nominated by the national groups in the PCA.[475] States which are not represented on the court may appoint an *ad hoc* judge when they are involved in a case.[476] Because of their appointment by a disputing party, on an *ad hoc* basis, these decision-makers are considered

471 U.N. Charter art. 92.

472 U.N. Charter art. 92; Statute of the International Court of Justice art.1, June 26, 1945, I.C.J. Acts & Docs. 59 [hereinafter ICJ-Statute].

473 Rules of Court (1978), Apr. 14, 1978, I.C.J. Acts & Docs. 91 [hereinafter ICJ Rules].

474 ICJ-Statute art. 34–37.

475 ICJ-Statute art. 3; art. 4, para. 1. The judges, also referred to as members of the Court, serve for nine years and may be reappointed. The renewal of the Court is staggered: Every three years, a third of the members are elected (ICJ-Statute art. 13, para. 1).

476 ICJ-Statute art. 31, para. 2–3. *See* FRANCK, STRUCTURE, *supra* note 41, at 253 ("This is like a sport, which in lieu of enforced rules, allows each side an equal number of foul plays.").

to be "a concession to the methods of arbitration."[477] Their *raison d'être* is justified with similar arguments as that of arbitrators: *Ad hoc* judges are said to ensure the disputing States' right to be heard, by helping the Court understand the national law of their appointing country, and to thereby improve the parties' confidence in the ICJ's decisions, and make unfavorable decisions more palatable.[478]

A Independence and Impartiality Requirements

The members of the ICJ are expected to be independent and impartial.[479] Their ability to exercise other political, administrative, and professional roles, and to adjudicate matters in which they were previously involved is severely restricted by the ICJ-Statute. Members of the Court are effectively banned from performing any other legal practice simultaneously:

> Article 16
> 1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature…
>
> Article 17
> 1. No member of the Court may act as agent, counsel, or advocate in any case.

An exception from this prohibition is the admissibility of occasional appointments as an arbitrator. Because most national courts and the PCA have a

477 Suh, *supra* note 122, at 226; Kooijmans, *supra* note 128, ¶ 2. *See also* Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339, 343 (2010) [hereinafter Paulsson, *Moral Hazard*] (going even further, by referring to *ad hoc* judges as, "once we overcome pretense, a species of advocate.").

478 *See* Suh, *supra* note 122, at 234; Schwebel, *National Judges*, *supra* note 122, at 889–890; Kooijmans, *supra* note 128, ¶¶ 2 and 6 ("[H]e or she will usually take care that during the deliberations and in the judgment the views and positions taken by the party which has appointed him or her will be duly reflected."). *Contra* Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 22 ARB. INT'L. 495, 498 (2006); PAULSSON, THE IDEA, *supra* note 22, at 159.

479 ICJ-Statute art. 2 ("The Court shall be composed of a body of independent judges, elected regardless of their nationality …") and art. 20 ("Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously."); *see also* ICJ Rules art. 4, para. 1. *See* Sheppard, *supra* note 32, at 135.

"long-standing tradition" of permitting judges to serve as arbitrators, the ICJ considers such appointments to be compatible with the judges' functions as members of the Court.[480] Two conditions must, however, be fulfilled: Firstly, the judges must give absolute precedence to their obligations as members of the Court, and secondly, they should not accept any appointments in cases which might later be submitted to the ICJ.[481] This exception is expanded to apply to the participation of judges in other occasional judicial or quasi-judicial activities.[482]

A limited exception is further made for the involvement of judges in academia. Members of the Court are barred from holding permanent teaching or administrative positions in universities, but are allowed to participate in occasional "scholarly pursuits in the sphere of international law as members of learned societies or as occasional lecturers." Like judges who occasionally serve as arbitrators, they must give precedence to their judicial duties.[483]

Article 17 para. 2 ICJ-Statute stipulates that members of the Court may not be involved in the same matter, at different stages. In other words, the dual role as a member of the ICJ and as a counsel is not only impermissible when it is exercised simultaneously, but also when it takes place successively, in the same matter:

> Article 17
> 2. No member may participate in the decision of any case in which he has 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…

480 *See* U.N. Secretary-General, *Conditions of service and compensation for officials other than Secretariat officials, Members of the International Court of Justice: Rep. of the Secretary-General*, ¶¶ 31–32, U.N. Doc. A/C.5/50/18 (Nov. 2, 1995). *See* examples of ICJ Judges' service as *ad hoc* arbitrators in Chiara Giorgetti, *The Challenge and Recusal of Judges of the International Court of Justice*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 3, 11–12 (Chiara Giorgetti ed., 2015) [hereinafter Giorgetti, *Judges of the ICJ*].

481 U.N. Secretary-General, *supra* note 480, ¶ 32; Philippe Couvreur, *Article 16*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 357, ¶¶ 14 and 22 (Andreas Zimmermann et al. eds., 2nd ed. 2012) [hereinafter Couvreur, *Article 16*].

482 Couvreur, *Article 16*, *supra* note 481, ¶¶ 25 and 34.

483 U.N. Secretary-General, *supra* note 480, ¶ 31. *See also* Couvreur, *Article 16*, *supra* note 481, ¶ 30.

Whether or not Article 17 para. 2 ICJ-Statute is exhaustive or should also apply to judges who have other relevant past professional experience, or who have previously publicly voiced their opinions on the subject-matter of a dispute was at the center of disqualification requests in three ICJ cases.[484] All three requests were dismissed, indicating that Article 17 para. 2 ICJ-Statute is considered to be exhaustive.[485]

By virtue of Article 31 para. 6 ICJ-Statute, *ad hoc* judges are subject to some of the same requirements of independence and impartiality as members of the Court. In particular, they must make the same solemn declaration on the impartial exercise of their function, they must be independent, and they may not previously have taken part in the decision of the relevant case in any function.[486]

To clarify the application of those rules to specific situations, Practice Directions VII and VIII deal with the admissibility of *ad hoc* judges' dual roles as adjudicators and as legal advisors in cases before the ICJ.[487]

Practice Direction VII stipulates the incompatibility of the role as an *ad hoc* judge in one case, and as an agent, counsel or advocate in another case.[488]

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484 South West Africa, Order of 18 March 1965, I.C.J. Reports 1965 [hereinafter *South West Africa Cases*]; Request for the removal of President Sir Muhammad Zafrulla Khan, Judge Padilla Nervo, and Judge Morozov, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Orders No. 1–3 of 26 January 1971, I.C.J. Reports 1971 [hereinafter *Namibia* (*South West Africa*)]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Order of 30 January 2004, I.C.J. Reports 2004 [hereinafter *Construction of a Wall*].

485 For details on the disqualification requests, see *infra* Part 1.2 C.

486 *See* ICJ-Statute art. 31, para. 6. *See also* Kooijmans, *supra* note 128, ¶ 6 ("It would … be improper to see a judge *ad hoc* as a representative of the State which appointed him. Once appointed, he or she is completely independent and bound by his or her solemn declaration, just as his or her regular colleagues are.").

487 Practice Direction VII, Feb. 7, 2002, I.C.J. Acts & Docs. 165 [hereinafter Practice Direction VII]; Practice Direction VIII, Feb. 7, 2002, I.C.J. Acts & Docs. 165 [hereinafter Practice Direction VIII]. The ICJ has been adopting Practice Directions since October 2001. These directions are additional to the ICJ Rules, and provide guidance on procedural matters to States.

488 Philippe Couvreur, *Article 17*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 372, ¶ 17 (Andreas Zimmermann et al. eds., 2nd ed. 2012) [hereinafter Couvreur, *Article 17*] (clarifying that Practice Direction VII was adopted to put an end to a "previously observed practice, which … consisted in acting simultaneously as judge *ad*

Parties shall therefore neither nominate persons as *ad hoc* judges, who are acting as legal advisors in another case, nor shall they instruct an *ad hoc* judge in another case with their representation. The roles are not only mutually exclusive when exercised simultaneously, but also successively, when the person has acted in the other role in the three years preceding the date of the nomination.

Practice Direction VIII is a counterpart of Practice Direction VII, and prohibits the designation as a legal representative (agent, counsel or advocate) of any person who has in the past three years been a Member of the Court, an *ad hoc* judge, a Registrar, a Deputy-Registrar or a higher official (principal legal secretary, first secretary or secretary) of the Court.[489]

It is noteworthy that Practice Directions VII and VIII are not restricted to the service in related cases, or in cases in which the facts, the law or the parties overlap. The simultaneous or (recently) sequential exercise of the two roles *per se* is considered to be inappropriate. Despite these strict provisions, the pool of individuals qualified enough to act as *ad hoc* judges has not become so small as to pose a problem to the functioning of the ICJ, as had been feared.[490] The effect on the pool of *ad hoc* judges might however be different if the ICJ's caseload was higher, and if the Practice Directions were binding and enforceable, which is a contentious issue.[491]

B Removal of ICJ Judges

With regard to the consequences of a judge's lack of independence or impartiality, or of a contravention against the more specific provisions on (relative or

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hoc in one case … and as counsel in another."); Kooijmans, *supra* note 128, ¶ 19 ("This new directive reflects the need to create a certain distance between the bench and the bar.").

489 *See* Sir Arthur Watts, *New Practice Directions of the International Court of Justice*, 1 L. & PRAC. INT'L. CTS. & TRIBUNALS 247, 252–253 (2002); Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 36.

490 Watts, *supra* note 489, at 254; Couvreur, *Article 17*, *supra* note 488, ¶ 17. Inferences for the ICSID system should however not be made insouciantly, since ICJ and investor-State arbitration proceedings differ in important respects. *See* Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 37.

491 Watts, *supra* note 489, at 255; Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 37; Stefan Talmon, *Article 43*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1088, 1096 (Andreas Zimmermann et al. eds., 2nd ed. 2012) ("more likely recommendations or guidelines than binding commands"); SERENA FORLATI, THE INTERNATIONAL COURT OF JUSTICE: AN ARBITRAL TRIBUNAL OR A JUDICIAL BODY? 27 (2014) (not binding, but Rules of Court prevail); ARMAN SARVARIAN,

absolute[492]) incompatibility, it is important to distinguish the disqualification of a judge in a specific case from a judge's dismissal from the bench.

Decisions on the dismissal of members of the ICJ from the bench are an absolute *ultima ratio,* and are taken by the Court en banc and by unanimous vote. The dismissal of a judge is therefore only possible if all members of the Court (excluding the respective judge) agree thereon.[493] Substantively, a dismissal from the bench requires the judge to have "ceased to fulfill the required conditions"[494] to serve – a very high threshold, which would require a grave conflict to effectively incapacitate the relevant judge.[495] The deliberations on the dismissal are confidential,[496] and no cases in which an ICJ judge was dismissed are reported.[497]

A disqualification, on the other hand, only affects a judge's decision-making function in a specific case, and is therefore subject to a lower threshold. If a judge refuses to recuse him- or herself upon notice by the President of the Court that "for some special reason … [the Member] should not sit in a particular case,"[498] the Court en banc (but without the challenged judge) shall decide on his or her disqualification.[499] The parties to the proceeding are authorized to file disqualification requests by virtue of Article 34 para. 2 ICJ Rules.

C Case Law

The grounds for a disqualification are narrowly limited to breaches of Articles 16 or 17 ICJ-Statute. These provisions were found to be exhaustive in the *South*

Professional Ethics at the International Bar 92 (2013) (not binding, but treated in practice as if obligatory).

492 *See* Giorgetti, *Judges of the ICJ*, *supra* note 480, at 5–9.

493 ICJ-Statute art. 18, para. 1; ICJ Rules art. 6. *See* Markus Buechel, *The Independence of International Arbitrators*, *in* The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges 243, 248 (Shimon Shetreet & Christopher Forsyth eds., 2012); David Anderson & Samuel Wordsworth, *Article 18*, *in* The Statute of the International Court of Justice: A Commentary 386, ¶ 18 (Andreas Zimmermann et al. eds., 2nd ed. 2012).

494 ICJ-Statute art. 18, para. 1.

495 Giorgetti, *Judges of the ICJ*, *supra* note 480, at 12; Anderson and Wordsworth, *supra* note 493, ¶ 10 (requiring "some statement, action or course of conduct [which] is egregious.").

496 ICJ Rules art. 6.

497 Anderson and Wordsworth, *supra* note 493, ¶18; Giorgetti, *Judges of the ICJ*, *supra* note 480, at 12.

498 ICJ-Statute art. 24, para. 2.

499 ICJ-Statute art. 16, para. 2; art. 17, para. 3; and art. 24, para. 3.

West Africa Cases,[500] in *Namibia* (*South West Africa*),[501] and in *Construction of a Wall*.[502]

The decision in *Construction of a Wall* is of particular interest, because of the famous dissent of Judge Buergenthal in this case. The government of Israel requested the removal of Judge Elaraby,[503] arguing that the judge had previously been "actively engaged in opposition to Israel including on matters which go directly to aspects of the question now before the Court."[504] More concretely,

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500 The details of the request for removal and the reasons for the Court's dismissal are not discernible in the decision (*South West Africa Cases*, at 3). According to *Namibia* (*South West Africa*), at 16, para. 9, the request for removal was based on the Judge's previous role as a government official, and on statements made in this capacity ("[T]he Court found no reason to depart in the present advisory proceedings from the decision adopted by the Court … in the South West Africa cases … after *hearing the same contentions as have now been advanced* by the Government of South Africa." (emphasis added)). *See also* Couvreur, *Article 17*, *supra* note 488, ¶ 19.

501 In *Namibia* (*South West Africa*), the government of South Africa objected to the participation of three members of the Court in the proceedings. The ICJ Judges had formerly participated, as representatives of their governments, in United Nations organs which were dealing with matters concerning South West Africa, and had made statements in this context. The Court held that there was no reason to depart from its decision in the *South West Africa Cases*, and concluded that such activities did not fall within the scope of application of ICJ-Statute art. 17, para. 2. *See Namibia* (*South West Africa*) at 16, para. 9 (referencing precedents of the ICJ as well as of the Permanent Court of International Justice (PCIJ), in which judges were allowed to remain on the Court, although they had taken part in the formulation of texts the Court was asked to interpret). *See also* Couvreur, *Article 17*, *supra* note 488, ¶ 19.

502 These three decisions are the only instances in which parties attempted to have ICJ Judges disqualified. The scarcity of disqualification requests against ICJ Judges can possibly be explained by the comparatively large number of recusals. It appears that ICJ Judges have a tendency to interpret ICJ-Statute art. 17, para. 2 rather strictly, and to recuse themselves voluntarily when the provision applies in a particular case. *See* Couvreur, *Article 17*, *supra* note 488, ¶ 18 ("[w]henever a member of the Court, has, before taking office, acted as agent, counsel or advocate of one of the parties to a case, he has always disqualified himself from the case without this ever becoming an issue. The same has applied to any judge taking part in arbitration proceedings which have become the subject of proceedings before the Court."); Giorgetti, *Judges of the ICJ*, *supra* note 480, at 6–7 and 13–17 tbl.1. *See also* 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 (recusals of Judge Higgins and Judge Fleischhauer). *But see*, with regard to ICJ *ad hoc* judges, Couvreur, *Article 17*, *supra* note 488, ¶ 20.

503 *Construction of a Wall*, 3–10.

504 *Construction of a Wall*, 3–10, para. 5.

Judge Elaraby had participated in the Tenth Emergency Special Session of the General Assembly, and had acted as the principal Legal Adviser to the Egyptian Ministry of Foreign Affairs (1976–1978 and 1983–1987), and as a Legal Adviser to the Egyptian Delegation to the Camp David Middle East Peace Conference of 1978. He had further been involved in initiatives following the signing of the Israel-Egypt Peace Treaty in 1979, concerning the establishment of autonomy in the West Bank and the Gaza Strip, and had given an interview to an Egyptian newspaper in August 2001 (two months before his election to the ICJ, when he was no longer his country's diplomatic representative), wherein he voiced his views on questions concerning Israel. According to Israel, Judge Elaraby's previous professional involvements, as well as the interview, warranted his removal from the Court.

Referencing *Namibia* (*South West Africa*), the ICJ dismissed the request in a near-unanimous vote.[505] It held that the activities Judge Elaraby performed as a diplomatic representative, mostly long before the question at the center of the dispute arose, and the newspaper interview he gave, were not sufficiently closely related to the dispute at hand to fall under Article 17 para. 2 ICJ-Statute. Judge Elaraby had not "previously taken part" in the case in any capacity.[506]

Judge Buergenthal's dissent in *Construction of a Wall* stressed that he did not doubt the personal integrity of Judge Elaraby, but that the views he had expressed in the newspaper interview could be perceived as a prejudgment of the question submitted to the Court, and of the disputing parties' respective arguments. The interview created an appearance of bias which justified Judge Elaraby's removal from the case.[507] Judge Buergenthal conceded that formally, the language of Article 17 para. 2 ICJ-Statute did not cover the specific situation, but argued that the provision was not exhaustive. It only covered the "most egregious violations of judicial ethics," while reflecting "much broader conceptions of justice and fairness that must be observed by courts of law":

> Judicial ethics are not matters strictly of hard and fast rules – I doubt that they can ever be exhaustively defined – they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy.[508]

505 The decision was taken with 13 votes to one.

506 *Construction of a Wall*, para. 8.

507 *Construction of a Wall*, para. 13.

508 *Construction of a Wall*, 3–10, at 9, para. 10. This broad interpretation of ICJ-Statute art. 17, para. 2 explicitly refers to *judicial* ethics, i.e. the independence and impartiality of elected judges, who are institutionally insulated as members of a permanent international

This dissent raises important questions about the appropriate standard of independence and impartiality of ICJ Judges, but does not alter the fact that the ICJ's case law indicates a formalistic and narrow construction of Article 17 para. 2 ICJ-Statute: Public statements of a Judge which might indicate a prejudgment of the issues at hand, but which were made in a function other than those listed in Article 17 para. 2 ICJ-Statute, including in a prior diplomatic function, as a government representative, or at the United Nations, do not lead to a disqualification.[509]

Apart from the disqualification requests in the above-referenced three cases, which were based on the judges' prior functions, the more abstract issue of national bias is usually at the center of the discussion about the independence of ICJ Judges (including *ad hoc* judges). The ICJ is frequently criticized for lacking political neutrality,[510] despite various provisions which aim at an equitable geographic distribution of the ICJ Judges[511] and at reducing the effect of member States' political considerations on the election process.[512] This criticism is closely connected to an apprehension of judicial nationalism,[513] i.e. national judges' bias in favor of their home country.[514] Even *ad hoc* judges mainly elicit concerns of national bias in favor of their appointing State.[515] In light of their

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dispute resolution body (*see* Giorgetti, *Judges of the ICJ*, *supra* note 480, at 3). Nevertheless, Judge Buergenthal's dissent is frequently cited in the investment arbitration context (Rubins and Lauterburg, *supra* note 32, at 174; Markert, *supra* note 21, at 174; Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 ARB. INT'L. 241, 242 (2005)), and Judge Buergenthal himself has transposed his views to ICSID arbitrators (Buergenthal, *supra* note 478, at 498).

509 Giorgetti, *Judges of the ICJ*, *supra* note 480, at 21.

510 Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L. L.J. 271, 278 (2003). This criticism often revolves around the control of individual seats by powerful countries, in particular by the United States. *See* Posner and Yoo, *Judicial Independence*, *supra* note 119, at 35.

511 ICJ-Statute art. 9. For the distribution of the seats in practice, *see* Mackenzie and Sands, *supra* note 510, at 278 (2003); Chiara Giorgetti, *The Challenge and Recusal of Judges of the International Court of Justice*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 3, 6 n.11 (Chiara Giorgetti ed., 2015).

512 E.g. the interposition of national groups of the PCA in the process of the election of ICJ Judges provided for in ICJ-Statute art. 4, para. 1.

513 *See* Dannenbaum, *supra* note 108; Smith, *supra* note 120.

514 These concerns are not discussed in detail herein, since they are more general, remote and abstract forms of potential bias than the conflicts of interest alleged by challenging parties in the ICSID system.

515 *See* Suh, *supra* note 122, at 229–230. This was already a concern when the Statute of the PCIJ was drafted by an Advisory Committee of Jurists in 1920. *See* PCIJ Advisory

similarity with arbitrators, it is surprising that other potential risks inherent in party-appointments, such as the preconceived views of such decision-makers, which are known to the appointing party and believed by it to be in its favor, are not discussed at all. Such factors could possibly provide an additional explanation for the striking empirical indication of national judge bias.[516]

1.3 *Dispute Settlement in the World Trade Organization*

In the World Trade Organization (WTO), trade disputes between member States are settled on two levels.

On the first-instance level, *ad hoc* panels handle the disputes and render reports. They usually consist of three panelists,[517] which are either jointly appointed by the disputing parties,[518] or, more often, by the Director-General.[519] The roster of potential panelists maintained by the Secretariat is only indicative.[520]

Committee of Jurists, *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists*, 34th Meeting (July 24, 1920), Annex No. l, 720–722, *available at* https://archive.org/details/procsverbauxofooleaguoft.

516 *See* Eric A. Posner & Miguel de Figueiredo, Is the International Court of Justice Biased? 18 (2004).

517 Understanding on Rules and Procedures Governing the Settlement of Disputes art. 6, para. 1 and art. 8, para. 5, Apr. 15, 1994, WTO Agreement, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. To date, the disputing parties have never agreed to a panel composed of five panelists, *see* Peter Van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization 214 (3rd ed. 2013); Gregory J. Spak & Ron Kendler, *Selection and Recusal in the WTO Dispute Settlement System*, *in* Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals 164, 165 (Chiara Giorgetti ed., 2015).

518 DSU art. 8, para. 7. The nominations proposed by the Secretariat (DSU art. 8, para. 6) are often rejected by the parties, *see* Van den Bossche and Zdouc, *supra* note 517, at 215–216; Spak and Kendler, *supra* note 517, at 166–167.

519 The Director-General is the head of the WTO Secretariat. *See* Agreement Establishing the World Trade Organization art. 6, para. 1, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]. Either party may request the Director-General to nominate the panelists if the disputing parties fail to reach an agreement on the nominees within twenty days (DSU art. 8, para. 7). In practice, parties try to stay in control of the nomination for as long as possible, and allow for more time to reach an agreement. Ultimately, however, they are rarely successful, and the Director-General has appointed most panels. Van den Bossche and Zdouc, *supra* note 517, at 216; Spak and Kendler, *supra* note 517, at 167 (listing detailled information on the number of panels composed by the Director-General).

520 DSU art. 8, para. 4. Most first-time panelists were not on this list at the time of their appointment. *See* Van den Bossche and Zdouc, *supra* note 517, at 216.

On the second level, panel reports can be appealed before divisions of the Appellate Body (AB), which usually consist of three members.[521] The AB itself is a standing body of seven individuals who are nationals of different WTO member States,[522] and who are appointed by the Dispute Settlement Body (DSB)[523] for staggered four year terms.[524] The divisions handling individual appeals are selected randomly and unpredictably, on a rotational basis.[525]

The DSB administers the proceedings at all stages, from the appointment of the dispute settlement panel, through the adoption of panel and Appellate Body reports, to the authorization of sanctions in the event of a non-compliance with a judgment.[526]

A Independence and Impartiality Requirements

When nominating panelists, the parties are free to agree on anyone who fulfils the requirements of Article 8 DSU. In particular, panelists shall:

– be well-qualified individuals with substantial expertise in international trade law or policy;[527]

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521 DSU art. 17, para. 1; Working Procedures for Appellate Review rule 6, para. 2, Aug. 16, 2010, WT/AB/WP/6 [hereinafter Working Procedures].

522 Appellate Body membership shall be broadly representative of membership in the WTO (DSU art. 17, para. 3). In reality, however, the United States and the European Union have assured seats, as well as an important influence on the candidates from other countries. *See* Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L. L. 387, 402 (2009).

523 The DSB is an emanation of the WTO's General Council (VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 206.). It is composed of representatives of all WTO member States. *See* WTO Agreement art. 4, para. 3 and 2.

524 DSU art. 17, para. 1 and 2. Appellate Body members may be reappointed once. The DSB appoints Appellate Body members by consensus, on the recommendation of a selection committee, which in turn selects among candidates nominated by WTO Members. *See* VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 232.

525 Working Procedures rule 6, para. 2.

526 DSU art. 2, para. 1. Many of the DSB's key decisions are subject to a reverse or negative consensus requirement: Unless all DSB members unanimously agree *not* to appoint a panel, *not* to adopt a report or *not* to authorize sanctions, the respective action cannot be blocked. *See* DSU art. 6, para. 1, art. 16, para. 4, art. 17, para. 14, and art. 22, para. 7; VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 206.

527 DSU art. 8, para. 1. DSU art. 8, para. 8 explicitly stipulates that member States shall permit their officials to serve as panelists. Apparently, this is not considered to be a potential source of conflict of interests.

– be independent, from diverse backgrounds, and with a wide spectrum of experience;[528]
– *not* be nationals of one of the disputing parties or a third party, unless otherwise agreed by the parties.[529]

To date, current or retired government trade officials with a background in law have predominantly served as panelists. Academics and private trade law practitioners have also adjudicated a considerable number of disputes. At least half of all panelists have prior experience with serving on a GATT or WTO panel – whether this experience is in related cases is unclear.[530]

Appellate Body members must generally be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."[531] When deciding appeals as members of an AB division, they may or may not be nationals of one of the disputing parties. In any event, they must be "unaffiliated with any government,"[532] and independent.[533] If the participation of an AB member in a particular division would create a direct or indirect conflict of interest in a specific case, that member must step down.[534]

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528 DSU art. 8, para. 2. DSU art. 8, para. 9 specifies the requirement of independence by stipulating that "[p]anelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel." DSU art. 8, para. 10 encourages the appointment of panelists from developing countries.

529 DSU art. 8, para. 3. This contrasts with the institution of the ICJ *ad hoc* judge. The fact that parties in WTO disputes have in some cases, but not usually agreed to national panelists (*e.g.* US – Zeroing (EC) (2006), *see* VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 215), could be understood to imply that the parties' distrust towards a national judge of their counterparty is more important than their own urge to have someone who will understand their national law, or promote their right to be heard, on the panel. The different prioritization could however also be explained with the existence of appellate review under the WTO DSU. Even if the grounds for such review are limited, the assurance of a certain degree of coherence and consistency and the feeling of control thereby afforded to the parties may effectively substitute their wish for control by appointing a national.

530 VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 215.

531 DSU art. 17, para. 3.

532 DSU art. 17, para. 3.

533 Working Procedures rule 2, para. 2 and 3 (prohibiting Appellate Body members from accepting or seeking instructions from anyone, and from pursuing any employment or other professional activity which might be at odds with their duties and responsibilities).

534 DSU art. 17, para. 3 ("They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.").

Panelists and Appellate Body members are subject to the WTO's Rules of Conduct,[535] which require them to be independent and impartial and to avoid direct or indirect conflicts of interest.[536] They must disclose any existing or developing interest, relationship or matter which they are (or could reasonably be expected to be) aware of and which "is likely to affect, or give rise to justifiable doubts" as to their independence or impartiality.[537]

Very exceptionally, panelists have voluntarily resigned as a consequence of alleged conflicts of interest.[538] In Turkey – Restrictions on Imports of Textile and Clothing Products (DS34) ("Turkey – Textiles"), a panelist withdrew after one of the parties complained that an unpublished conference paper he had previously authored on the subject-matter was relevant in the proceeding.[539] Appellate Body Members have apparently recused themselves on several occasions, but without a formal challenge proceeding being initiated.[540] Due to the confidentiality of Appellate Body operations, no detailed information about such withdrawals is available.[541]

B Challenge of Panelists and Members of the Appellate Body

Disputing parties can challenge panelists and Appellate Body members based on material violations of their obligations of independence and impartiality,

535 Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes Section IV, Working Procedures, Annex 2, Dec. 11, 1996, WT/DSB/RC/1 [hereinafter Rules of Conduct].

536 Rules of Conduct Section II, para. 1.

537 Rules of Conduct Section III, para. 1. This disclosure standard is similar to that of the ICSID and UNCITRAL Arbitration Rules. Annex 2 to the Rules of Conduct illustratively lists information which must be disclosed, such as financial, business, property, professional, employment, and family interests as well as statements of personal opinion on issues relevant to the dispute. These examples are reminiscent of the IBA Guidelines' Orange and Red Lists (*infra* Part 3.2 B.). *See also* Rubins and Lauterburg, *supra* note 32, at 166.

538 VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 217; Spak and Kendler, *supra* note 517, at 164 and 175–176 (specifying that all withdrawals but one "were the result of unrelated concerns, such as the panelists' health or promotion to other positions in the WTO").

539 Panel Report, Turkey – Restrictions on Imports of Textile and Clothing Products, ¶¶ 1.5–1.6, WT/DS34/R (May 31, 1999); *see* Spak and Kendler, *supra* note 517, at 175.

540 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); Spak and Kendler, *supra* note 517, at 177.

541 Spak and Kendler, *supra* note 517, at 178.

and of their duty to avoid conflicts of interest, which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism.[542] In the case of panel members, such challenges are decided by the chair of the DSB, in consultation with the Director-General and the chairs of the relevant WTO bodies; if the removal of an Appellate Body member is requested, the Appellate Body itself will adjudicate the request.[543]

The burden of proof for a successful challenge of a panelist or Appellate Body member appears to be rather high:[544] The Rules of Conduct require the submission of "evidence of a material violation" of the Rules of Conduct in a written statement specifying the relevant facts and circumstances.[545] The concrete meaning of the "material violation" threshold, however, is unclear.[546] To date, no material violation of the Rules of Conduct has been found to have occurred.[547]

So far, challenges have been very rare in the WTO system.[548] Given the similarities among WTO panelists and ICSID arbitrators, this is surprising: Like

542 Rules of Conduct Section VIII, para. 1. If the disputing parties agree that a material violation has occurred, the disqualification should be confirmed, *see* Rules of Conduct Section VIII, para. 8.

543 Rules of Conduct Section VIII, para. 8 and Section VIII, para. 16. *See also* Gabrielle Zoe Marceau, *Rules on Ethics for the New World Trade Organization Dispute Settlement Mechanism: The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, 32 J. WORLD TRADE 57, 67 (1998); Spak and Kendler, *supra* note 517, at 173–178. Objections to panelists which are addressed to the panel itself, instead of the chair of the DSB, are not appraised: *See* Guatemala – Cement II (Panel Report, Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico, WT/DS156/R (Oct. 24, 2000)), ¶ 4.3 (Guatemala raised concerns that the panelist, as a result of his previous service on a panel dealing with the same issue, would have preconceived positions) and ¶ 8.11.

544 Marceau, *supra* note 543, at 85. *Contra* Rubins and Lauterburg, *supra* note 32, at 167 (stating that the standard is less stringent than that contained in the IBA Rules of Ethics for International Arbitrators); Nadakavukaren Schefer, *supra* note 82, at 237 (stating that the standard is less stringent than arbitration rules).

545 Rules of Conduct Section VIII, para. 1 and 2 (clarifying that a failure to disclose by itself is not a sufficient ground for disqualification). *See also* Spak and Kendler, *supra* note 517, at 172.

546 Since the deliberations on the challenged member's dismissal are confidential (Rules of Conduct Section VIII, para. 20), the interpretations of the threshold by the chair of the DSB and the AB are unknown.

547 Spak and Kendler, *supra* note 517, at 174; VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 217.

548 Rubins and Lauterburg, *supra* note 32, at 167; Spak and Kendler, *supra* note 517, at 165.

ICSID arbitrators, WTO panelists and Appellate Body members often decide disputes which affect public interests, and in which the stakes are high. Like the appointment of ICSID arbitrators, the selection of WTO panelists is party-driven, and might therefore tempt the parties to try to manipulate the outcome of a proceeding, by selecting a partisan decision-maker.

The independence and impartiality of WTO decision-makers and the scarcity of disqualification requests in the WTO system have received very little doctrinal attention.[549] The few scholars who have broached the subject have mainly argued that there might be fewer challenges in the WTO system because the parties are required to agree on the panelists,[550] and that this selection mechanism allows parties to address ethical concerns from the outset, instead of challenging the decision-makers later on.[551]

This circumstance on its own, however, cannot explain the virtual inexistence of challenges in the WTO system. In fact, due to the difficulty of the parties' agreement on the decision-makers, the panel members are more often appointed by the Director-General,[552] and hence without any input from the parties at all, except for their ability to reject undesirable candidates.[553] In these instances, it is possibly the very absence of party influence which diminishes the parties' reciprocal mistrust, and which reduces the incidence of challenges. Thus, it seems that the combination of a party-driven appointment mechanism, in which the parties are required to make a joint effort, on the one hand, and a subsidiary institutional appointment mechanism, on the other hand, instill confidence in the panelists' reliability for independent and impartial judgment in the parties.

Spak and Kendler mention several additional factors which might help explain the lack of challenges in the WTO system.[554] In particular, and interestingly, they argue that circumstances which are widely held to increase the risk of dependence and bias in ICSID arbitration – such as the small and tightly knit community, and the interchanging roles of its members – reduce the likelihood of challenges in the WTO system.[555] If this were indeed the case, however, it would seem to indicate that the actors in the WTO system refrain from filing

549 *See* Nadakavukaren Schefer, *supra* note 82, at 234.

550 Rubins and Lauterburg, *supra* note 32, at 167; Spak and Kendler, *supra* note 517, at 178–180.

551 Spak and Kendler, *supra* note 517, at 178 and 180.

552 *See* VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 216; Spak and Kendler, *supra* note 517, at 167.

553 DSU art. 8, para. 6; *see* Spak and Kendler, *supra* note 517, at 178.

554 Spak and Kendler, *supra* note 517, at 178–181.

555 *Id.* at 181.

challenges against each other in order to preserve their own and each other's reputation, and not because there are no grounds for such challenges.[556]

A more convincing explanation for the lack of panelist challenges (but not Appellate Body members) is the parties' possibility of appealing a panel report: Given the possibility of appealing a flawed decision by the panelists, the parties are less dependent on averting an unfavorable outcome by filing arbitrator challenges.[557]

1.4 *Contextualization and Conclusion*

The most remarkable conclusion to be drawn from the above analysis of the requirements of independence and impartiality and the challenge proceedings before the ICJ and in the WTO Dispute Settlement Mechanism is that the scarcity of available challenge case law in both systems leads to substantial uncertainty regarding the handling of potential bias in practice.

On an abstract level, the relevant provisions applicable to ICJ Judges and WTO decision-makers are generally similar: all decision-makers are required to be independent and impartial, and to avoid conflicts of interest. The differences between the requirements on a more detailed level, however, are striking.

Ad hoc judges at the ICJ can effectively only be challenged based on their previous involvement in the same matter, as exhaustively regulated in Article 17 para. 2 ICJ-Statute. While this rule is crucial, it is also quite elementary, and leaves an entire category of potential conflict situations untouched: Whenever an *ad hoc* judge has dealt with the specific matter before, but in a function other than those listed in Article 17 para. 2 ICJ-Statute, or where he or she has previously been confronted with the decisive questions in the dispute, but in another case, a disqualification request will not succeed.[558] The simultaneous role as a counsel in another dispute resolution mechanism, and the ability to make decisions which are prejudicial to that case in the function of an *ad hoc* judge, are not covered by ICJ-Statute Article 17 para. 2 either.

Beyond Article 17 para. 2 ICJ-Statute, *ad hoc* judges are not covered by the institutional protections[559] applicable to ICJ Judges. In particular, while

556 *See also* Nadakavukaren Schefer, *supra* note 82, at 238.

557 Spak and Kendler, *supra* note 517, at 181.

558 This limitation on challenges which are based on the successive involvement with the same legal or factual questions, in different roles, also applies to members of the ICJ.

559 ICJ-Statute art. 16, para. 1 and art. 17, para. 1, also referred to as absolute or functional incompatibilities (Giorgetti, *Judges of the ICJ*, *supra* note 480, at 7–9.).

Practice Direction VII extends the incompatibility provisions of Article 17 para. 1 ICJ-Statute to *ad hoc* judges, and even provides for a three year vesting period, this is a mere recommendation, which is not enforceable.

Although the ICJ-Statute requires independence and impartiality from all judges, the existing challenge case law[560] strongly implies that a general allegation of a lack of independence or impartiality is not a valid basis for a disqualification request. Accordingly, it appears that challenges based on an *ad hoc* judge's connection to a participant in the proceeding (including, *in extremis*, an attorney-client relationship between an *ad hoc* judge and his or her appointing party, in another matter) or to an adverse third party would be dismissed. An *ad hoc* judge's role as a public servant or as an employee of the appointing party appears not to be a sufficient basis for a challenge, either. More indirect connections, such as the familiarity of an *ad hoc* judge with a legal representative of a party, can impair the judge's free decision-making, but will not suffice for a disqualification.

Finally, role switching and repeat appointments as particularly important conflict categories in the ICSID system are not covered by enforceable independence and impartiality related provisions of the ICJ-Statute or ICJ Rules, and could therefore theoretically be an issue. However, these conflict categories appear not to be problematic in the context of the ICJ, since *ad hoc* judges are usually only appointed once.[561]

The rules concerning the independence and impartiality of WTO panelists, in contrast, are very general and do not limit challenges to particular conflict categories. Any material violation of the panelists' obligation of independence or impartiality which may impair the integrity or impartiality of the dispute settlement mechanism can serve as a basis for a disqualification request. The challenging party must then, however, provide proof of such a material violation.

The interpretation of this threshold is anything but clear. In fact, the questions arising from this terminology are very similar to the discussions in the context of the ICSID challenge threshold: How does a challenging party prove a material violation of independence or impartiality? Is it required to provide evidence for the decision-maker's state of mind, or is it allowed to draw inferences from his or her behavior? Is the burden imposed by the requirement to prove a "material violation" heavier than if a simple, ordinary, or plain violation were required? Finally, the Rules of Conduct require that the violation "may

560 *Supra* Part 1.2 C.

561 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 37.

impair the integrity [or] impartiality … of the dispute settlement mechanism." This could either be read as a loosening of the challenge standard, or as limiting language: On the one hand, the reference to the system's integrity implies the importance of appearances and perceived legitimacy; on the other hand, remote connections or vague preconceptions which might well affect the outcome of a particular case, are unlikely to taint the legitimacy of the entire dispute settlement mechanism.

For lack of existing case law, as well as an academic discussion of these questions, the answers to these questions are even less clear than in the ICSID system.

2 International Commercial Arbitration

2.1 *Relevance*

The delimitation of independence and impartiality in international commercial arbitration is instructive for the ICSID system because the two arbitration systems are based on the same structural design.[562] In particular, investment and commercial arbitration share the central feature of *ad hoc* party-appointments. In both systems, the parties autonomously select the decision-makers who will adjudicate their dispute, without regard to any roster or panel of approved arbitrators.[563] In international commercial arbitration as in investor-State arbitration, party-appointments are portrayed as one of the main advantages of the arbitration system, because they should guarantee that the arbitrators have the requisite legal knowledge and practical expertise in the

562 Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L. L., 139 (2006) (explaining that commercial arbitration rules served as a model for the structural design of ICSID arbitration); DE BRABANDERE, *supra* note 455, at 2 (considering investment arbitration to be "derived from" commercial arbitration); Wouters and Hachez, *supra* note 19, at 618 (considering ICSID arbitration to be a form of commercial arbitration, and not a *sui generis* mechanism which procedurally emulates commercial arbiration); VAN HARTEN, INVESTMENT TREATY ARBITRATION, *supra* note 7, at 124. *But see* Gabrielle Kaufmann-Kohler, *Foreword*, in ANTONIO R. PARRA, THE HISTORY OF icsid (2012) ("ICSID arbitration procedure was not based on commercial arbitration. The drafters relied on public international law instruments such as the Statute and Rules of the International Court of Justice (ICJ) or the Model Rules on Arbitral Procedure of the International Law Commission (ILC).").

563 Van Harten and Loughlin, *supra* note 562, at 139; SCHWARTZ AND DERAINS, *supra* note 87, at 114.

field at issue.[564] The parties, it is argued, know best what qualifications are required to understand their positions and the subject-matter of their dispute. Another argument brought forward in support of party-appointments is that they enhance the parties' identification with and acceptance of the arbitrators' decision, and thereby allow for the finality of arbitration awards. Thus, the tension between party-appointments and the requisite independence and impartiality of arbitrators described in the context of ICSID arbitration[565] is also present in commercial arbitration. This Part analyzes how select commercial arbitration rules and case law deal with the tension, and how independence and impartiality are delimited so as to facilitate the legitimate interests pursued by the system of party-appointments, while preventing dependence and bias.

Finality has a central role in both investment and commercial arbitration: Neither system provides for an appellate mechanism, and the grounds for annulment are very limited.[566] This is further reinforced in the self-contained ICSID regime, where external (domestic) review mechanisms do not enter the picture at the enforcement stage.[567] The driving forces behind finality, however, appear to differ in the two systems: In commercial arbitration, finality is primarily associated with the reliable and efficient dispute settlement function of the mechanism. The (speedy) resolution of disputes is the main goal of commercial arbitration, even more important than substantive justice.[568] This focus on efficiency and liberty, rather than justice, entails a high degree of party autonomy,[569] which is sometimes even held to extend to the requirement of arbitrators' independence and impartiality.[570] In the ICSID system, on the other hand, finality and the full decoupling from domestic judicial processes serve the purpose of de-politicization,[571] rather than a speedy and efficient

564 Wouters and Hachez, *supra* note 19, at 620.

565 *See supra* Chapter 1, Part 2.2.

566 *See* ICSID Convention art. 53, para. 1. *See also* PAULSSON, THE IDEA, *supra* note 22, at 1.

567 *See* Schreuer, *Dynamic Evolution*, *supra* note 5, at 18.

568 PAULSSON, THE IDEA, *supra* note 22, at 17.

569 *Id.* at 2.

570 *See* Nordström-Janzon and Nordström-Lehtinen v. the Netherlands, ECHR 28101/95 (Nov. 27, 1996) (by submitting to arbitration, the disputing parties waive their right to individual and impartial decision-makers; such a waiver is only restrained by domestic law rules on the annulment of arbitral awards, which guarantee a minimum degree of independence and impartiality). This reasoning does not apply in the self-contained ICSID system. *See, e.g.*, LUTTRELL, *supra* note 31, at 214.

571 Broches, *supra* note 4, at 343. *But see* Wouters and Hachez, *supra* note 19, at 623 (arguing that the expedient, final and apolitical settlement of disputes is the main appeal of arbitration in both the commercial and in the investment arbitration context).

(but not primarily just) resolution of the dispute. Procedural justice and the perceived fairness of the proceeding are the very *raisons d'être* of investor-State arbitration under the ICSID Convention, and determinative for its acceptance as a legitimate dispute resolution mechanism.[572] As a consequence, the qualities of party-appointed arbitrators which legitimize the finality of ICSID awards are arguably different from those of commercial arbitrators. Independence and impartiality, in particular, are essential traits of ICSID arbitrators, which cannot be waived by the disputing parties. Accordingly, the priority given to arbitrators' independence and impartiality under the commercial arbitration rules examined below should only be understood as a minimum standard – a floor, and not a ceiling – for ICSID arbitration.

This stance is also supported by other key differences between commercial and investment arbitration. In particular, the more frequent involvement of public interests in the investment context calls for increased attention to the perceived legitimacy of the system.[573] This is even more crucial in the light of the amounts in dispute which are often higher than in commercial arbitration.[574] The small size of the investment arbitration community[575] and the relatively repetitive legal issues at the center of investment disputes[576] increase the likelihood of conflicts of interest, and call for a particularly strict approach to the issue of independence and impartiality. The same is true for the character of the ICSID framework as a self-contained regime, which deprives the parties of the usual possibility of questioning the arbitrators' independence

572 PAULSSON, THE IDEA, *supra* note 22, at 17; Franck, *Integrating Investment Treaty Conflict*, *supra* note 22, at 214–215; Kee, *supra* note 22, at 195.

573 Rivkin, *supra* note 18, at 341 ("Investor-state arbitration is of course an entirely different animal than traditional commercial arbitration since these disputes involve sovereign states rather than just private parties. There is simply much more at stake here. In this context, we are concerned not only about certainty but also about legitimacy. We care far more about tribunals 'getting it right' because the awards involve public goods and public money."). *See also* Horvath and Berzero, *supra* note 37, at 5; DAELE, *supra* note 51, ¶ 5–107.

574 Rivkin, *supra* note 18, at 352. *But see* Caron, *Investor State Arbitration*, *supra* note 23, at 514 (pointing out that the differences between commercial and investment arbitration are not always as accentuated in practice as is argued in the doctrine). Commercial arbitration cases can also involve issues that are in the public interest. For example, investment disputes which are not governed by the ICSID Convention are often subject to the commercial arbitration rules examined in this Chapter. On the other hand, investment arbitration cases sometimes concern questions unrelated to public policy, and involving relatively modest claims for damages.

575 Horvath and Berzero, *supra* note 37, at 5.

576 Horvath and Berzero, *supra* note 37, at 5; PAULSSON, THE IDEA, *supra* note 22, at 151; BLACKABY ET AL., *supra* note 90, ¶ 4.128; *contra* Caron, Caron, *Investor State Arbitration*, *supra* note 23, at 517.

and impartiality at the execution stage. This renders the availability of an effective mechanism to ensure unbiased decision-making during the proceedings all the more important.[577] On balance, it appears proper to expect the standard of independence and impartiality applied in investment arbitration to provide at least an equivalent level of protection to the parties as the standards applied in commercial arbitration.

The commercial arbitration rules examined in this study[578] – i.e., the UNCITRAL, SCC and ICC Arbitration Rules – were chosen based on their wide acceptance and frequent use in investment arbitration.[579] The availability of challenge decisions under the SCC and ICC Arbitration Rules, however, is limited: Decisions are generally unreasoned and unpublished,[580] and have only selectively been reported in academic publications. As a consequence, the documented outcomes of challenges are not necessarily representative, and the rationales of particular challenge decisions are unknown. Acknowledging this limitation, this book nevertheless seeks to identify trends in the assessment of particular categories of potential conflict of interest, by working with the available resources. For this purpose, the reported challenge decisions are grouped in the categories established in Chapter 2, Part 2. Where reasoned

577 Levine, *supra* note 45, at 62; DAELE, *supra* note 51, ¶ 5–108.

578 The respective challenge decisions are hereinafter categorized according to the arbitration rules applicable to the dispute, and not according to the decision-making body dealing with the disqualification request. Disqualification decisions taken by the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce [hereinafter SCC Institute] as an Appointing Authority under the UNCITRAL Rules, for example, are summarized in Part 2.2. Since the IBA Guidelines usually only supplement (but don't supersede) the otherwise applicable rules, decisions made in application of the IBA Guidelines are hereinafter classified under the arbitration rules which otherwise apply to the proceeding. Only where parties in ICSID proceedings specifically agreed on the application of the IBA Guidelines, do they supplant the otherwise applicable rules. Such decisions are examined in Part 3 hereinafter.

579 At times, investment disputes are also governed by the LCIA Arbitration Rules. While the LCIA is an important arbitral institution and the public availability of its decisions would have made it interesting to include them in this study, this analysis instead focusses on the arbitration rules most frequently used for the settlement of investor-State disputes, and on the challenge decisions made thereunder.

580 ICC challenge decisions have been unreasoned until recently. The provision of reasons (to the parties, not publicly), was announced by the President of the ICC Court (Alexis Mourre) on September 21, 2015. *See* Grant Hanessian et al., The ICC Court Decides to Provide Parties With Reasons for Administrative Decisions, Global Arbitration News (Nov. 10, 2015), http://globalarbitrationnews.com/the-icc-court-decides-to-provide-parties-with-reasons-for-administrative-decisions-20151110/ [hereinafter Hanessian et al., Reasons for Administrative Decisions].

decisions are unavailable, the decisions are sorted by the invoked grounds for disqualification and the requests' outcomes, and listed in bullet point format. The breakdown of the examined cases into these elements allows for a comparison of challenge decisions based on similar constellations across arbitration regimes. The divergences and similarities between the case law under the ICSID Convention and Arbitration Rules and the decisions made under the examined commercial arbitration rules are visualized in a spreadsheet in Part 2.5 of this Chapter.

2.2 *The UNCITRAL Arbitration Rules*

The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) were first adopted in 1976,[581] and subsequently revised in 2010[582] and 2013.[583] They represent the second most commonly used framework for the settlement of investment disputes – to date, 234 cases have been brought under the UNCITRAL Arbitration Rules.[584]

Under the UNCITRAL Arbitration Rules, arbitrator challenges are decided by the so-called Appointing Authority.[585] The Appointing Authority is either

581 Arbitration Rules of the United Nations Commission on International Trade Law, Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) [hereinafter UNCITRAL Arbitration Rules (1976)].

582 UNCITRAL Arbitration Rules as revised in 2010, Res. 65/22, U.N. Doc. A/RES/65/22 (Dec. 6, 2010) [hereinafter UNCITRAL Arbitration Rules (2010)].

583 UNCITRAL Arbitration Rules (2013), *supra* note 109. The 2013 revision only added a new paragraph to incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The provisions on arbitrators' independence and impartiality remained unchanged – accordingly, any references to provisions on arbitrator disqualification in the UNCITRAL Arbitration Rules (2013) equally refer to their 2010 version. The rules will hereinafter be referred to as the UNCITRAL Arbitration Rules without reference to a year where any or all versions are meant. It is important to distinguish the UNCITRAL Arbitration Rules from the UNCITRAL Model Law on International Commercial Arbitration. The latter is not directed at arbitral parties, but at States. It "reflects worldwide consensus on key aspects of international arbitration practice," and is designed to serve as a basis for States to reform and modernize their domestic laws on arbitral procedure.

584 *See* List of Cases brought under the UNCITRAL Arbitration Rules, UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution. The latest UNCTAD Report reporting the number of investment disputes brought under the UNCITRAL Arbitration Rules (United Nations Conference on Trade and Development, *Report on Recent Developments in Investor-State Dispute Settlement* (*ISDS*), Apr. 2014, http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf, at 9 [hereinafter UNCTAD, *ISDS Report*) puts the number at 158 cases.

585 UNCITRAL Arbitration Rules (1976) art. 12; UNCITRAL Arbitration Rules (2013) art. 13, para. 4.

designated by the parties in their arbitration agreement, or (in the absence of such designation, or if the specified Appointing Authority fails to act) by the Secretary-General of the PCA, upon the request of the challenging party.[586]

Pursuant to the consistent wording of all versions of the UNCITRAL Arbitration Rules,[587] arbitrator disqualifications are subject to a justifiable doubts threshold:

> Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.[588]

Doubts are justifiable if an objective third party would find them reasonable.[589]

A Behavior in Current Proceeding

Four of the examined UNCITRAL challenges were based on the arbitrators' behavior. All were dismissed.

In *National Grid II*,[590] Argentina challenged Mr. Judd Kessler, the Claimant-appointed arbitrator. During the cross-examination of an expert witness, Mr. Kessler made a statement which, viewed in isolation, could have been interpreted as a prejudgment of the merits of the case:

> 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

586 UNCITRAL Arbitration Rules art. 6. The Secretary-General of the PCA is explicitly mentioned as a possible Appointing Authority in UNCITRAL Arbitration Rules (2013) art. 6, para. 1.

587 CARON AND CAPLAN, *supra* note 91, at 178 et seqq.

588 UNCITRAL Arbitration Rules (1976) art. 10, para. 1; UNCITRAL Arbitration Rules (2013) art. 12, para. 1. Interestingly, the threshold for the disclosure of possible conflicts of interest by potential arbitrators is the same (UNCITRAL Arbitration Rules (2013) art. 11), and not higher, as under ICSID Arbitration Rule 6, para. 2 (Chapter 1, Part 1.3).

589 Country X v. Company Q, Challenge Decision (Jan. 11, 1995), *in* YEARBOOK COMMERCIAL ARBITRATION 1997 – VOLUME XXII 227, 234 (Albert Jan van den Berg ed.). Due to the identical standards of conduct in all versions of the UNCITRAL Arbitration Rules, the case law on arbitrator disqualification under the UNCITRAL Arbitration Rules (1976) remains relevant. *See* CARON AND CAPLAN, *supra* note 91, at 178.

590 National Grid plc v. The Republic of Argentina (*National Grid II*), LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L. Kessler (Dec. 3, 2007), *available at* http://www.iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf. In the same case, Dr. Rigo Sureda was also challenged (*see infra* Part 2.2 B.).

> know the facts generally speaking that there was major harm or major change in the expectations of the investment.[591]

The Appointing Authority[592] held that under the relevant third person test, the statement had to be viewed as a whole and in the context of the arbitrator's intervention.[593] As such, it could not reasonably justify such doubts.[594]

In *Arbitration 120/2001,*[595] the disqualification of the chairman of the arbitral tribunal was requested based on his interventions in a challenge proceeding against his co-arbitrator. The chairman had tried to persuade the Respondent not to pursue the disqualification request against the Claimant-appointed arbitrator,[596] and had sought to convince the Appointing Authority not to uphold the challenge.[597] The chairman characterized his interventions as mere "comments," "reflections," and "friendly invitation[s]."[598] The Board of Directors of the Arbitration Institute of the Stockholm Chamber of Commerce[599] dismissed the challenge for reasons which remain undisclosed. It did make it clear, however, that the request was dismissed on the merits, and not because it was belated or had not been submitted in the correct form, as argued by Claimant.[600] Hence, the chairman's nudging of the Respondent appears not to have been considered sufficient to raise justifiable doubts about his independence and impartiality.

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591 *See National Grid II*, ¶¶ 32 and 92.

592 The parties had agreed to submit the challenge to a Division of the LCIA Court.

593 *National Grid II*, ¶ 93.

594 *Id.* ¶¶ 96, 99 and 102. *See also* Fry and Stampalija, *supra* note 31, at 215 et seqq.; Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L. L. REV. 341, 354 et seq. (2009).

595 Öhrström, *supra* note 45, at 49–57 (Arbitration 120/2001).

596 The chairman had even written to the Respondent, stating that "you should certainly have not pursued this challenge."

597 The Respondent further based his request on procedural decisions of the tribunal, i.e. the continuation of the proceeding while the challenge was pending, and a decision on the calculation of fees. These arguments were however not as central as the chairman's nudging of the Respondent.

598 Öhrström, *supra* note 45, at 56 ("[T]he notion as such that colleagues on a panel may … voice their own view on a challenge brought against one of their colleagues is a very well-established notion.").

599 Hereinafter the SCC Board. The SCC Board is the competent body for final decisions on requests for disqualifications under the SCC Arbitration Rules (*see infra* Part 2.3). In this case, it was designated as the Appointing Authority.

600 Öhrström, *supra* note 45, at 57.

Another UNCITRAL challenge was decided by the SCC Board in *Arbitration 46/2004*.[601] Respondent alleged that the Claimant-appointed arbitrator had *ex parte* communications with counsel for Claimant, and that this caused an appearance of bias. The existence of *ex parte* communications, however, could not be proved and was disputed by Claimant, the challenged arbitrators, and the unchallenged arbitrators. Thus, the SCC Board dismissed the challenge.

In *Arbitrations U/2003* and *61/2004*, Claimant repeatedly challenged the same arbitrator,[602] based on his claim for additional fees and his refusal to withdraw unless he would be paid such fees. The Chairman of the SCC Institute held that a dispute regarding arbitration costs did not constitute a valid ground for disqualification.[603]

B Familiarity with Another Participant in the Proceeding

In five cases, arbitrators were challenged based on their familiarity with another participant in the proceeding. In another case, the tribunal brought up the arbitrator's repeat appointment *sua sponte*, without a challenge being filed.

In *Arbitration 115/2010*, Claimant challenged the arbitrator appointed by Respondent based on his academic collaboration with counsel for Respondent. The arbitrator and counsel for Respondent had co-authored several books and articles, and worked at the same university. The SCC Board dismissed the challenge.[604]

In *Grand River*,[605] the United States challenged Professor James Anaya for being adverse to the United States in cases which were simultaneously pending before the Inter-American Commission on Human Rights and the Committee on the Elimination of Racial Discrimination (CERD). The ICSID Secretary-General held that Respondent's concerns were well-founded because of the "basic similarity" of the issues: All proceedings concerned the compliance of

601 Annette Magnusson & Hanna Larsson, *Recent Practice of the Arbitration Institute of the Stockholm Chamber of Commerce. Prima Facie Decisions on Jurisdiction and Challenges of Arbitrators*, 2 STOCKHOLM ARB. REP. 47, 75–78 (2004) (Arbitration 46/2004).

602 Magnusson and Larsson, *supra* note 601, at 78–84 (Arbitration U/2003 and 61/2004).

603 Magnusson and Larsson, *supra* note 601, at 80–84.

604 Felipe Mutis Tellez, ARBITRATORS' INDEPENDENCE AND IMPARTIALITY: A REVIEW OF SCC BOARD DECISIONS ON CHALLENGES TO ARBITRATORS (2010–2012) 5–6 (2012), *available at* http://www.sccinstitute.com/media/30001/felipe-mutis-tellez_article-on-scc-challenges-on-arbitrators.pdf.

605 Grand River Enterprises Six Nations Ltd et al v. United States of America (*Grand River*), Decision on the Challenge to Arbitrator James Anaya (Nov. 28, 2007), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0382_0.pdf.

the United States with "its international commitments."[606] Professor Anaya was called upon to cease either of his roles, since they were incompatible. After he discontinued his involvement in the human rights cases,[607] the ICSID Secretary-General dismissed the challenge.[608] The mere supervision and mentoring of clinical students in the CERD cases was held not to be problematic.

Mr. Stanimir Alexandrov was successfully challenged by Argentina in *ICS*.[609] The Appointing Authority in the case, Jernej Sekolec, held that the arbitrator's representation of a Claimant against Argentina in an ongoing (although unrelated) proceeding[610] put the arbitrator into "a situation of adversity," which is a "source of justified concerns." Mr. Sekolec stated:

> [Such situations of adversity] should in principle be avoided, except where circumstances exist that eliminate any justifiable doubts as to the arbitrator's impartiality or independence.

Referring to the Orange List of the IBA Guidelines, Jernej Sekolec affirmed that the situation was serious enough to raise justifiable doubts about the arbitrator's independence and impartiality.[611] The fact that *Vivendi* might soon come to an end, and that it was unrelated to *ICS*, was not enough to resolve such justifiable doubts.[612]

As formulated by Sekolec, the burden of proof relating to a lack of independence and impartiality gets reversed when the challenging party successfully substantiates circumstances that would cause a reasonable third person to justifiably doubt an arbitrator's unbiased decision-making. It is then for the arbitrator to dispel all such doubts. Sekolec argued that even though *Vivendi*

606 *Grand River*, at 1.

607 *See* Letter from S. James Anaya to Nassib G. Ziadé, Deputy Secretary-General International Centre for Settlement of Investment Disputes (Oct. 25, 2007), *available at* http://www.naftaclaims.com/disputes/usa/GrandRiver/GRE-USA-Anaya_Challenge-25-10-07.pdf (last accessed on Dec. 30, 2016).

608 *Grand River*, at 2. *See also* Sheppard, *supra* note 32, at 150.

609 ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (*ICS*), PCA Case No. 2010–9, Decision on Challenge to Arbitrator (Dec. 17, 2009), *available at* http://italaw.com/sites/default/files/case-documents/ita0415.pdf.

610 *ICS*, at 2. Mr. Alexandrov's law firm (Sidley Austin LLP) also previously represented a company possibly linked to the Claimant. The relevance of this circumstance was however not examined by the Appointing Authority, since Mr. Alexandrov's concurrent representation of an investor in proceedings against Argentina (in *Vivendi*) was sufficient to give rise to justifiable doubts.

611 *Id.* at 4.

612 *Id.* at 4.

seemed to come to a close, there was still a possibility that Mr. Alexandrov would continue to be involved in the case in some way. Furthermore, even if the cases were unrelated, they were not entirely dissimilar:

> Both matters are investment protection actions of considerable magnitude which raise broadly similar concerns against the same State party in a manner that reinforces any justifiable doubts as to the arbitrator's impartiality or independence.[613]

In *National Grid,*[614] Argentina brought a challenge against the chairman Dr. Andres Rigo Sureda, based on his role switching with Mr. Tawil (a counsel in the case). Like the challenges brought on the same basis in *Azurix* and *Siemens*, the request was dismissed for unknown reasons.[615] The decision was not published.

The repeat appointment of Professor Albert Jan van den Berg in disputes against Argentina was at the core of his challenge in *BG Group.*[616] Instead of alleging a lack of independence, or an imbalance of knowledge on the tribunal, however, Argentina claimed that the arbitrator's inconsistent decisions on the state of necessity in two prior proceedings involving Argentina[617] were indicative of his lack of independence and impartiality. While the ruling in *LG&E* accepted the state of necessity defense for a seventeen month time-frame, the *Enron* decision denied it. Argentina argued that those findings were contradictory and that a lack of neutrality could be inferred from van den Berg's "arbitrary," "capricious," and "abrupt change of mind." The International Court of Arbitration of the ICC[618] rejected the challenge, for reasons which remain

613 *Id.* at 5.

614 National Grid plc v. The Argentine Republic (*National Grid*), UNCITRAL Case.

615 International Institute for Sustainable Development, ICC Nixes Argentina's bid to disqualify Arbitrator in National Grid Case, Investment Treaty News (Jan. 12, 2006), http://www.iisd.org/pdf/2006/itn_jan12_2006.pdf. *See* Sheppard, *supra* note 32, at 146. The reasons for the challenge are set out in more detail above (Chapter 2, Part 2.2 B., pp. 63–64), in the context of the ICSID disputes in *Azurix* and *Siemens*.

616 BG Group plc v. The Republic of Argentina (*BG Group*).

617 LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic (*LG&E*), ICSID Case No. ARB/02/1; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (*Enron*), ICSID Case No. ARB/01/3. Prof. Albert Jan van den Berg was appointed by the Claimants in *BG Group* and in *LG&E*, while the Chairman of the Administrative Council appointed him following the resignation of the Respondent-appointed arbitrator in *Enron*.

618 Hereinafter the ICC Court.

unknown.[619] Argentina subsequently filed a motion to vacate the award rendered in favor of BG Group in the U.S. District Court of the District of Columbia,[620] on the same grounds.[621] Its motion was denied.[622]

Finally, the repeat appointment of Dr. Barrera by Ecuador was at issue in *EnCana*.[623] No challenge was filed, but the tribunal acknowledged that the situation could cause an inequality of the parties if Dr. Barrera used information attained in the previous proceeding, which his co-arbitrators did not possess. The tribunal stated:

> Dr. Barrera 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.[624]

Nevertheless, the issue was not framed as a hazard to his impartiality, but as a matter of equality of arms. In order to avoid an imbalance of information on the tribunal, Dr. Barrera was asked to disclose any facts he considered relevant for *EnCana* to the tribunal, and to make the award in the parallel proceeding available to the Claimant as soon as possible after it would be issued.[625]

C Familiarity with the Subject-Matter of the Proceeding

Four of the examined UNCITRAL challenge decisions were based on the arbitrators' familiarity with the subject-matter of the proceeding.

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619 Mouawad, *supra* note 252, at 8–9. Luke Eric Peterson, ANALYSIS: Decrying past "contradictory" rulings, Argentina challenges arbitrator, Investment Treaty News (Apr. 1, 2008), http://www.iisd.org/pdf/2008/itn_april1_2008.pdf, 3 [hereinafter Peterson, Argentina].

620 The Republic of Argentina v. BG Group plc, Case No. 08–0485 (RBW) (D.D.C.), Petition to Vacate or Modify Arbitration Award file on March 21, 2008, ¶¶ 73, 75 and 76, *available at* http://ita.law.uvic.ca/documents/BGvArgentina.pdf.

621 Mouawad, *supra* note 252, at 8; Peterson, Argentina, *supra* note 619.

622 Ian A. Laird et al., *International Investment Law and Arbitration: 2010 in Review*, *in* YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2010–2011, 130–131 (Karl P. Sauvant ed., 2012).

623 EnCana Corporation v. Republic of Ecuador (*EnCana*), LCIA Case No. UN3481, Partial Award on Jurisdiction (Feb. 27 2004), ¶ 44 *et seqq.*, *available at* http://www.italaw.com/sites/default/files/case-documents/ita0283_0.pdf. *See also* Sheppard, *supra* note 32, at 154. Ecuador had mandated the same legal advisors and appointed the same arbitrator in Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (*Occidental Petroleum*), ICSID Case No. ARB/06/11.

624 *EnCana*, ¶ 45.

625 *Id.* ¶ 46. This approach has been praised as being particularly practical, *see* Sheppard, *supra* note 32, at 154. How such disclosures could be reconciled with the arbitrator's duty of confidentiality is unclear.

In CC/*Devas,*[626] the chairman of the tribunal, Marc Lalonde, and the Claimant-appointed arbitrator, Professor Francisco Orrego Vicuña, were challenged because they had previously served on tribunals which decided a legal issue that was expected to arise in the case at hand. Professor Orrego Vicuña had chaired three tribunals dealing with "essential security interest" provisions, and defended his position in an article. Mr. Lalonde served as a co-arbitrator on two of these cases. All three decisions were at least partially annulled later on.[627] Respondent argued that the "strongly held and articulated positions" of the arbitrators in previous proceedings raised doubts about their impartiality.[628] The President of the International Court of Justice (ICJ), acting as the Appointing Authority in the case, upheld the challenge with respect to Professor Orrego Vicuña. The Professor had dealt with the same legal concept on four previous occasions, and reaffirmed his position after reviewing the respective annulment decisions. The President of the ICJ therefore considered it unlikely that the Respondent could change the arbitrator's mind, and held the Respondent's apprehension of prejudgment to be objectively reasonable.[629] The disqualification request against Mr. Marc Lalonde, on the other hand, was dismissed. Not only were his statements regarding the "essential security interest" defense more limited, but unlike his co-arbitrator, he did not take a stand on the issue after the annulment decisions were issued. The President of the ICJ therefore relied on the chairman's assurance that he intended to approach the case open-mindedly.[630]

In *Telekom Malaysia,*[631] Professor Emmanuel Gaillard was not faced with an issue he had previously decided as an arbitrator, but with a finding made by the arbitral tribunal in *RFCC,*[632] which he challenged as counsel in the respective annulment proceeding. Ghana requested his disqualification, arguing that it was impossible for the arbitrator to vehemently oppose an argument as a counsel in one case, and to be unprejudiced with regard to the same issue in another case. Professor Gaillard refused to resign, arguing that no two cases

626 CC/Devas v. Republic of India (CC/*Devas*), PCA Case No. 2013–09, 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).

627 *Id.* ¶¶ 3 and 19. The relevant cases are *CMS*, *Sempra* and *Enron* (*supra* note 334).

628 *Id.* ¶¶ 17 and 52.

629 *Id.* ¶ 64.

630 *Id.* ¶ 66.

631 Telekom Malaysia Berhad v. Republic of Ghana (*Telekom Malaysia*).

632 Consortium R.F.C.C. v. Kingdom of Morocco (*RFCC*), ICSID Case No. ARB/00/6.

were alike, and that he was able to independently and impartially apply the relevant rules of law to the case.[633]

Ghana's challenge was first adjudicated by the Secretary-General of the PCA (the Appointing Authority), and dismissed without a reasoning.[634] Ghana subsequently filed a request for disqualification at the seat of the arbitration, with the District Court of the Hague.[635] Applying Dutch arbitration law,[636] the District Court conditionally upheld the request, giving Professor Gaillard ten days to resign from his function as a counsel in *RFCC*, lest he be disqualified.[637] It argued that the mind-set expected of Professor Gaillard in his role as counsel was incompatible with the open-mindedness expected of as arbitrator. Even if he did manage to keep the two roles apart, he could not possibly avoid the appearance of lacking the necessary distance, as long as he concurrently served in both functions.[638]

Professor Gaillard subsequently resigned as a counsel. Ghana filed another challenge with the District Court of the Hague, criticizing the conditional nature of the previous decision, and arguing that Professor Gaillard's resignation as counsel did not eliminate the existing justifiable doubts regarding his independence and impartiality.[639] The District Court, however, refused to unconditionally disqualify the arbitrator, and explained that:

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633 Sheppard, *supra* note 32, at 151; Mann, *supra* note 237, at 1; Horvath and Berzero, *supra* note 37, at 6.

634 *See* Rubins and Lauterburg, *supra* note 32, at 176.

635 Telekom Malaysia Berhad v. Republic of Ghana (*Telekom Malaysia I*), Petition No. HA/RK 2004.667, Decision of the District Court of The Hague (Oct. 18, 2004), English translation *available at* http://www.italaw.com/cases/1091.

636 *See Id.* ¶ 5. Unlike ICSID arbitration, UNCITRAL is not a self-contained regime. Hence, the District Court of the Hague was free to apply Dutch arbitration law in the disqualification proceeding. Art. 1033 of the Dutch Code of Civil Procedure however appears to contain a standard similar to that under UNCITRAL. It only surpasses the latter by explicitly requiring appearances to be taken into account: "An arbitrator may be challenged if from an objective point of view … justified doubts exist with respect to his impartiality or independence. *The examination of whether there are sufficient grounds for a challenge should also take account of outward appearance." See Id.* ¶ 6 (emphasis added).

637 *Id.* ¶ 7. *See also* BROOKS W. DALY, EVGENIYA GORIATCHEVA & HUGH A. MEIGHEN, A GUIDE TO THE PCA ARBITRATION RULES ¶ 4.59 (2014).

638 *Telekom Malaysia I*, ¶ 6.

639 Telekom Malaysia Berhad v. Republic of Ghana (*Telekom Malaysia II*), Petition No. HA/RK 2004.788, Decision of the District Court of The Hague (Nov. 5, 2004), English translation *available at* http://www.italaw.com/cases/1200.

> [I]n international arbitrations, lawyers frequently act as arbitrators. Therefore, it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded [sic] than if he had not defended such a point of view before.[640]

This decision of the District Court of the Hague seems to be premised on two assumptions: First, Professor Gaillard's concurrent exercise of counsel and arbitrator roles in cases that were unrelated but where the same legal issues were decisive, gave rise to an appearance of bias that would justify his disqualification. Second, this appearance of bias could be remedied by the arbitrator (and hence disqualification avoided), by resigning as a counsel. In other words, a reasonable third person's doubts regarding the arbitrator's cognitive ability to wear a double-hat are justified where an arbitrator simultaneously acts as a counsel in a similar case – if the same happens successively, however, there is no reason to doubt his ability to tell his roles apart. The roles are incompatible when exercised concurrently, but the appearance of independence and impartiality is restored when one of the roles is subsequently discontinued.[641]

In *Canfor*,[642] the Claimant-appointed arbitrator Mr. Conrad Harper had given a speech on the subject-matter of the dispute to a Canadian government council prior to the commencement of the arbitration. He had therein expressed his political view on the matter very clearly:

> This will be the fourth time we have been challenged. We have won every single challenge on softwood lumber, and yet they continue to challenge us with respect to those issues. Because they know the harassment is just as bad as the process.

The United States argued that this statement amounted to a prejudgment of the dispute and that Mr. Harper was unable to approach the parties' arguments

640 *Id.* ¶ 11.

641 *See also* Mouawad, *supra* note 252, at 5.

642 Canfor Corporation v United States (*Canfor*), *see Canfor Corporation v. United States of America*, U.S. DEPARTMENT OF STATE, http://www.state.gov/s/l/c7424.htm (last accessed on Dec. 30, 2016). The unpublished challenge decision is reported in Legum, *supra* note 508, at 243. *See also* Sheppard, *supra* note 32, at 149.

on the issue with the requisite open-mindedness. The Claimant, on the other hand, pleaded that the arbitrator's statement was innocuous, since it did not concern the investment dispute directly.[643] The ICSID Secretary-General dealing with the challenge[644] advised Mr. Harper to resign, or that the challenge would otherwise be upheld. The arbitrator followed this instruction and stepped down.[645]

D Connection to an Adverse Third Party

Four arbitrators were challenged because of connections to an adverse third party.

In *Vito Gallo,*[646] an investment arbitration proceeding under NAFTA Chapter 11,[647] Mr. J. Christopher Thomas, Q.C., was challenged because he simultaneously advised Mexico on matters of international trade and investment law. As a party to NAFTA, Mexico was allowed to make submissions in *Vito Gallo*, although it was not a party to the dispute.[648] It was argued that Mr. Thomas appeared to be influenced by Mexico's interests – whether or not the country actually intervened.

The Deputy Secretary-General of the ICSID[649] held that indeed, by simultaneously serving as an arbitrator and as a counsel to a potential third party

643 *See* Mouawad, *supra* note 252, at 7; Legum, *supra* note 508, at 244–245.

644 NAFTA art. 1124, para 1 provides that the ICSID Secretary-General shall serve as Appointing Authority in NAFTA/UNCITRAL cases.

645 Since the arbitrator resigned, ICSID did not publish a decision. Unfortunately, this makes it impossible to analyze the ICSID Secretary-General's motivation of his decision in detail. In particular, it is unclear to which degree the criticized public statements and the subject-matter of the dispute need to overlap. *See* Legum, *supra* note 508, at 245.

646 Vito G. Gallo v. Government of Canada (*Vito Gallo*), Decision on the Challenge to Mr. J. Christopher Thomas, Q.C. (Oct. 14, 2009), *available at* http://italaw.com/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf.

647 NAFTA Chapter 11 is the NAFTA investment chapter. It covers the definition of the term investment and the ensuing obligations in its Part A, and investor-State dispute settlement in its Part B. According to NAFTA art. 1120, claims may be submitted under the ICSID Convention, the Additional Facility Rules of the ICSID, or the UNCITRAL Arbitration Rules. NAFTA disputes brought under the UNCITRAL Arbitration Rules are hereinafter referred to as NAFTA/UNCITRAL cases.

648 NAFTA art. 1128. *See Vito Gallo*, ¶ 30.

649 NAFTA art. 1124, para. 1 provides that the ICSID Secretary-General shall serve as Appointing Authority in NAFTA/UNCITRAL cases. Whether or not the Deputy Secretary-General was authorized to act in his place by virtue of ICSID Convention art. 10, para. 3 (i.e. in the Secretary-General's absence or due to his inability to act) was disputed in the case.

participant, "an arbitrator inevitably risks creating justifiable doubts as to his impartiality and independence."[650] He highlighted that this was true irrespective of the amount of work performed for, and the remuneration received from the third party. The mere fact that services were provided was enough.[651] Even if Mexico had not made a submission in the present case, "an apparent conflict of interest [was] perceptible" because of its right to intervene, making it "next to impossible" for Mr. Thomas to avoid the appearance of bias.[652]

The Deputy Secretary-General of the ICSID did not, however, disqualify the arbitrator. Instead, he dismissed the challenge, and gave Mr. Thomas the option of either acting as an arbitrator in the case or advising Mexico. Only if he did not discontinue his advisory services to Mexico for the remainder of the proceedings, justifiable doubts about his impartiality and independence would arise. Mr. Thomas resigned from the arbitration seven days later.[653]

In *Eureko,*[654] Poland challenged Judge Stephen M. Schwebel before Belgian courts. It argued that the arbitrator's close working relationship with the Washington D.C. office of Sidley Austin LLP, which was adverse to Poland in an unrelated but ongoing investment arbitration, created an appearance of bias. In the Court of First Instance, Poland referred to reports on the close working relationship in the *American Lawyer* magazine, to the location of the Judge's office in the same building the law firm, and to his collaboration as a co-counsel with the firm in several investment arbitrations. The court considered those facts insufficient evidence of bias and rejected the challenge.[655]

Poland appealed the decision and invoked additional grounds for the challenge before the Court of Appeals. In particular, it criticized that the Judge based his pleadings as a counsel in an ongoing unrelated arbitration (*Vivendi*) on the partial award he had co-authored in *Eureko*. The reliance, in his role as a counsel, on an award he had himself drafted, was argued to indicate a "clear

650 *Vito Gallo*, ¶ 31.

651 *Id.* ¶ 32.

652 *Id.* ¶ 35. The Deputy Secretary-General of the ICSID explicitly referenced the IBA Guidelines on Conflicts of Interest in International Arbitration in ¶ 36.

653 Giorgetti, *Challenges*, *supra* note 32, at 316; Fry and Stampalija, *supra* note 31, at 221.

654 Eureko B.V. v. Republic of Poland (*Eureko*), UNCITRAL case; s*ee* Sheppard, *supra* note 32, at 147 and 152; Mouawad, *supra* note 252, at 5–7.

655 *In re:* The Republic of Poland v. Eureko BV, R.G. 2006/1542/A, Judgement [sic] of the Court of First Instance of Brussels (Dec. 22, 2006), at 5, English translation *available at* http://www.italaw.com/documents/Eureko-arbitratorchallenge.pdf.

conflict of interest."[656] The Court of Appeals dismissed the challenge without considering the new argument, since it had not been raised before the Court of First Instance. With respect to the other bases for the disqualification request, it affirmed the Court of First Instance's ruling.[657]

In *Arbitration 45/2008*, Claimant challenged the arbitrator appointed by Respondents. The arbitrator was a long-time academic and legal advisor to Russian government officials, who allegedly had an interest in the outcome of the proceeding. One of the Respondents was an administrative body of a Russian city, and according to Claimant, the Russian government officials had been officials of the city during the relevant period, and had as such been involved in the transactions at issue in the proceedings. Although none of these allegations were disputed by the Respondents or the challenged arbitrator, the SCC Board dismissed the challenge.[658] The Claimant subsequently substantiated its challenge and submitted evidence for many of the circumstances alleged in its first challenge and certain new grounds. This time, the challenge was upheld.[659]

In *Suez II*, the basis of the challenge was the same as previously described[660] but the unchallenged arbitrators decided the challenge filed by the third corporate Claimant (AWG Group Limited, hereinafter AWG) separately, since it was subject to the UNCITRAL Arbitration Rules. Adopting a reasonable third person's perspective, they held that the connection between AWG and UBS was too tenuous to give rise to justifiable doubts as to Professor Kaufmann-Kohler's independence and impartiality.[661]

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656 Argentina brought forward the same argument in *Vivendi*, questioning the arbitrator's ability to draft an arbitral award in one proceeding, without (consciously or unconsciously) considering the effect of this award in another dispute, in which he serves as a counsel. It therefore asked for the *Eureko* award to be disregarded. *See* Sheppard, *supra* note 32, at 152; Mouawad, *supra* note 252, at 6.

657 International Institute for Sustainable Development, Belgian Appeals Court rejects Poland's challenge to Arbitrator in Eureko case, Investment Treaty News (Nov. 15, 2007), http://www.iisd.org/pdf/2007/itn_nov15_2007.pdf.

658 Niklas Lindström, CHALLENGES TO ARBITRATORS – DECISIONS BY THE SCC BOARD DURING 2008–2010 10–12, *available at* http://www.hannessnellman.com/sites/default/files/media/Challenges_to_Arbitrators__Decisions_by_the_SCC_Board_during_2008_2010.pdf.

659 Lindström, *supra* note 658, at 12–14.

660 For details of the circumstances of the case, *see supra* Chapter 2, Part 2.4, pp. 80–82.

661 Sheppard, *supra* note 32, at 141. AWG operated in the water sector and UBS conducted research and developed financial products related to the water sector. A closer connection did not exist. In particular, UBS was not a shareholder of AWG.

2.3 *The SCC Arbitration Rules*

The current Arbitration Rules of the SCC Institute[662] entered into force on January 1, 2010. They are applicable to arbitration proceedings commenced on or after that date.[663] The exact number of investment disputes that have so far been brought under the SCC Arbitration Rules is not verifiable[664] since SCC arbitration is, by default, confidential.[665] In any event, the SCC Institute is a significant player in investment arbitration: It is the second most commonly used institution, after ICSID, and the SCC Arbitration Rules are the third most commonly used instrument for the resolution of investment disputes (after the ICSID Convention and the UNCITRAL Arbitration Rules). Various BITS stipulate that disputes shall be governed by the SCC Arbitration Rules, or that the SCC Institute shall act as the Appointing Authority under the UNCITRAL Arbitration Rules.[666]

The SCC Arbitration Rules explicitly require arbitrators to be independent and impartial.[667] The threshold applied to arbitrator challenges is that of "justifiable doubts,"[668] which is substantively identical to the test applied

662 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce [hereinafter the SCC Arbitration Rules].

663 Previous versions of the rules dated from 1976, 1988, 1999 and 2007.

664 According to the United Nations Conference on Trade and Development (UNCTAD), 28 investment disputes are known to have been brought under the SCC Arbitration Rules, amounting to about 5% of arbitrated investment disputes. *See* UNCTAD, *ISDS Report*, *supra* note 584, at 9. The Arbitration Institute of the SCC, on the other hand, reports that the SCC has administered 85 investment disputes to date, 62 of which were subject to the SCC Arbitration Rules. *See Investment Disputes 2015*, ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, http://www.sccinstitute.com/media/181705/scc-statistics-2015.pdf (last accessed on Dec. 30, 2016).

665 SCC Arbitration Rules art. 46.

666 *Investment Disputes*, ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, http://www.sccinstitute.com/dispute-resolution/investment-disputes/ (last accessed on Dec. 30, 2016).

667 SCC Arbitration Rules art. 14, para. 1 ("Every arbitrator must be impartial and independent."). Other than that, the parties are free to appoint arbitrators of any nationality or profession, as there are no pre-established lists from which to choose. *See* Magnusson and Larsson, *supra* note 601, at 64.

668 SCC Arbitration Rules art. 15 ("A party may challenge any arbitrator if circumstances exist which give rise to justifiable doubts as to the arbitrator's impartiality or independence."). The 2007 version of the SCC Arbitration Rules already contained the same wording in art. 15, para. 1. The 1999 version did not mention the threshold of "justifiable doubts" in the provision on arbitrator challenges (art. 18), but already applied that standard with respect

under the UNCITRAL Arbitration Rules.[669] The standard is an objective one, justifiable doubts must thus exist from a reasonable third person's objective point of view. Whether the arbitrator is de facto independent and impartial is irrelevant.[670]

The IBA Guidelines are officially applicable to challenges under the SCC Arbitration Rules and are referenced whenever they are pertinent,[671] although parties rarely refer to them.[672]

Furthermore, Section 8 of the Swedish Arbitration Act (SAA)[673] contains an illustrative enumeration of circumstances in which an arbitrator should be disqualified because the parties' confidence in their impartiality is deemed to be compromised.[674] The non-exhaustive catalogue mentions the following scenarios: an arbitrator's potential self-interest (or interest of someone close to them) in the outcome of the proceeding; an arbitrator's position as a director or other representative of an entity or person which has a potential interest in the outcome of the proceeding; and the prior involvement of the arbitrator in the dispute (as an expert, counsel or otherwise).

The final decision on requests for disqualification is made by the SCC Board, whose members are appointed by the Board of Directors of the SCC.[675] In

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to arbitrators' disclosure obligations (art. 17), as the current SCC Arbitration Rules do (SCC Arbitration Rules art. 14, para. 2 and 3).

669 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 14.

670 Lindström, *supra* note 658, at 2.

671 Helena Jung, *SCC Practice: Challenges to Arbitrators. SCC Board decisions 2005–2007*, STOCK. INT'L. ARB. REV. 1–18, 2 (2008) [hereinafter Jung, *SCC Practice*]; Patrik Schöldström, *The Arbitrators*, *in* INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER'S GUIDE 115, ¶ 7 (Ulf Franke et al. eds., 2013). The Swedish Supreme Court and the Svea Court of Appeal have referred to the IBA Guidelines when deciding challenges and appeals to challenge decisions. *See* Lindström, *supra* note 658, at notes 10–11 (arguing, however, that the IBA Guidelines have not been applied *strictu senso*, but that they provide useful guidance).

672 IBA Conflict of Interests Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009*, 4 DISP. RESOL. J. 5, 33 (2010).

673 The SAA applies to arbitrations seated or otherwise taking place in Sweden, i.e. a majority of the arbitrations administered by the SCC Institute.

674 Öhrström, *supra* note 45, at 36; Magnusson and Larsson, *supra* note 601, at 63.

675 SCC Arbitration Rules art. 15, para. 4 and Appendix I to the SCC Arbitration Rules art. 3 and 4. Interestingly, the SAA provides for disqualification requests to be adjudicated by the relevant tribunals en banc, including the challenged arbitrator(s). In contrast to the ICSID Convention, the SAA does not provide for an exception from this allocation of competences. Accordingly, a sole arbitrator would have to decide on a requests for his or her

contrast to challenges under the ICSID Convention, the number of disqualification requests under the SCC Arbitration Rules appears to be unrelated to the overall caseload of the SCC Institute: Despite the increase of the latter, the number of challenges is not on the rise and has been fluctuating very much over the past twenty years.[676] Generally speaking, the number of disqualification requests is rather low in comparison to the number of arbitrations administered by the SCC Institute.[677]

Unfortunately, challenge decisions under the SCC Arbitration Rules are unpublished and unreasoned, making it difficult to understand how the relevant rules are interpreted.[678] Only select[679] decisions rendered between 1999 and 2012 have been reported by scholars[680] with more or less details on the backgrounds of the challenges, but without any information on the reasons for the decisions. The most instructive of those decisions will be summarized hereinafter.

A Familiarity with Another Participant in the Proceeding

To date, the most frequent (and successful) reason for challenges under the SCC Arbitration Rules has been the familiarity of an arbitrator or the arbitrator's law firm with another participant in the proceeding.[681]

In the following constellations, the challenged arbitrator or his / her law firm had an attorney-client relationship with the arbitrator's appointing party

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own removal (Schöldström, *supra* note 671, ¶ 33.). This provision of the SAA is however not applicable to arbitrations under the SCC Rules.

676 Magnusson and Larsson, *supra* note 601, at 66; Jung, *SCC Practice*, *supra* note 671, at 2.

677 Jung, *SCC Practice*, *supra* note 671, at 1.

678 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 14; Magnusson and Larsson, *supra* note 601, at 65; Jung, *SCC Practice*, *supra* note 671, at 4; Mutis Tellez, *supra* note 604, at 4.

679 Challenge decisions in 32 cases have been reported by the above-mentioned authors: 5 out of 13 cases from 1999 to 2002, 5 out of 19 cases from 2001 to 2004, 6 out of 22 cases from 2005 to 2007, 7 out of 14 cases from 2008 to 2010, and 9 cases from 2010 to 2012.

680 Öhrström, *supra* note 45; Jung, *SCC Practice*, *supra* note 671; Helena Jung, *The Standard of Independence and Impartiality for Arbitrators in International Arbitration. A Comparative Study Between the Standards of the SCC, the ICC, the LCIA and the AAA* (2008), *available at* http://sccinstitute.com/media/61993/the_standard_of_independence_helena_jung-1.pdf [hereinafter Jung, *Comparative Study*]; Lindström, *supra* note 658; Schöldström, *supra* note 671; Magnusson and Larsson, *supra* note 601; Mutis Tellez, *supra* note 604.

681 Öhrström, *supra* note 45, at 35; Jung, *SCC Practice*, *supra* note 671, at 1. Challenges were based on such grounds in 20 reported cases.

or an entity related to it. This was held to create an appearance of bias in favor of the appointing party, and the arbitrator was disqualified:

- The arbitrator's partners had given legal advice in unrelated matters to his appointing party "from time to time."[682]
- The arbitrator's co-worker represented the appointing party's parent company in a different, unrelated dispute.[683]
- The chairman's law firm had received three unrelated assignments from one of the parties in the same year.[684]
- The arbitrator's law firm had previously dealt with his appointing party on five unrelated occasions. In one of these instances, at a time when events relevant in the arbitration occurred, the arbitrator personally advised the appointing party's majority shareholder on the acquisition of a majority of the shares in the appointing party, together with the firm who represented the appointing party in the arbitration.[685]
- The arbitrator's law firm had previously advised the appointing party and its major shareholder, although it was argued that those contacts were of a limited scope and commercially insignificant.[686]
- The arbitrator's law firm had represented his appointing party in a closely-connected dispute until six months earlier.[687]
- The arbitrator had previously represented his appointing party (Claimant) in a proceeding before a national court and acted as counsel in an unrelated ongoing proceeding, in which the counter-party was represented by counsel for Respondent.[688]
- The arbitrator had provided services to his appointing party on a day-to-day basis during the past four years, and who was a long-time friend and professional colleague of the company's managing director.[689]

Where the arbitrator had ceased to work for the law firm representing his appointing party, no appearance of bias was found:

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682 Öhrström, *supra* note 45, at 41–42 (Arbitration 60/1999). The challenging party argued that the arbitrator was conflicted, since the firm's partners shared a common interest.

683 Öhrström, *supra* note 45, at 49 (Arbitration 60/2001).

684 Jung, *SCC Practice*, *supra* note 671, at 6 (Arbitration 53/2005).

685 Lindström, *supra* note 658, at 16–19 (Arbitration 68/2010).

686 Mutis Tellez, *supra* note 604, at 11 (Arbitration 170/2011).

687 *Id.* at 11–12 (Arbitration 174/2011).

688 *Id.* at 12–13 (Arbitration 177/2011).

689 *Id.* at 14–15 (Arbitration 78/2012).

– The arbitrator had worked in the law firm representing his appointing party for twelve years, up to seven years before the commencement of the arbitration.[690]
– The arbitrator had been a partner in the firm representing his appointing party for four years. At that time, however, the counsel involved in the arbitration was not yet working for the firm, and the arbitrator never met him.[691]

In the following situations, prior contacts were held to create an appearance of bias against one of the parties, and the arbitrator was disqualified:

– The arbitrator's law firm was currently and had in the past been involved in cases for and against the challenging party and one of its subsidiaries.[692]
– The arbitrator had issued a legal opinion in an ongoing arbitration between the challenging party and one of its group companies, on behalf of the latter.[693]
– In two unrelated litigation proceedings, in which the arbitrator was sued, counsel for Claimant represented the Claimants.[694]

Animosity between an arbitrator and a counsel in the arbitration based on their confrontation in another proceeding was held not to be a sufficient ground for disqualification in the following constellations:

– The chairman was concurrently involved in a court case, representing the defendant, while one of the counsel in the arbitration represented the plaintiff. In the court case, the chairman raised allegations of unethical behavior against the counsel.[695]
– The arbitrator had previously served as a counsel in a proceeding where the chairman's spouse represented the counterparty, and had strongly criticized her, causing strong conflict and antagonism.[696]

690 Jung, *SCC Practice*, *supra* note 671, at 9–11 (Arbitration 2/2006).
691 *Id. supra* note 671, at 9–11 (Arbitration 2/2006).
692 Mutis Tellez, *supra* note 604, at 9–10 (Arbitration 124/2011).
693 Jung, *SCC Practice*, *supra* note 671, at 14 (Arbitration 46/2007). The line of arguments of the party contesting the challenge was very similar to that of decision-makers in ICSID challenge proceedings: It claimed that the challenge was not based on "actual or specific circumstances" but on an insufficient, "abstract or theoretical bias based on principles".
694 Lindström, *supra* note 658, at 19–20 (Arbitration 58/2008).
695 Magnusson and Larsson, *supra* note 601, at 74–75 (Arbitration 14/2004).
696 Lindström, *supra* note 658, at 9–10 (Arbitration 1/2010).

Furthermore, prior contacts were held not to cause justifiable doubts as to the arbitrators' independence and impartiality in the following cases, and the challenges were dismissed:

- The arbitrator's cousin was a board member of the appointing party's parent company.[697]
- A former lawyer in the firm that was representing the arbitrator's appointing party had represented the arbitrator in a dispute relating to arbitrator's fees, but left the firm in the meantime.[698]
- The arbitrator's company had repeatedly performed services for his appointing party.[699]
- The chairman had worked with a decisive witness before: he had served as an arbitrator in four disputes in which the witness was called as an expert.[700]
- The arbitrator had previously advised the firm of the witness called by his appointing party on internal matters.[701]

Arbitrators were challenged based on repeat appointments in three reported cases. An arbitrator who was appointed by the same law firm in eight cases within two years, and by the same corporate group in six cases was disqualified. His appointments by the law firm made up for a significant part of his caseload.[702] In another case, the arbitrator was appointed by the same party "on several prior occasions," and was the chairman (as well as a member of the

697 Öhrström, *supra* note 45, at 47–48 (Arbitration 87/2000). The SCC Board's dismissal is surprising, since SAA Section 8 requires the disqualification of an arbitrator if a person "closely associated" to them is a director or otherwise represents an entity which might derive a benefit or a detriment from the outcome of the proceeding. It appears that cousins are not considered to be such "closely associated" persons.

698 Magnusson and Larsson, *supra* note 601, at 66–68 (Arbitration 72/2003).

699 Jung, *SCC Practice*, *supra* note 671, at 12 (Arbitration 19/2006).

700 Lindström, *supra* note 658, at 7–9 (Arbitration 137/2008).

701 *Id.* at 7–9 (Arbitration 137/2008).

702 Magnusson and Larsson, *supra* note 601, at 71 (Arbitration 14/2004). Out of 21 appointments between 2002 and 2004, 7 cases were still ongoing at the time of the proceeding, and in 5 of the arbitrations, the arbitrator was appointed by the same law firm. The challenging party stressed the relevance of appearances, stating that: "The ability or intention to decide the matter in an impartial manner … is of no relevance if … justifiable doubts as to the arbitrator's impartiality and independence are present." It did not seem to matter that a different lawyer had made each individual appointment because of the arbitrator's legal specialization, and that the arbitrator was unaware of the corporate affiliation of his appointing parties.

ethical board) of an industrial association which two companies controlled by the appointing party belonged to. He was also disqualified.[703] In an investment arbitration between a British investor and Russia, the challenge of the Claimant-appointed arbitrator, who had served in unrelated arbitrations against Russia on two prior occasions, was dismissed.[704]

B Familiarity with the Subject-Matter of the Proceeding

Challenges based on the familiarity of an arbitrator with the subject-matter of the proceeding appear to be rarer, or are at least not reported as extensively. They were upheld in three cases in which the arbitrator's law firm dealt with one of the parties as well as the subject-matter of the proceeding. In the first case, the law firm which the chairman previously worked for had drafted the contract in dispute while he was working there.[705] In the second case, the arbitrator's law firm had advised the appointing party on similar issues, possibly even on how to handle the current dispute.[706] In the third case, the arbitrator owned a company which had competed with the appointing party for the contract in dispute, but was turned down by the challenging party. After the alleged breach of the contract in dispute, the arbitrator and his company were contacted by the challenging party to obtain a proposal for the remediation of the alleged defects. Their offer was again rejected. Not only the prior involvement but also the knowledge of commercial and technical details at issue were claimed to undermine the arbitrator's independence and impartiality.[707]

Another challenge based on the arbitrator's familiarity with the subject-matter in dispute was dismissed: The arbitrator had previously adjudicated cases which were allegedly related to the arbitration at issue, and the knowledge acquired in those matters was argued to put the challenging party at a disadvantage.[708] The scarce information available, however, neither elucidates

703 Lindström, *supra* note 658, at 14–16 (Arbitration 18/2009).

704 Öhrström, *supra* note 45, at 42–46 (Arbitration 10/2000). Russia further argued that the first arbitration, which had led to a substantial award in damages, was decisive for the current proceeding, in which Russia's financial condition was at issue.

705 Jung, *Comparative Study*, *supra* note 680, at 19. Furthermore, the chairman and counsel for Respondent previously worked at the same law firm and were involved in an unrelated arbitration in the same roles.

706 Mutis Tellez, *supra* note 604, at 13–14 (Arbitration 81/2012). It did not matter that advice rendered to the appointing party did not generate considerable income, and that the arbitrator was not personally involved.

707 *Id.* at 6–8 (Arbitration 190/2010).

708 Magnusson and Larsson, *supra* note 601, at 68–70 (Arbitration 148/2003).

whether the proceedings were indeed related to similar issues, nor does it explain why the challenge was dismissed.

2.4 *The ICC Arbitration Rules*

The current Arbitration Rules of the International Chamber of Commerce (ICC)[709] came into force on January 1, 2012, and apply to all ICC arbitrations which commenced on or after that date. Their precursor dated from January 1, 1998.[710] Currently, only six investment arbitration disputes are known to have been brought under the ICC Arbitration Rules.[711] ICC arbitrations are, however, by default confidential[712] – it is therefore possible that a larger number of investment disputes have been resolved under the auspices of the ICC.

Under the ICC Arbitration Rules, the ICC Court is competent to ensure arbitrators' independence and impartiality.[713] Despite its name, it is not an actual judicial body, but the organ that administers ICC arbitrations. It is, among other things, responsible for the confirmation of party-appointed arbitrators, and the scrutiny and approval of awards rendered under the ICC Arbitration Rules.[714] The members of the ICC Court are elected by the ICC World Council, with the involvement of the National Committees or Groups, as well as the ICC Executive Board.[715] Accordingly, they inevitably have strong ties to the members of such National Committees or Groups – i.e. to their domestic arbitration communities. They are however required to be independent from them in their function as members of the ICC Court.[716] Furthermore, when they serve as ICC arbitrators, they but must be absent from all related discussions and decisions of the ICC Court.[717]

The ICC Arbitration Rules provide for arbitrators' independence and impartiality to be examined in two steps: First, at the appointment stage, and second,

709 Rules of Arbitration of the International Chamber of Commerce [hereinafter ICC Arbitration Rules].

710 Hereinafter ICC Arbitration Rules (1998). The provisions on arbitrators' independence and impartiality of the ICC Arbitration Rules (1998) might still be relevant in ongoing proceedings which were commenced prior to January 1, 2012, or where the parties have agreed on their application.

711 *See* UNCTAD, *ISDS Report, supra* note 584, at 9. *See also* List of Cases brought under the UNCITRAL Arbitration Rules, UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution.

712 *See* ICC Arbitration Rules art. 22, para. 3.

713 ICC Arbitration Rules art. 14, para. 3.

714 ICC Arbitration Rules art. 1, para. 2 and art. 13, para. 1 and 2.

715 Appendix I to the ICC Arbitration Rules art. 3.

716 Appendix II to the ICC Arbitration Rules art. 3, para. 1.

717 Appendix II to the ICC Arbitration Rules art. 2, para. 4.

if a party challenges an arbitrator. Unlike arbitrators in disputes subject to the ICSID Convention or the SCC Arbitration Rules, arbitrators in ICC arbitrations require the institution's confirmation of the parties' nomination. In this confirmation process, the ICC Court or the Secretary General[718] make a first assessment of the nominees' neutrality. In doing so, they take the parties' objections to the nomination into consideration.[719] Arbitrators who are confirmed by the institution can still be challenged by the parties. Such disqualification requests are dealt with by the ICC Court. In practice, the ICC Court appoints one of its members to prepare a report on the challenge, and then decides en banc.[720]

The independence and impartiality of arbitrators is governed by Article 11 para. 1 ICC Arbitration Rules:

> Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.[721]

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718 The Secretary General is competent to confirm arbitrators who have submitted unqualified statements of acceptance (i.e. who attested that they had no potential conflicts of interest to disclose) and arbitrators to whose nomination the parties did not object (in the absence of or despite disclosures of potential conflicts of interest). The ICC Court decides on the confirmation of arbitrators to whose nomination a party has objected or whom the Secretary General decides not to confirm. *See* ICC Arbitration Rules art. 13, para. 1 and 2.

719 Jung, *Comparative Study*, *supra* note 680, at 21. Where parties fail to appoint an arbitrator, the ICC Court proceeds with the appointment (ICC Arbitration Rules art. 12, para. 4), usually upon the proposal of an ICC National Committee (ICC Arbitration Rules art. 13, para. 3 and 4). In this case, the Court will normally ensure the arbitrator's absolute independence and therefore not accept a qualified Statement of Independence. Accordingly, the parties are not given the opportunity to submit objections prior to the arbitrator's appointment. However, they may still challenge the arbitrator once she or he has been appointed. *See* Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, *in* ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, 2007 SPECIAL SUPPLEMENT, INDEPENDENCE OF ARBITRATORS 7, 12 (2008).

720 MICHAEL W. BÜHLER & THOMAS H. WEBSTER, HANDBOOK OF ICC ARBITRATION ¶ 11–31 (1st ed. 2005).

721 ICC Arbitration Rules (1998) art. 7, para. 1 contained the same wording, but without any reference to impartiality. Apparently, the lack of a satisfactory definition of impartiality was one of the reasons for omitting the requirement. *See* Sheppard, *supra* note 32, at 134 & n.19; SCHWARTZ AND DERAINS, *supra* note 87, at 117. Arbitrators could, however, be challenged "for an alleged lack of independence or otherwise" (ICC Arbitration Rules (1998) art. 11, para. 1), and the requirement of impartiality was de facto subsumed under "otherwise" (*see* Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 15; BLACKABY ET AL., *supra* note 90, ¶ 4.78; JACOB GRIERSON & ANNET VAN HOOFT, ARBITRATING UNDER THE 2012 ICC RULES 18 (2012); Andreas Reiner & Christian Aschauer, *Commentary Article 11*, *in* INSTITUTIONAL ARBITRATION, 205 (Rolf A. Schütze

According to the ICC Court's practice, the requirement of independence and impartiality is mandatory. It is even upheld where the parties have agreed on the appointment of non-independent arbitrators.[722]

The threshold for a successful disqualification request is not specified in the ICC Arbitration Rules. It cannot be derived from Article 11 para. 2 ICC Arbitration Rules, which establishes a reasonable doubts standard for disclosure obligations only.[723] Scholars have stressed that in contrast to the subjective perspective from which disclosure obligations are to be examined, the vantage point for the evaluation of disqualification requests is an objective one.[724] This does not, however, determine the threshold for a disqualification: Does the challenging party have to prove that the arbitrator is biased, or merely that she or he appears biased? Are justifiable doubts regarding the arbitrator's independence and impartiality sufficient for a challenge to succeed or does the challenging party carry the full burden of proof for the decision-maker's actual lack of independence and impartiality? According to Whitesell, there is no unequivocal answer to those questions:

> The Court does not apply a single standard to all cases, but rather decides the questions in each case on their own merits.[725]

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ed., 2013) [hereinafter Reiner and Aschauer, *Art. 11*]). Under the current ICC Arbitration Rules, a challenge is possible based on "an alleged lack of impartiality or independence, or otherwise" (ICC Arbitration Rules art. 14, para. 1).

722 Whitesell, *supra* note 719, at 14; SCHWARTZ AND DERAINS, *supra* note 87, at 142.

723 *See also* ICC Arbitrator Statement of Acceptance, Availability And Independence (2012 ICC Arbitration Rules), *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Practice-notes,-forms,-checklists/ (last accessed on Dec. 30, 2016) (putting the general requirement of disclosing "any facts or circumstances which might … call into question the arbitrator's independence … [or] give rise to reasonable doubts as to the arbitrator's impartiality" into more concrete terms by requiring the disclosure of "any past or present relationship, direct or indirect, whether financial, professional or ofany other kind, between you and any of the parties, their lawyers or other representatives, or related entities and individuals" and by expressly stating that "[a]ny doubt must be resolved in favor of disclosure").

724 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 15; Whitesell, *supra* note 719, at 11; SCHWARTZ AND DERAINS, *supra* note 87, at 122. *But see* Jason Fry & Simon Greenberg, *The new ICC Rules on Arbitration: How Have They Fared After the First 18 Months?*, 16 INT'L. ARB. L. REV. 171, 176 (2013) (applying a subjective test to disclosures relating to independence only, and an objective test to disclosures regarding impartiality).

725 Whitesell, *supra* note 719, at 7. *Contra* SCHWARTZ AND DERAINS, *supra* note 87, at 121–122 (arguing that at the confirmation stage, a "reasonable doubts" standard is applied, while at the challenge stage, an arbitrator must appear likely not to be independent to be disqualified).

The consideration of the idiosyncrasies of every specific case is undoubtedly an important element of individual fairness, and attention to such specificities is particularly important in a dispute settlement system as strongly built on party autonomy as arbitration. Nevertheless, if there truly is no abstract standard – a metric to measure the specific circumstances of a case by – this might seriously impede the predictability and the uniformity of the ICC case law on arbitrator challenges.[726]

The IBA Guidelines are not binding on the ICC Court, which has repeatedly highlighted the "fundamental incompatibility" between the ICC Arbitration Rules and the IBA Guidelines. Since the ICC Arbitration Rules provide for a subjective test of which circumstances should be disclosed, there is no room left for the IBA Guidelines' Green List, according to which certain situations never require disclosure.[727] Nevertheless, the IBA Guidelines are usually mentioned by the ICC Secretariat, in its briefing of the ICC Court on challenges. They appear to be a persuasive authority for the interpretation of the disqualification standard under the ICC Arbitration Rules,[728] and might enhance the predictability and uniformity of challenge decisions.[729] They further assist prospective arbitrators in deciding whether to disclose potential obstacles to their independence or impartiality.[730]

Other than the IBA Guidelines, specific standards for arbitrator challenges in the law and practice at the place of the arbitration and at the probable place of enforcement are determinative.[731]

In contrast to the ICSID system, the number of challenges in ICC proceedings has not significantly increased over time.[732] Whitesell argues that this circumstance bears witness to the effectiveness of the ICC Court's review of

726 *See also* MONTT, *supra* note 26, at 150 (criticizing, in the context of investment arbitration, the common emphasis on a case-by-case aproach: "It is a truism that all cases need must [sic] be decided individually, on their own terms, and in light of all relevant circumstances. So, when tribunals state and highlight these propositions … it may mean something else. Many times, what is really being said is that the tribunal will reach its decision according to its own sense of justice and fairness.").

727 Jung, *Comparative Study*, *supra* note 680, at 20. Whitesell, *supra* note 719, at 36.

728 DAELE, *supra* note 51, ¶ 5–046; IBA Conflict of Interests Subcommittee, *supra* note 672, at 28–29. *Contra* Whitesell, *supra* note 719, at 36.

729 *Contra* Whitesell, *supra* note 719, at 37 (arguing that the IBA Guidelines fail to cover many of the alleged conflicts of interest arising in the ICC practice).

730 GRIERSON AND VAN HOOFT, *supra* note 721, at 132.

731 BÜHLER AND WEBSTER, *supra* note 720, ¶¶ 11–17 (1st ed. 2005).

732 Andreas Reiner & Christian Aschauer, *Commentary Article 14*, *in* INSTITUTIONAL ARBITRATION, 314 (Rolf A. Schütze ed., 2013).

independence and impartiality during the confirmation process.[733] Indeed, objections to an arbitrator's confirmation seem to carry a lot of weight: In the past, at least, they led to a denial of the confirmation in a majority of cases.[734]

This Part will summarize some of the known disqualification decisions, in an attempt to derive a common challenge standard from the case law. Since the ICC Court's disqualification decisions were neither published nor reasoned[735] until recently,[736] it is difficult to establish a representative interpretation of the ICC Arbitration Rules' challenge standard based on the outcome of individual reported disqualification proceedings.[737] This study will nevertheless attempt to provide some useful insight.

A Familiarity with Another Participant in the Proceeding

As in other arbitration mechanisms, previous contacts between an arbitrator or his firm on one side, and a party or their counsel on the other side, are frequent grounds for objections to arbitrators' confirmations and for disqualification requests under the ICC Arbitration Rules. Throughout this category, however, the degree of proximity between the challenged arbitrator and the respective party varies widely, and with it the likelihood of the objection's or the challenge's success.

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733 Whitesell, *supra* note 719, at 26–27.

734 SCHWARTZ AND DERAINS, *supra* note 87, at 136.

735 *See* ICC Arbitration Rules (1998) art. 7, para. 4 and ICC Arbitration Rules art. 6. The ICC has justified the absence of a reasoning of the Court's challenge decisions with the specific circumstances under which decisions are made: Disqualification requests are considered at plenary sessions, by 35 to 45 members from various countries, who almost always reach a consensus, but may have different reasons for the same conclusion. It was argued that it would be impractical to require them to agree on a uniform substantiation of the decision, and that unreasoned challenge decisions are a necessary trade-off for the geographically and culturally broad basis of challenge decisions which lends the ICC Court its democratic legitimacy. *See* Whitesell, *supra* note 719, at 39. *But see* SCHWARTZ AND DERAINS, *supra* note 87, at 139 (arguing that the decisions are mainly unreasoned "to avoid causing possible embarrassment or offense to the arbitrators concerned."). It is indeed questionable why such important decisions are made by such a large and unaccountable body, which is rumored to be susceptible to improper "lobbying" when deciding on challenges. *See* ROGERS, ETHICS, *supra* note 98, ¶ 2.70.

736 On 21 September 2015, the President of the ICC Court (Alexis Mourre) communicated that the ICC Court will forthwith provide information on administrative decisions taken by the institution to the parties (but not publish the decisions). This includes challenge decisions pursuant to ICC Arbitration Rules art. 14. *See* Grant Hanessian et al., Reasons for Administrative Decisions, *supra* note 580.

737 *See* BÜHLER AND WEBSTER, *supra* note 720, ¶ 11–32; Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 16.

In the following instances, the challenged arbitrator or another attorney in their law firm had an attorney-client relationship with the arbitrator's appointing party or an entity related to it. The confirmation was denied or the arbitrator disqualified:

- The arbitrator was "of counsel" of the law firm representing his appointing party.[738]
- The arbitrator worked as a consultant and counsel for the law firm representing his appointing party.[739]
- The arbitrator previously served as a counsel to his appointing party in unrelated matters.[740]
- The arbitrator's law firm represented one of the parties in court proceedings which were terminated at the time of the challenge.[741]
- A foreign office of the arbitrator's law firm advised his appointing party on an unrelated transaction.[742]

In two cases in which no objection against the arbitrator's confirmation was raised,[743] the attorney-client relationship between an arbitrator's law firm and a party did not lead to a disqualification:

- Several offices of the arbitrator's law firm had ongoing attorney-client relationships (regarding unrelated matters) with one of the parties.[744]
- The chairman's law firm was concurrently advising one of the Respondents on a litigation proceeding involving a subsidiary of one of the Claimants.[745]

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738 Whitesell, *supra* note 719, at 21 (case 4). The arbitrator had failed to disclose this fact, but his phone number and address were identical to those of counsel for his appointing party.

739 *Id.* at 29 (case 8). For the summary of a case in which the chairman was of counsel at a law firm which advised several companies which were affiliated with one of the arbitration parties, and the ensuing annulment of the partial award rendered by the chairman, *see* Reiner and Aschauer, *Art. 11*, *supra* note 721, at 211.

740 Whitesell, *supra* note 719, at 23 (case 3).

741 Reiner and Aschauer, *Art. 11*, *supra* note 721, at 210.

742 Whitesell, *supra* note 719, at 21 (case 4), 23 (case 3), and 29 (case 8).

743 The lack of objections to the arbitrators' appointments comes as a surprise in these cases. Usually, disclosures which raise important questions with regard to arbitrators' independence and impartiality lead to follow-up questions, at least. *See* Whitesell, *supra* note 719, at 17.

744 Jung, *Comparative Study*, *supra* note 680, at 23 (case 1). The arbitrator was not personally involved and the work did not involve significant amounts of money.

745 Whitesell, *supra* note 719, at 17 (case 3). Furthermore, the chairman had recently acted as an arbitrator in a proceeding involving one of the Claimants. It is unclear who had appointed him.

Arbitrators were further disqualified based on contacts with a party or their counsel in the following cases:

- The arbitrator was a director of a company which was represented by the counsel of his appointing party in an unrelated proceeding.[746]
- The arbitrator's spouse was a partner in the law firm that had nominated him.[747]
- The arbitrator was a former employee of a direct and an indirect subsidiary of a party. He had worked in the companies' legal departments for a total of ten years, and his employment had only ended one year prior to his nomination.[748]
- The arbitrator was a partner at a law firm which was in an alliance with the law firm representing one of the parties.[749]
- The arbitrator was the acting director of the biggest shareholder of another company, which was in turn the Respondent's largest shareholder.[750]

Whether an appearance of bias against an arbitration party can arise from the representation of its counterparty in another proceeding appears not to be settled. In one reported case, a chairman was disqualified because a foreign office of his law firm was involved in an unrelated lawsuit against a parent company of one of the parties.[751] In another case, an arbitrator's law firm had represented a third party in an unrelated proceeding against a subsidiary of an arbitration party five years earlier. In this case, the challenge was dismissed.[752] The different outcomes of the disqualification requests are surprising, since the circumstances of the cases were very similar. Without a more detailed knowledge of the cases, it is impossible to explain the different outcomes of the challenges

746 Reiner and Aschauer, *Art. 11*, *supra* note 721, at 210.

747 *Id.* at 210.

748 Jung, *Comparative Study*, *supra* note 680, at 25 (case 2).

749 Reiner and Aschauer, *Art. 11*, *supra* note 721, at 210. The law firms were legally and financially independent. Their alliance meant that they shared office space in some of their locations and organized common seminars and workshops.

750 Whitesell, *supra* note 719, at 21 (case 1).

751 Jung, *Comparative Study*, *supra* note 680, at 26 (case 5). According to Reiner and Aschauer, the geographic dispersal of large law firms should not serve as a mitigating factor in the assessment of potential conflicts of interest, since all offices of such firms are usually subject to a uniform strategy and under the same management (Reiner and Aschauer, *Art. 11*, *supra* note 721, at 213).

752 Jung, *Comparative Study*, *supra* note 680, at 24–25 (case 6).

and to derive a reliable rule on how to assess such cases. One could surmise that it made a difference in the assessment of the cases how long ago the previous proceeding took place, or what the roles of the specific arbitrators were.

Whether the familiarity of an arbitrator with a counsel through membership in the same British Chambers leads to disqualification seems to depend on the geographical setting. In one ICC challenge, the arbitrator was a member in the same British Chambers (Blackstone Chambers) as counsel for her appointing party.[753] The place of arbitration was Vienna, where the British concept of barristers, solicitors and Chambers is foreign. This gave rise to a more critical and cautious evaluation of the arbitrator's impartiality and independence.[754] As a consequence, the ICC Court held that although barristers are formally self-employed and Chambers do not have a collective legal identity, in practice, they are conceived as a "club." In another case, in which the arbitrator also belonged to the same British Chambers as counsel, but London was the place of arbitration, and counsel for both parties (but not the parties themselves) were from London, the challenge was dismissed.[755]

To date, all reported challenges of public servants appointed as arbitrators have been dismissed. In one such case, the arbitrator was a former employee of the Ministry of Foreign Affairs of her appointing State, whose employment had terminated ten years earlier. At the time, she had held the same position as the person now representing the State.[756] In another case, the arbitrator was a former minister of his appointing State, whose employment by the State in various positions dated more than twenty years back.[757] Finally, the challenge of an arbitrator whose employment with the government only dated back almost four years was dismissed. He had previously worked for the State's Ministry of Justice and as its Solicitor General (none of which were responsible for the project in dispute). In this role, he had acted as a defense counsel for the government in several ICC arbitrations.[758]

753 ICC Case No. 16553/GZ, summarized in Horvath and Berzero, *supra* note 37, at 10.

754 Horvath and Berzero, *supra* note 37, at 11. The geographic setting also matters in ICSID challenges to counsel, based on such circumstances. *See* Hrvatska Elektroprivreda d.d. v. Republic of Slovenia (*Hrvatska*), ICSID Case No. ARB/05/24, Decision on the Participation of a Counsel (May 06, 2008), ¶ 10 ("[W]hat may not, apparently, be cause for concern in London may well be viewed very differently by a reasonable third person from Africa, Argentina, or Zagreb, Croatia.").

755 ICC Case No. 15860/VRO/MLK, S.P. 26.03.2009, summarized in Horvath and Berzero, *supra* note 37, at 11.

756 Whitesell, *supra* note 719, at 19 (case 6).

757 *Id.* at 18 (case 14).

758 *Id.* at 16 (case 5).

The following forms of previous contacts between an arbitrator or their law firm and a counsel were considered less problematic and objections to the arbitrators' confirmation or challenges were dismissed:

- The arbitrator and counsel for his appointing party acted as co-counsel in two unrelated cases, and co-edited a book on arbitration. The arbitrator further issued legal opinions for a party represented by the counsel in an unrelated non-ICC case.[759]
- The arbitrator had previously issued legal opinions in four matters for parties represented by counsel for his appointing party.[760]
- The arbitrator had issued a legal opinion in an unrelated matter for his appointing party seven years earlier.[761]
- A partner in the chairman's law firm previously represented a party in an unrelated non-ICC arbitration, in which one of the current counsel acted as the chairman.[762]
- The chairman and a co-arbitrator concurrently served in another, unrelated dispute, in reversed roles.[763]
- The arbitrator and counsel for his appointing party were classmates in law school.[764]
- The arbitrator had supervised the doctoral thesis of counsel for his appointing party.[765]
- Five years earlier, the arbitrator gave legal advice to a firm in which one of the counsel worked at the time.[766]

Challenges based on repeat appointments are relatively rare in ICC arbitration, or at least not widely reported. The frequency of repetitive nominations by the same party or through the same law firm, as well as the parties involved in such proceedings, will determine whether an arbitrator is confirmed or

759 *Id.* at 23 (case 2). The arbitrator had also issued legal opinions for parties represented by counsel for the other party in an unrelated case. This circumstance might have made a difference for the Court's decision.

760 *Id.* at 18 (case 10).

761 Jung, *Comparative Study*, *supra* note 680, at 24 (case 4).

762 *Id.* at 24 (case 5).

763 Whitesell, *supra* note 719, at 32 (case 11).

764 *Id.* at 19 (case 4).

765 *Id.* at 31 (case 4).

766 Jung, *Comparative Study*, *supra* note 680, at 23 (case 3).

disqualified.[767] In the following constellations, arbitrators were not confirmed or they were disqualified:

- The arbitrator concurrently served as an arbitrator in a parallel proceeding, which was not directly linked to the arbitration at issue and did not involve the arbitrator's nominating party (Claimant). The appointing party in the parallel proceeding was however wholly owned by the Claimant in the proceeding where the objection was filed. Furthermore, the two disputes concerned the same facts, parties from the same country, the same type of issues. In both proceedings, the same law firm represented the respective Claimants.[768]
- The arbitrator was nominated by the same party in three related ICC cases involving the same counsel.[769]
- In two more instances, the arbitrators were nominated by the same party in parallel or subsequent related proceedings, and the respective counterparties argued that there would be an imbalance in the access to information.[770]

Objections to arbitrators' repeat nominations and challenges have been unsuccessful where the same parties are involved in all proceedings, and on both sides. For example, in a case in which the Claimants nominated the same arbitrator in three ICC proceedings, which involved the same parties and counsel on both sides, and which concerned different provisions of the same agreement, the ICC Court confirmed the arbitrator. Since the involved parties and counsel were identical in all three proceedings, the ICC Court held that there was no risk of an unequal access to information.[771]

B Familiarity with the Subject-Matter of the Proceeding

In general, in cases where – beyond the mere existence of a link between the arbitrator and a party or their counsel – the arbitrator (or a person close to him) has previously dealt with the subject-matter in dispute, the denial of the arbitrator's confirmation or his disqualification are certain. In the following cases, arbitrators were disqualified or not confirmed on such grounds:

767 Reiner and Aschauer, *Art. 11*, *supra* note 721, at 214.

768 Whitesell, *supra* note 719, at 23 (case 5).

769 Jung, *Comparative Study*, *supra* note 680, at 25 (case 1).

770 Whitesell, *supra* note 719, at 22 (cases 7 and 8).

771 *Id.* at 19 (case 7).

– The arbitrator previously rendered legal advice to his appointing party, leading to the very contract at issue in the arbitration.[772]
– The arbitrator's colleague had advised the arbitrator's appointing party on the agreement at the center of the dispute.[773]
– The arbitrator was previously appointed by one of the parties as an expert in a judicial proceeding linked to the arbitration. The expert opinion he rendered was on the subject-matter of the dispute.[774]
– The arbitrator had formerly served as a mediator in the same dispute.[775]

If, however, the arbitrator has only made general statements about the subject-matter, a non-confirmation or disqualification seems unlikely: In a case where the chairman had expressed political views in favor of one of the parties and against the home country of the other, the risk of a prejudgment was denied and the chairman confirmed.[776]

C Connection to an Adverse Third Party

Under the ICC Arbitration Rules, it is unclear under which circumstances an arbitrator's ties to a competitor or to a party that is otherwise opposed to one of the arbitration parties can justify their removal or the denial of their confirmation.

This question arose in *Saudi Cable,*[777] where the chairman of the tribunal was a non-executive director of a major competitor of one of the arbitration parties. His company had been an unsuccessful bidder for the project which was at the core of the arbitration. The ICC Court dismissed the Claimant's challenge for unknown reasons. The Claimant applied to the English High Court for the arbitrator's removal, and failed. The subsequent appeal was equally unsuccessful.[778] The English High Court Justices held that the requirement of independence only calls for "an absence of connection with either of the

772 Reported as "ICC Case – not disclosed" by Horvath and Berzero, *supra* note 37, at 11. *See also* Whitesell, *supra* note 719, at 29 (case 3).

773 Jung, *Comparative Study*, *supra* note 680, at 25 (case 3). The fact that he had drafted the agreement while working for another law firm did not make enough of a difference for the ICC Court to confirm his nomination.

774 Whitesell, *supra* note 719, at 28 (case 1).

775 Reiner and Aschauer, *Art. 11*, *supra* note 721, at 210.

776 Whitesell, *supra* note 719, at 32 (case 9).

777 AT&T Corporation and Lucent Technologies, Inc. v. Saudi Cable Company, ICC Case No. 8540.

778 AT&T Corp. and another v. Saudi Cable Co. (Woolf, LJ, May 15, 2000) [2000] All ER (Comm) 201.

parties in the sense of an absence of interest in, or of any present or prospective business or other connection with, one of the parties, which might lead the arbitrator to favor the party concerned."[779]

2.5 *Contextualization and Conclusion*

The above analysis of the three most important sets of commercial arbitration rules has shown that the abstract threshold for the disqualification of an arbitrator and its concrete application in certain constellations considerably depart from the ICSID case law.[780]

The disqualification of an arbitrator under any of the examined commercial arbitration rules requires justifiable or reasonable doubts about the arbitrator's independence or impartiality.[781] No proof of an arbitrator's actual dependence or bias is required. Whether justifiable doubts arise in the specific circumstances of a case is examined from the vantage point of an objective third person under all of the covered arbitration rules.

The importance of an objective assessment has repeatedly been highlighted in past UNCITRAL disqualification decisions: Appointing authorities have stressed that they did not personally doubt the relevant arbitrator's independence or impartiality, but that this was not what mattered. Instead, what was decisive was whether the specific circumstances could create a reasonable perception of a lack of impartiality or independence. Appointing authorities deciding challenges under the UNCITRAL Arbitration Rules have also explicitly stated that a disqualification for prudential concerns may be warranted in certain cases, in order to protect the system's perceived legitimacy.[782]

The following spreadsheet provides an overview of the examined challenge decisions and visualizes the contrasting outcomes in investment and commercial arbitration. The case names of upheld challenges are *underlined and in italics*. Unnamed challenge decisions are marked ◦ for dismissed and • for upheld. Challenges marked with "R" (resignation) and "UT" (untimely) were not decided on the merits.

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779 *Id.*, referenced in SCHWARTZ AND DERAINS, *supra* note 87, at 132.

780 *Contra* Reinisch and Knahr, *supra* note 24, at 121 ("[A]lthough the applicable standards … differ markedly, in practice there seems to be a growing convergence. This is true even with regard to the different standards of assessing conflict of interest.").

781 The ICC Arbitration Rules do not clearly spell out the threshold applicable to arbitrator challenges. The reported disqualification decisions made under the ICC Arbitration Rules, however, are in line with decisions under the UNCITRAL and SCC Arbitration Rules, which explicitly stipulate a justifiable doubts threshold.

782 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 9. *See, e.g.*, *Vito Gallo*, ¶¶ 18 and 33.

FIGURE 2 *Outcomes of examined challenge decisions under the ICSID convention and commercial arbitration rules*

Basis for Challenge			ICSID (Dismissed)
Familiarity with a Participant	**Contact with a Party**	**attorney-client relationship** (between arbitrator or his firm and party or related entity)	Amco Asia Vivendi Lemire
		representation of counterparty in previous or parallel proceeding	
		issuance of legal opinion for counterparty in parallel proceeding	
		counsel was adverse to the arbitrator in a proceeding against them personally	
		merely occasional contacts	Zhinvali
		prior familiarity with a witness	
		previous public servant role	Generation Ukraine
		former employee of subsidiary of a party	
		director of indirect controlling shareholder of party	
	Contact with a Counsel or Law Firm Representing a Party	**affiliation of law firms** (of arbitrator and counsel)	Amco Asia
		previous collaboration (of arbitrator and counsel or law firm)	Universal Compression (Tawil) Nations Energy Repsol (Wobeser)

ICSID (Upheld)	UNCITRAL	SCC	ICC
Blue Bank		*60/1999* *53/2005* *68/2010* *170/2011* *174/2011* *177/2011* *78/2012*	• • • • • ◦ (no objection) ◦ (no objection) ◦
	Grand River (cease either role) *ICS*	*124/2011*	• ◦
		46/2007	◦
		58/2008	
		137/2008	
			◦ ◦ ◦
			•
			•
			•
Vannessa Ventures (R)	115/2010		◦

FIGURE 2 *Outcomes of examined challenge decisions under the ICSID convention* (cont.)

Basis for Challenge		ICSID (Dismissed)
	confrontation in previous proceeding	
	membership in same British Chambers	
	shared educational history	Alpha Projektholding
	arbitrator's company represented by same counsel in unrelated proceeding	
	arbitrator's spouse is a partner in law firm which nominated the arbitrator	
	issuance of legal opinions for parties represented by one of the counsels	
	former supervisor of the doctoral thesis of a counsel	
	legal advice / counsel services to clients of a law firm now representing a party	Total
Role Switching		SGS Azurix Siemens
Repeat Appointment	**against a party**	PIP Repsol (Vicuña, Wobeser) Suez I
	by a party	Tidewater Universal Compression (Stern) OPIC Ickale Saba Fakes Electrabel

ICSID (Upheld)	UNCITRAL	SCC	ICC
		14/2004 1/2010	
			ICC Case No. 16553 ICC Case No. 15860
			◦
			•
			•
			◦
			◦
			◦
	National Grid		◦
	National Grid	10/2000	
Caratube	*EnCana* (no challenge)	*14/2004* *18/2009*	• (nominating party in parallel proceeding wholly owned by appointing party in arbitration) • • • ◦ (involved parties and counsel identical in all proceedings)

FIGURE 2 *Outcomes of examined challenge decisions under the ICSID convention* (cont.)

Basis for Challenge		ICSID (Dismissed)
	by a law firm / counsel	Tidewater Universal Compression (Stern) OPIC Ickale Burlington (UT) Rusoro Caratube
Familiarity with Subject-Matter	**as an arbitrator**	
	faced with same issues as a counsel	
	public servant role	Saint-Gobain
	academic publications	Urbaser
	public speech	
	arbitrator or his law firm dealt with subject-matter of specific dispute	
	arbitrator or his law firm dealt with subject-matter of a related dispute	
	law clerk discussed legal questions online	
Connection to Adverse Third Party	**decision could impact parallel proceeding, in which arbitrator is a counsel**	
	decision could impact parallel proceeding, in which related counsel is adverse to party	Saint-Gobain Cemex (UT)

ICSID (Upheld)	UNCITRAL	SCC	ICC
		14/2004	
	CC/Devas (Lalonde, *Vicuña*)		
	Telekom Malaysia (resign as a counsel)		
	Canfor (advice to resign)		◦
		• *81/2012* *190/2010*	• • • •
		148/2003	
Tanzania Electric (R)			
S&T Oil (R)			
	Eureko		

FIGURE 2 *Outcomes of examined challenge decisions under the ICSID convention* (cont.)

Basis for Challenge		**ICSID (Dismissed)**
	relationship with firm adverse to a party	ConocoPhillips I Favianca (Mourre, R) Favianca (Fortier, UT) ConocoPhillips III ConocoPhillips IV ConocoPhillips V Favianca II ConocoPhillips VI Favianca III
	brother serves as arbitrator in parallel proceeding	Getma
	relationship with third party which is potentially interested in outcome of proceeding	EDF Suez I
	simultaneous advice to potential third party participant	
	director of major competitor of a party	

Both under the SCC Arbitration Rules and under the ICC Arbitration Rules, contacts between a party and an arbitrator (or someone in the arbitrator's firm) are viewed more critically than under the ICSID Convention and Rules: Under the SCC Arbitration Rules, practically all (reported) challenges based on such contacts have been upheld, even where these acquaintances were only superficial, infrequent or commercially insignificant, and even if the involvement in an unrelated and/or dissimilar case was at stake.[783] This practice is considerably stricter than ICSID case law; so much that it raises the question where the *de minimis* threshold for a disqualification due to previous contacts lies:

> [I]f a lawyer is to be considered disqualified as soon as the law firm where he or she practices has had any instructions from one of the parties, in

783 *See*, for example, Arbitration 60/1999.

ICSID (Upheld)	UNCITRAL	SCC	ICC
	45/2008 Suez II		
	Vito Gallo (cease either role)		
			Saudi Cable

principle all lawyers at law firms would be barred from acting as arbitrators whenever a big company is party to the dispute.[784]

The case law under the ICC Arbitration Rules appears to be more balanced in this regard. When relationships between an arbitrator's firm and a party are at issue in a challenge, different factors are weighed, and the decision is made on a precautionary basis, to ensure the enforceability of the award. In particular, the ICC Court considers the timing of previous contacts, the proximity of the involved entities to the arbitrator or his law firm, the commercial significance of the relationship, and how closely related the matter was to the proceeding at issue. Even if only one of the criteria weighs in favor of a disqualification (i.e. if the contact was particularly recent), and a majority of the criteria indicate that the connection is innocuous, the challenge is

784 Mutis Tellez, *supra* note 604, at 11 (Arbitration 170/2011).

upheld or the confirmation withheld.[785] This approach is more lenient than that of the SCC Arbitration Rules,[786] yet significantly stricter than the ICSID challenge case law.

Under all examined commercial arbitration rules, arbitrators were generally disqualified if they or their law firm previously had an *attorney-client relationship* with one of the arbitration parties or with an entity related to a party.[787] This stands in contrast to the three ICSID cases in which such a connection was not considered to be a sufficient ground for disqualification.[788]

The two case categories besides attorney-client relationships in which challenges have been raised and dismissed under the ICSID Convention and Arbitration Rules, namely occasional contacts between the arbitrator and a party, and the arbitrator's familiarity with a party due to his or her previous role as a public servant, have not been assessed differently in commercial arbitration.[789]

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785 SCHWARTZ AND DERAINS, *supra* note 87, at 123. The examined case law implies that a previous attorney-client relationship between the arbitrator and one of the parties or their counsel will lead to the arbitrator's disqualification in most cases. A very close personal relationship between an arbitrator and a counsel can also lead to a disqualification. A close working relationship between an arbitrator and a counsel or party, on the other hand, seems less problematic. There are however exceptions to this rule: In a case where the arbitrator was a former employee of a direct and an indirect subsidiary of a party, the ICC Court withheld his confirmation, although no objection was made, because his employment had lasted for a long time and had only just been terminated. *See* Jung, *Comparative Study*, *supra* note 680, at 25 (case 2).

786 *Contra* Jung, *Comparative Study*, *supra* note 680, at 27 (holding that the ICC Arbitration Rules are, in principle, just as strict as the SCC Arbitration Rules).

787 *See* SCC Arbitrations 60/1999, 53/2005, 68/2010, 170/2011, 174/2011, 177/2011, and 78/2012. *See also* Mutis Tellez, *supra* note 604, at 15 (referring to a "[c]onsistent SCC practice of sustaining challenges based on the arbitrator's and/or his/her law firm's previous or current professional involvement with one of the parties."). In at least five reported ICC challenges, arbitrators were disqualified: *See* Whitesell, *supra* note 719, at 21 (case 4), 23 (case 3), and 29 (case 8); Reiner and Aschauer, *Art. 11*, *supra* note 721, at 210; Jung, *Comparative Study*, *supra* note 680, at 26 (case 4).

788 *Amco Asia*, *Vivendi*, and *Lemire*.

789 Under the ICC Arbitration Rules, current employees of the entity involved in the dispute, and civil servants otherwise involved with the subject-matter at issue will usually not be confirmed as arbitrators. Independent civil servants or former government employees, on the other hand, will usually be confirmed. This is in line with the ICSID challenge decision in *Generation Ukraine*. Where the arbitrator is neither a current employee of the involved State entity, nor otherwise involved with the subject-matter at issue, but has another, more indirect connection to the State, the decision is difficult to predict, and will often be influenced by pragmatic considerations, i.e. the ease with which the arbitrator could be substituted for an equally qualified arbitrator without a connection to the government. *See* SCHWARTZ AND DERAINS, *supra* note 87, at 129–130.

Challenges based on an arbitrator's *representation of a counterparty* in a previous or parallel proceeding have led to disqualifications in several UNCITRAL and SCC cases. Under the ICC Arbitration Rules, the issue is not settled yet – to date, only one of two such challenge cases (which were reported) has resulted in the arbitrator's disqualification. So far, no such case has been adjudicated under the ICSID Convention and Arbitration Rules – in *S&T Oil*, the arbitrator voluntarily resigned.[790]

Previous contacts between an arbitrator (*or their law firm*) *and a counsel* are generally held to be unproblematic in commercial arbitration, as in ICSID arbitration. One exception is however worth highlighting: In an ICC case in which the arbitrator's law firm and the law firm representing one of the parties were in an alliance, the arbitrator was disqualified. The firms' sharing of office space in some locations and their organization of common seminars seemed to suffice to raise justifiable doubts about the arbitrator's independence and impartiality. This outcome stands in contrast to the dismissal of the challenge in *Amco Asia*, where the law firms had shared office space and administrative services for about half a year into the arbitration proceedings, and where a long-standing profit-sharing arrangement had been discontinued shortly before the arbitration was initiated.

With the exception of this deviation, the circumstances under which arbitrators have been challenged in the ICSID system have not triggered disqualifications under any of the examined commercial arbitration rules so far. In particular, the previous collaboration of an arbitrator and a counsel, or their shared educational history have not led to disqualifications under any of the examined arbitration rules. Disqualifications have generally only taken place under qualified circumstances, for example where the arbitrator's spouse was a partner in the law firm which had nominated him,[791] and in a case where the arbitrator and counsel for one of the parties belonged to the same British Chambers and the place of arbitration was not London.[792]

Role switching appears to have been invoked as a basis for disqualification requests much more rarely in commercial arbitration than under the ICSID Convention and Arbitration Rules. To date, it has not led to the removal of an arbitrator.

Repeat appointments have most often been invoked as grounds for challenge where the same party repeatedly appointed the same arbitrator (shown in the

790 *See supra* Chapter 2, Part 2.4.

791 Reiner and Aschauer, *Art. 11*, *supra* note 721, at 210.

792 ICC Case No. 16553. In the context of the membership of an arbitrator and a counsel in British Chambers, the particularities of the case and the geographical setting appear to have a pivotal impact on the outcome of an objection or a challenge. *See* SCHWARTZ AND DERAINS, *supra* note 87, at 126–127.

spreadsheet as repeat appointments *by* a party). In contrast to ICSID case law, most of those challenges were upheld under commercial arbitration rules.[793] Under the UNCITRAL Arbitration Rules, a tribunal even broached the issue in the absence of a challenge, and affirmed a risk of an inequality of arms.[794]

Challenges based on repeat appointments *against* a party have generally been dismissed.[795] This is in line with the case law under the ICSID Convention and Rules.

In contrast to the ICSID challenge case law, one disqualification request based on the repeat appointment *by a law firm* was upheld under the SCC Arbitration Rules.[796] Eight appointments by the same law firm within two years, of which five were still ongoing, were held to raise justifiable doubts about the arbitrator's independence and impartiality. This contrasts with the obiter dictum in *Caratube*, where the unchallenged arbitrators held that repeat appointments by the same law firm were not sufficient to infer a manifest lack of independence and impartiality, because they were unavoidable.

Under the ICC Arbitration Rules, repeat appointments have been held not to necessarily erode an arbitrator's independence.[797] If, however, they are made in cases which concern the same particular or even general subject-matter, this might entail a risk of prejudgment, as well as an imbalance of knowledge on the tribunal. Accordingly, the confirmation of arbitrators has in the past been withheld when repeat appointments were made in multiple connected arbitrations, which raised identical issues, but where the parties were not the same.[798]

Looking at challenges based on the *familiarity of an arbitrator with another participant in the proceeding* in general, an important difference between ICSID and UNCITRAL decisions is the degree to which an overlap of the parties, facts and legal issues of the relevant cases is required. Under the ICSID Convention and Arbitration Rules, such challenges are generally dismissed, unless the parties, facts *and* legal issues of the relevant cases overlap to a significant degree. This is not the case under the UNCITRAL Arbitration Rules. In *Grand River*, for example, the indigenous land claim which was simultaneously pending before the Inter-American Commission on Human Rights was entirely

793 *See* SCC Arbitrations 14/2004 and 18/2009 and the ICC challenges reported in Whitesell, *supra* note 719, at 22 (cases 7 and 8), 23 (case 5); Jung, *Comparative Study*, *supra* note 680, at 25 (case 1).

794 *See supra EnCana.*

795 *See National Grid* and SCC Arbitration 10/2000.

796 *See* SCC Arbitration 14/2004.

797 SCHWARTZ AND DERAINS, *supra* note 87, at 127–128.

798 *Id.* at 129.

unrelated to the issues at stake in the UNCITRAL arbitration. In particular, the compliance of the United States with different international instruments was at issue. Nevertheless, the ICSID Secretary-General affirmed the "basic similarity" of the issues and held Professor Anaya's dual roles to be incompatible, highlighting that all proceedings concerned the compliance of the United States with "its international commitments."[799] This "basic similarity" threshold is significantly lower than the virtual identity of cases required in ICSID disqualification proceedings.[800]

Moreover, since a complete overlap of the pertinent facts and legal bases is not required, the difficulty of assessing such an overlap before a case has fully been pleaded does not arise under the UNCITRAL Arbitration Rules. This makes it easier for parties to raise objections and make disqualification requests in a timely manner.

In the category of challenges based on a *familiarity with the subject-matter at issue*, most of the examined SCC and ICC cases concern arbitrators' (or their firms') previous involvement in the specific disputes at hand. In all of these cases, the arbitrators' confirmation was denied, or they were disqualified. To date, no such disqualification requests have been made under the ICSID Convention and Arbitration Rules.

Under the UNCITRAL Arbitration Rules, disqualifications have also occurred where the arbitrator was not previously involved in the specific dispute, but dealt with the same legal questions in another setting – be it as a counsel,[801] as an arbitrator,[802] or in a political function.[803] Although the challenged arbitrators' confrontation with the same legal questions in *Saint-Gobain* and *Urbaser* stemmed from different functions, these cases are comparable to the challenges under the UNCITRAL Arbitration Rules: In each of these constellations, valid concerns were to be weighed against arbitrator independence and impartiality. For example, the specialization of arbitrators (CC/*Devas*) and the interchangeability of their roles as arbitrators and counsel (*Telekom Malaysia*) are said to improve the flow of arbitration proceedings.[804] The doctrinal discourse protected in *Urbaser* is an important motor to the development of international

799 *Grand River*, at 1.

800 *See* Mouawad, *supra* note 252, at 9; Fry and Stampalija, *supra* note 31, at 230.

801 *See Telekom Malaysia I*. Professor Emmanuel Gaillard was conditionally disqualified in this case. He would have been removed, if he had not resigned from his role as a counsel.

802 *See* the disqualification of Professor Francisco Orrego Vicuña in CC/*Devas*.

803 *See Canfor*, where the arbitrator was advised to step down, lest the ICSID Secretary-General uphold the challenge.

804 LUTTRELL, *supra* note 31, at 5.

law; and the involvement of previous public servants, as in *Saint-Gobain*, serves the interest of better understanding the positions of the involved Respondent States. These interests were however differently weighed against the requirement of impartiality in the two systems, leading to different results.

Connections to an adverse third party have been accepted as a basis for a disqualification in two of the examined UNCITRAL cases.[805] In both cases, the arbitrator rendered legal advice in an unrelated matter to a third party which was potentially interested in the outcome of the proceeding. The challenged arbitrator's connection to the adverse third party in *Saudi Cable* was no less close, yet the disqualification request was dismissed, for lack of a direct connection between the arbitrator and one of the parties.[806] Most ICSID challenges in this category were based on relationships to allegedly adverse third parties which were just as intense;[807] nevertheless, all but one were dismissed.

In summary, the ICSID system imposes a heavier burden of proof and a higher challenge threshold than commercial arbitration rules on challenging parties. This still holds true today, despite the use of terminology which implies an alignment of the standards in recent ICSID challenge decisions.

In certain case categories, the available disqualification decisions under commercial arbitration rules are numerous and consistent enough to derive a practicable guidance as to which degree of proximity between an arbitrator and a party is acceptable. In particular, the inadmissibility of attorney-client relationships between an arbitrator or his or her law firm and a party or an entity related to it appears to be settled. The same can be said for repeat appointments by a party (depending, of course, on the number and frequency

805 Technically, the arbitrator in *Vito Gallo* was not disqualified, but was given the choice of ceasing either role. Had he not stepped down as Mexico's legal adviser, however, a disqualification would have ensued.

806 This argumentation by the English High Court is too narrow to do justice to the concepts of independence and impartiality. While independence concerns the relationship between the arbitrator and the parties, impartiality is broader. It requires the arbitrator to be free from any predisposition toward one of the parties or their argument. The proximity to an adverse third party, such as an important competitor, in particular, can clearly cause such a predisposition.

807 In *EDF* and *Suez I*, the challenged arbitrator was a director of the third party. In *Getma*, the arbitrator's brother was potentially adverse to the challenging party. In the *ConocoPhilips* and *Favianca cases*, the arbitrator's firm (from which he resigned in the course of the proceeding) targeted the law firm most adverse to one of the parties for a merger. In *Cemex*, finally, the arbitrator was a retired partner of the adverse law firm. The relationship between the arbitrator and the third party was only more remote in *Saint-Gobain*, where the arbitrator was a former co-worker of the adverse counsel.

of the appointments), and for the arbitrator's (or his or her firm's) prior involvement in the subject-matter of the specific dispute. A category which is consistently considered to be unproblematic is the familiarity of an arbitrator with a party as a result of his or her former public servant role. The arbitrator's familiarity with a counsel only justifies his or her disqualification under qualified circumstances.

There are still, however, important case categories in which the outcome of a disqualification request is difficult to predict, because disqualification decisions are unavailable, scarce, or contradictory. The rendering of legal services to a counterparty in an unrelated proceeding, the repeat appointment against a party or by the same counsel or law firm, and connections to an adverse third party are examples of such unresolved scenarios.

3 Self-regulatory Codes of Conduct for Arbitrators

3.1 *Relevance*

Self-regulatory codes of conduct for arbitrators mainly differ from the arbitration rules examined above in that they are specifically enacted to govern arbitrators' conduct. They do not regulate arbitral proceedings as a whole, but only contain specific standards of adjudicators' ethics.

Furthermore, they are generally not binding, but only serve as guidelines. In practice, however, this differentiation is not as clear-cut. As will be laid out in more detail hereinafter, some self-regulatory codes of conduct have a rather far-reaching field of application, due to the lack of clarity and uniformity of existing (binding) arbitration rules. They often come into play when a conflict of interest is alleged, and as such, are an important source of standards of arbitrators' independence and impartiality.

Users of arbitration sometimes criticize self-regulatory codes of conduct for limiting what they perceive as their right to freely appoint a decision-maker. Proponents of the codes counter that the standards enounced in such instruments enhance parties' certainty that their appointee will remain on the arbitral tribunal. They make the criteria for assessing disclosure obligations, objections by the counterparty and challenges more transparent and predictable and render it more difficult for arbitrators or institutions dealing with such issues to pursue their own agenda.[808] The legal certainty created by such

808 William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 San Diego L. Rev. 629, 674 (2009) [hereinafter Park, *Arbitrator Integrity*]; Park, *Arbitration's Discontents*, *supra* note 24, at 600.

instruments, it is argued, is in the interest of all participants of international arbitration, and justifies the self-regulation of the arbitration community.

The IBA Guidelines on Conflict of Interest in International Arbitration[809] are the most important and most frequently used such instrument – they will therefore be examined hereinafter.[810]

3.2 *The IBA Guidelines*

The IBA Guidelines were adopted by the Council of the International Bar Association in July 2004 and revised in October 2014. They apply to international commercial arbitration as well as to international investment arbitration.[811] Their promulgation was driven by the realization that existing standards of independence and impartiality lacked clarity and uniformity. The IBA Guidelines aim to increase both, and to thereby reduce the number of unnecessary disclosures and withdrawals.[812] The overarching goal of the Guidelines is to protect the integrity of international arbitration.[813]

Initially, the IBA Guidelines earned a lot of criticism for being too burdensome[814] and strict, and for enabling opportunistic parties to delay and derail proceedings.[815] This criticism has however largely died down and the IBA

809 Hereinafter the IBA Guidelines. The IBA Guidelines are not to be confused with the IBA Rules of Ethics for International Arbitrators, which only stipulate a broad obligation to be competent, diligent, efficient and to remain "free from bias." *See* IBA Rules of Ethics for International Arbitrators (1987), rules 1, 2; Park, *Arbitration's Discontents*, *supra* note 24, at 600–601, note 55.

810 Specific codes of ethics for international arbitrators have been introduced by newer regional arbitral institutions. *See, e.g.*, Milan Chamber of Commerce, International Arbitration Rules: Code of Ethics for Arbitrators (2010), *available at* http://www.camera-arbitrale.it/Documenti/cam_arbitration-rules_2010.pdf (last accessed on Dec. 30, 2016); Singapore International Arbitration Centre, Code of Practice: Code of Ethics for an Arbitrator (2009), *available at* http://www.siac.org.sg/our-rules/code-of-ethics-for-an-arbitrator (last accessed on Dec. 30, 2016). *See* ROGERS, ETHICS, *supra* note 98, ¶¶ 2.80 and 2.83.

811 IBA Guidelines, Introduction, para. 5.

812 IBA Conflict of Interests Subcommittee, *supra* note 672, at 5. Ball, *supra* note 45, at 323; Leon Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, 10 INT'L. ARB. L. REV. 124, 124–125 (2007); BLACKABY ET AL., *supra* note 90, ¶ 4.85.

813 David A. Lawson, *Impartiality and Independence of International Arbitrators – Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 ASA BULLETIN 22, 36 (2005); Trakman, *supra* note 812, at 129 (adding efficiency to the list of regulatory intents of the IBA Guidelines).

814 *See* Ramon Mullerat OBE, *Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration*, 4 DISP. RESOL. INT'L. 55 (2010).

815 Trakman, *supra* note 812, at 125 (stating that the Guidelines "opened the door to both opportunity and opportunism").

Guidelines have gained wide acceptance in the international arbitration community. Although the Guidelines are technically non-binding,[816] they are increasingly seen as representing good practice[817] and therefore widely used.[818]

In commercial arbitration, they are routinely applied by arbitrators when considering an appointment, deciding whether to make a disclosure, or when ruling on a disqualification request. Counsel and parties in commercial arbitration rely on the IBA Guidelines when deciding whether to challenge an arbitrator, and even arbitral institutions and courts increasingly invoke them when ruling on challenges to arbitrators and awards.[819] The SCC Board, for example, often references the IBA Guidelines and considers them officially applicable to challenges under the SCC Arbitration Rules. The ICC Court has repeatedly stated that it does not consider the IBA Guidelines to be binding, but in practice, the ICC Secretariat usually references them as persuasive authority in its briefing of the ICC Court on challenges.[820] ICSID tribunals, in contrast, still persistently highlight that they are not bound by the IBA Guidelines,[821] although the Guidelines are regularly relied upon by parties.[822]

The IBA Guidelines are construed in two parts. The first part enounces the principles – the General Standards – to be kept in mind by arbitrators, parties and institutions when deliberating on (alleged) bias. Every General Standard is accompanied by an explanatory note, which outlines the observations and regulatory intent of the Working Group. The General Standards are then followed by (non-exhaustive) lists of specific conflict situations for practical guidance (the Application Lists) in Part two. The color (red, orange or green) of the respective Application List indicates whether a disclosure or a disqualification is or is not warranted in light of the specific situation: In the situations listed on the Red List, arbitrators should decline their appointment, or withdraw. The Orange List enumerates situations which may give rise to justifiable doubts as to the arbitrator's impartiality or independence, and which must therefore be disclosed to the parties. If, upon said disclosure, the parties do not object to the arbitrator's involvement within thirty days, they are deemed to have waived

816 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 29.

817 Sheppard, *supra* note 32, at 136; Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 29.

818 ROGERS, ETHICS, *supra* note 98, ¶¶ 2.87 and 6.75; Trakman, *supra* note 812, at 126 (pointing out the "subtly peremptory" nature of the Guidelines).

819 IBA Guidelines, at i; ROGERS, ETHICS, *supra* note 98, ¶ 2.86.

820 IBA Conflict of Interests Subcommittee, *supra* note 672, at 29 ("According to the ICC, in 106 of the 187 cases, at least one article of the Guidelines was referred to as potentially contemplating the situation" – in a vast majority of cases, the basis for the challenge was covered by the Orange List).

821 *ConocoPhillips I*, at 59.

822 IBA Conflict of Interests Subcommittee, *supra* note 672, at 37.

their right to a challenge. Finally, the Green List describes situations in which neither a disclosure nor withdrawal is advised.

The core content of the General Standards and Application Lists is briefly outlined hereinafter.

A General Standards

General Standard 1 very generically stipulates the obligation of independence and impartiality:

> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

General Standard 2 specifies the vantage point and threshold for the examination of a potential conflict of interest. An arbitrator shall forego his appointment or resign if he personally doubts, or if an informed reasonable third person would justifiably doubt his ability to act independently and impartially.[823] The vantage point for the assessment of challenges is thus an objective one.[824] The threshold for affirming justifiable doubts is remarkably low: The mere *likelihood* of external factors influencing the arbitrator's decision-making is sufficient.[825]

General Standard 3 governs the disclosure of potential conflicts of interest. Since the disclosure obligation is less intrusive than a disqualification or an obligation to resign,[826] it makes sense that the threshold stipulated in General Standard 3(a) is lower: Arbitrators are required to disclose all circumstances which may – "in the eyes of the parties" – raise doubts about their impartiality or independence. Unlike the objective (reasonable third person) standard in General Standard 2, this test is a subjective one. It favors transparency, as does the presumption in favor of disclosure provided for in General Standard 3(d).

General Standard 6 mentions various situations in which the connection between an arbitrator and a party is indirect, and the assessment of independence and impartiality is therefore more difficult: One of the parties (or a company

823 IBA Guidelines, General Standards 2(a) and (b).

824 Horvath and Berzero, *supra* note 37, at 5; Park, *Arbitration's Discontents*, *supra* note 24, at 601.

825 IBA Guidelines, General Standard 2(c). The explanation to General Standard 2 does not elaborate on this choice of wording. In the situations described in the Non-Waivable Red List (*see infra* Part 3.2 B.), doubts are always justified, and arbitrators are accordingly required to resign (IBA Guidelines, General Standard 2(d)).

826 IBA Guidelines, General Standard 3(c) (clarifying that a disclosure does not prejudice the outcome of a potential challenge).

in the same group) may be involved in the activities of the arbitrator's law firm, or an arbitrator or his firm may have a connection with a physical person who has a controlling influence on one of the parties, or a direct economic interest in the outcome of the proceeding. Unfortunately, the IBA Guidelines provide no concrete guidance on the assessment of such constellations, besides stating that the connections of related third parties *may* be taken into account, and that the facts of each individual case have to be considered. If anything, the IBA Guidelines are rather lenient on this point, stating explicitly that "activities of the arbitrator's firm should *not automatically* create a conflict of interest."[827]

B Application Lists

The Application Lists are generally considered to be one of the most useful features of the IBA Guidelines. They illustrate the weighting of opposing interests (on the one hand, procedural economy and the parties' right to freely chose an arbitrator, and on the other hand, the greatest possible independence and impartiality of the decision-maker) by categorizing potential conflict situations according to their level of sensitivity and by providing for commensurate legal consequences, ranging from disclosure to disqualification or resignation.[828] Where parties, arbitrators or arbitration institutions are faced with a situation explicitly provided for in a list, their decisions regarding a resignation, a challenge or a removal are directly facilitated by the IBA Guidelines. The IBA Guidelines are unique and novel in their nuanced and practical approach to frequently occurring conflict situations.

Beyond providing for the legal consequences in anticipated situations, however, they are also a useful guideline for the evaluation of situations which were not borne in mind when the IBA Guidelines were drafted. The weighting expressed by the categorization provides a more accurate guideline than the abstract standards and thresholds for arbitrator challenges contained in the General Standards or in the arbitration rules described above, in Chapter 3, Part 2.

The Non-Waivable Red List enumerates four instances of obvious self-interest of the arbitrator in the outcome of the proceeding, based on his or her relationship with one of the parties:

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

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827 IBA Guidelines, Explanation (a) to General Standard 6 (emphasis added). *See also* Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 31 (arguing that General Standard 6 "tacitly recogniz[es] and approv[es] the dual arbitrator / counsel role").

828 Park, *Arbitration's Discontents*, *supra* note 24, at 601.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.
1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.
1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.

These situations are considered to be so contrary to the principle of *nemo iudex in causa sua* (no one can be his or her own judge), that even a formalized and informed consent of the parties does not cure the conflict – the respective arbitrator must resign or will be disqualified.[829] Because of the intrusiveness of this legal consequence, only the most striking scenarios are included in the Non-Waivable Red List. Some are further qualified using descriptors such as "significant" or "regularly." While these terms intend to restrict the scope of application of the Non-Waivable Red List, the ample room for interpretation they create also entails a risk of unpredictability.[830]

The constellations listed in the Waivable Red List are still serious, but not quite as severe.[831] A conflict of interest will therefore be presumed, and the arbitrator disqualified, unless all parties agree on an express and fully informed waiver of their right to challenge the respective arbitrator.[832] The degree of proximity between the arbitrator and the other participant in the proceeding is generally very high in the listed constellations.

Examples of covered situations are an arbitrator's prior involvement in the specific dispute (*inter alia* by rendering legal advice)[833] and certain forms of (direct or indirect, financial or personal) interest in the outcome of the dispute, such as shareholdings in one of the parties,[834] or the arbitrator's (or a close family member's) significant financial interest in the outcome of the

829 IBA Guidelines, General Standard 2(d) and Introduction to the Application Lists, ¶ 2.

830 *See* Mullerat OBE, *supra* note 814, at 61 and 67. For example, it is argued that para. 1.3 should apply to investment arbitrators who are simultaneously acting as counsel in other investor-State disputes involving similar issues, since they have a significant personal and professional interest in creating a useful precedent for that second case (even more so if services in that case are rendered on a contingency fee basis). *See* Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 32.

831 IBA Guidelines, Introduction to the Application Lists, ¶ 2.

832 See also General Standard 4(c).

833 IBA Guidelines, Application Lists, §§ 2.1.1 and 2.1.2.

834 IBA Guidelines, Application Lists, § 2.2.1.

dispute.[835] Certain non-exhaustively enumerated relationships with a party or its counsel[836] are also on the Waivable Red List.

The Orange List is the most extensive of all Application Lists. It enumerates situations which may, in the eyes of the parties, give rise to doubts as to the arbitrator's independence and impartiality, and requires arbitrators to disclose any such situation. The disclosure triggers a thirty day delay to challenge the arbitrator, after which the right to challenge is presumed to have been waived. The inclusion of a particular constellation in the Orange List does not prejudice the success of a respective challenge – not even in the event of an arbitrator's failure to disclose the potential conflict of interest. In contrast to the constellations included in the Red Lists, a request for disqualification based on a (disclosed or undisclosed) Orange List situation will be evaluated in the light of General Standard 3(a), thus requiring an objective determination of justifiable doubts as to the arbitrator's independence and impartiality.

The following three examples offer a glimpse of the long list of constellations covered by the Orange List: Firstly, an arbitrator who was personally (or whose firm was) involved in an unrelated matter concerning a party or one of its affiliates within the past three years falls under the Orange List.[837] Secondly, two or more repeat appointments by a party or an affiliate (or more than three by the same counsel) within the past three years trigger the application of the Orange List.[838] Thirdly, if the arbitrator has within the last three years served, or is currently serving as an arbitrator in a related case involving one of the parties or an affiliate, the situation is also covered by the Orange List.[839]

As these examples illustrate, the Orange List explicitly enumerates situations where a very recent (or simultaneous) and relatively close connection between an arbitrator and a party exists. This raises the question whether connections which are more remote, or contacts which fall outside the indicated three year time frame, are automatically innocuous. The answer is no. The high level of detail of the descriptions of proximity and the time frames in the Orange list should not distract from the fact that this Application List is non-exhaustive. Situations which are seemingly not covered by the Orange List, because they are not expressly provided for, are subject to General Standard 2, and while they might generally not be problematic, they must be assessed on a case-by-case basis.[840]

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835 IBA Guidelines, Application Lists, § 2.2.2.

836 IBA Guidelines, Application Lists, § 2.3.

837 IBA Guidelines, Application Lists, §§ 3.1.1, 3.1.2., and 3.1.4. It is irrelevant whether the attorney-client relationship was with the party or with its adversary.

838 IBA Guidelines, Application Lists, § 3.1.3.

839 IBA Guidelines, Application Lists, § 3.1.5.

840 IBA Guidelines, Introduction to the Application Lists, ¶ 6.

Finally, the Green List is a non-exhaustive list of circumstances in which it is presumed that no actual or apparent lack of independence and impartiality exists from an objective point of view. Thus, no disclosure is required and a challenge will normally fail. Interesting (and controversial) constellations contained in this list are the previous expression of legal opinions on issues that arise in the dispute, but without reference to the respective case, and the previous service of an arbitrator and a counsel as co-arbitrators.

Being a reflection of international principles and best practices, and an international self-regulatory compromise,[841] a certain vagueness of the Application Lists is said to be unavoidable.[842] This vagueness, however, limits the usefulness of the Lists, since it endangers their coherent interpretation and application. It enables litigious counsel to file tactical challenges and to thereby obstruct proceedings.[843] Accordingly, the vague and circumlocutory language of the Application Lists impedes procedural efficiency and jeopardizes arbitrators' and arbitration's reputation. On the other hand, when applied to limit the scope of the Red and Orange Lists, the same language causes arbitrators not to be held to a sufficiently high standard of independence and impartiality.[844] Accordingly, the vagueness of the Application Lists serves neither the interest of the greatest possible independence and impartiality of arbitrators, nor the interest of procedural efficiency and party autonomy.

C Case Law

The IBA Guidelines do not supersede but only supplement the otherwise applicable provisions on conflicts of interest. Therefore, decisions which were governed by rules other than the ICSID Convention and Arbitration Rules, and in which the IBA Guidelines were applied are classified above, under the respective arbitration rules.

Within the ICSID framework, there have so far only been two published challenges in which the parties agreed on the application of the IBA Guidelines. In *Perenco,*[845] Respondent challenged the Claimant-appointed arbitrator, the

841 Mullerat OBE, *supra* note 814, at 57.

842 IBA Guidelines, Introduction to the Application Lists, ¶ 8: "[T]he Lists contain, for various situations, general terms such as 'significant' and 'relevant'. The Lists reflect international principles and best practices to the extent possible. Further definition of the norms, which are to be interpreted reasonably in light of the facts and circumstances in each case, would be counterproductive."

843 Trakman, *supra* note 812, at 124, 130; Mullerat OBE, *supra* note 814, at 59.

844 Mullerat OBE, *supra* note 814, at 61–62 (criticizing the IBA Guidelines' "pro arbitro attitude").

845 Perenco Ecuador Limited v. The Republic of Ecuador & Empresa Estatal Pertoleos Del Ecuador (*Perenco*), ICSID Case No. ARB/08/6, Decision of the Secretary-General of the Permanent Court of Arbitration on a Challenge an Arbitrator, PCA Case No. IR-2009/1 (Dec. 8, 2009).

Hon. Charles N. Brower, for making comments about the pending proceeding and about Respondent in a published interview. The statement that triggered the challenge 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.[846]

Applying an "objective" appearance of bias standard, the Secretary-General of the PCA[847] examined whether "a reasonable and informed third party [could] conclude 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."[848] In view of the wording chosen by Judge Brower (the association of the pejorative term "recalcitrant" with the Respondent) and the context of his statement, the question was answered in the affirmative. The comparison of the conduct of Ecuador with that of Libya in the 1970s, in particular, could lead a reasonable third party to doubt the arbitrator's open-mindedness with regard to the allegation of expropriation and Ecuador's willingness to abide by an arbitral award. Moreover, the Secretary-General of the PCA held that since the Judge made those comments as a response to the interviewer's question about the "most pressing issues in international arbitration," it could be inferred that he considers Ecuador's behavior to be of such gravity as to represent one of the most important challenges in international arbitration.[849] The Secretary-General of the PCA dismissed the Claimant's argument that the arbitrator's statements should be examined in the light of his "experience and

846 *Perenco*, ¶ 27.

847 The disputing parties in the case had expressly agreed that arbitrator challenges should be decided by the Secretary-General of the PCA. *See Id.* ¶ 2.

848 *Id.* ¶¶ 43 and 46.

849 *Id.* ¶¶ 48–52.

standing." Since there was nothing in the IBA Guidelines supporting a special deference to an arbitrator's experience or reputation, it was held that those factors were irrelevant.[850] In other words, experienced and well-known arbitrators do not get the benefit of the doubt.

It is also noteworthy that the Secretary-General of the PCA explicitly noted that other interpretations of the arbitrator's statements would ("of course") have been possible, but that the described interpretation, which raised doubts as to the arbitrator's impartiality, was a reasonable one.[851] This sufficed for a disqualification. In other words, the understanding which leads to the doubts need not be the only possible or the most obvious interpretation – it merely needs to be justified in the eyes of a reasonable third person.

In *Highbury,*[852] Professor Brigitte Stern was challenged by the investor, based on her repeat appointments by Venezuela and by the law firm Foley Hoag LLP (Foley Hoag). Within the last five years, Venezuela had appointed her in five cases (once within the past three years), and Foley Hoag had done so in six cases (twice within the last three years).[853]

The unchallenged arbitrators applied §§ 3.1.3 and 3.3.8 of the IBA Guidelines' Application List, but highlighted that the time frames stated in these provisions would have to be longer in investment treaty arbitration, since public interests were at stake. Furthermore, they stressed that the numbers of appointments and time frames in §§ 3.1.3 and 3.3.8 of the Application List were not authoritative thresholds in a strict sense. While exceeding them could surely raise doubts as to the arbitrator's independence and impartiality, falling short of those parameters would not necessarily exonerate her.[854] Disqualification requests should not be approached as if they were a matter of statistical analysis, since numbers can be deceiving. Instead, all relevant factors would have to be taken into account; for example the nomination dates, the current status of the other proceedings (ongoing or terminated), any jurisdictional or substantive decisions, dissenting opinions rendered in favor of the appointing party and the proportion of cases referred to the arbitrator by the appointing party, compared to the arbitrator's entire caseload.[855] Every nomination would have to be examined in detail, and pursuant to these criteria.

The unchallenged arbitrators then went on to analyze the specific allegations against Professor Stern. They established that the thresholds in §§ 3.1.3

850 *Id.* ¶ 62.

851 *Id.* ¶ 53.

852 Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela (*Highbury*), ICSID Case No. ARB/14/10, Decision on the Proposal to Disqualify Professor Brigitte Stern (June 9, 2015).

853 *Highbury*, ¶¶ 89–91.

854 *Id.* ¶¶ 84–85.

855 *Id.* ¶ 87.

and 3.3.8 of the Application List were not exceeded. Considering all appointments, beyond the three year limit,[856] the unchallenged arbitrators concluded that the repeat appointments were not sufficient to justify Professor Stern's disqualification.[857] They highlighted, in particular, that the nine appointments by Venezuela and Foley Hoag needed to be seen in relation with the total of seventy or eighty arbitrations in which she has participated, of which fifty-seven were administered by ICSID. Furthermore, four of the nine nominations had been made more than five years ago, and only five of the arbitrations were still ongoing. Also, Professor Stern had never issued a dissenting opinion.[858] A potential issue conflict could not be considered at this point of the proceeding, since the case had not entirely been pleaded yet.[859] The apprehension that Professor Stern could form an opinion in *Highbury* based on evidence submitted in one of the other cases was held to be unfounded, since the tribunal could not decide based on documents which were not on the record.[860]

3.3 *Contextualization and Conclusion*

The IBA Guidelines are undeniably innovative in their practical approach of listing specific situations which might lead conflicts of interests, and color-coding them according to their level of sensitivity. At first sight, this approach is more nuanced and instructive than an abstract qualitative[861] standard, and promises to achieve a more uniform case law on arbitrator challenges. On closer inspection, however, it is questionable whether the IBA Guidelines would enhance the predictability of challenge decisions in the investment arbitration context.

First, the IBA Guidelines provide clear and helpful guidance regarding the obligation to disclose, but remain inconclusive for most challenges. Only in a tiny minority of situations is the outcome of a disqualification request predictable, because the situation is either mentioned in a Red List (which entails at least a presumption of disqualification), or on the Green List (which normally excludes disqualification). In all other constellations, it is either unclear which list is relevant, or the Orange List is pertinent. Since the Red Lists are very narrowly tailored, while the Orange and Green Lists are more extensive and non-exhaustive, there is much room left for uncertainty. Indeed, the predictability of the outcome of a challenge is not the rule, but the exception. The vagueness of certain provisions of the Application Lists further aggravates this insecurity.

856 *Id.* ¶ 95.

857 *Id.* ¶ 99.

858 *Id.* ¶ 98.

859 *Id.* ¶ 106.

860 *Id.* ¶ 107 ("ningún tribunal puede decidir sobre la base de documentos que no se encuentran en el expediente.").

861 *See* ROGERS, ETHICS, *supra* note 98, ¶ 6.69.

In situations which cannot be assigned to either the Red or the Green Lists, the success of a disqualification request will depend on the finding of justifiable doubts as to the arbitrator's independence and impartiality. The parties, arbitrators as well as the authority deciding on the challenge are thus relegated to the abstract, qualitative standard which was meant to be put in more concrete terms in the Application Lists, and the outcome of the challenge remains unpredictable.

Second, it appears that the particularities of investment arbitration were to a certain extent sidelined when the IBA Guidelines were drawn up.[862] Although the Guidelines are said to have been designed with commercial and investment arbitration in mind, they fail to mention some situations which are frequently invoked as grounds for challenges in investment arbitration.[863] For example, the arbitrator's previous employment as a public servant (and her or his ensuing familiarity with the State party or with the subject-matter of the case),[864] and role switching,[865] are not covered by the Application Lists. While it is possible to resolve such challenges by subsuming the situations under the General Standards of the IBA Guidelines, the advantage of predictability and uniformity is thereby lost.

Furthermore, the valuations underlying the Application Lists are not always suitable in the investment arbitration context. For example, the Green List includes previously expressed legal opinions concerning an issue relevant in the arbitration, which were made without reference to the arbitration.[866] In investment arbitration, however, such statements might be more problematic, due to the narrower, more repetitive set of issues at the center of such disputes.[867] The threshold numbers and timeframes for repeat appointments to be covered by the Orange List[868] might also have to be reconsidered in the context of ICSID: Since the system as a whole (caseload, number of actors, number of potential parties) is smaller than commercial arbitration, fewer reappointments can entail a higher risk to arbitrators' independence.[869]

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862 The IBA Guidelines are not simply the "product of an objective application of technical expertise to the problem of arbitrator conflicts," but, as a global regulatory process, their drafting had "important distributional implications, generating winners and losers." *See* ROGERS, ETHICS, *supra* note 98, ¶ 6.80.

863 Mouawad, *supra* note 252, at 1.

864 *See* the challenge decisions in *Generation Ukraine* and *Saint-Gobain*.

865 *See* the challenge decisions in *SGS*, *Azurix* and *Siemens*.

866 IBA Guidelines, Application Lists, § 4.1.1.

867 *See also* Rubins and Lauterburg, *supra* note 32, at 164.

868 IBA Guidelines, Application Lists, §§ 3.1.3, 3.3.8, and 3.1.5.

869 In *Highbury*, the unchallenged arbitrators held that longer timeframes were appropriate in investment arbitration, since public interests were at stake (¶ 84).

Third, even if the particularities of investment arbitration are factored out, the IBA Guidelines appear very lenient in their classification of certain conflict categories. Only the most striking examples of an arbitrator's obvious self-interest and highly likely bias are included on the Red Lists, while certain constellations in which disqualifications have occurred in commercial arbitration are not included. For example, challenges based on repeat appointments which do not fall within the narrow parameters of the IBA Guidelines' Orange List[870] have been upheld under the SCC[871] and ICC Arbitration Rules.[872] Similarly, attorney-client relationships with a party which would not be covered by the IBA Guidelines' Red List[873] have consistently been accepted as a basis for disqualification under the SCC[874] and ICC Arbitration Rules.[875] Even the few cases in which ICSID arbitrators were disqualified would not fall under the Red Lists, but only under the Orange List.[876] In these categories, the IBA Guidelines do not achieve their goal of enhancing predictability and uniformity.

Indeed, the narrow construction of the IBA Guidelines' Red Lists and the relatively high threshold imposed by the Orange List could be interpreted to express an underlying presumption against disqualification. While such a presumption would be at odds with General Standards 2 and 3(d), the weighting of conflicting interests inherent in the Application Lists and transpiring from the framework is likely to influence arbitration users' approach to challenges. Such an effect would be undesirable.

The following charts illustrate the (hypothetical) application of the IBA Guidelines' Application Lists to the ICSID challenges analyzed in Chapter 2, and corroborate the above objections.

Most situations which have been invoked as grounds for ICSID challenges would fall under the Orange List, or are not expressly provided for in the Application Lists, and are difficult to classify by analogy. In these cases, it is unclear how the challenge would have been decided:

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870 Repeat appointments are only mentioned in the Orange List, and only trigger the arbitrator's disclosure obligation in narrowly delineated circumstances: Within the past three years, the arbitrator must have been appointed by the same party (or its affiliate) on two or more occasions, by the same counsel or law firm on three or more occasions, or in a related proceeding involving one of the parties (or an affiliate) in at least one instance. *See* IBA Guidelines, Application Lists, §§ 3.1.3, 3.3.8, and 3.1.5.

871 Öhrström, *supra* note 45, at 42–46 (SCC Arbitration 10/2000).

872 *See supra* Part 2.4 A.

873 IBA Guidelines, Application Lists, § 2.3.1. Unless the arbitrator personally is currently advising the party or its affiliate, the situation is only covered by § 3.1.4 of the Orange List.

874 *See supra* Part 2.3 A.

875 *See supra* Part 2.4 A.

876 *Vannessa Ventures* would fall under § 3.3.9 of the Application Lists, while *Caratube* would be covered by § 3.3.8.

FIGURE 3 *ICSID challenges with unclear outcome under IBA guidelines*

Basis for Challenge		
Familiarity with a Participant	**Contact with a Party**	**attorney-client relationship** (between arbitrator or his firm and party or affiliate)
	Contact with a Counsel or Law Firm Representing a Party	**previous collaboration** (of arbitrator and counsel or law firm)
	Repeat Appointment	**against a party**
		by a party or by a law firm / counsel
Connection to Adverse Third Party		**decision could impact parallel proceeding, in which arbitrator is a counsel**
		decision could impact parallel proceeding, in which related counsel is adverse to party
		merger with firm adverse to a party

ICSID Case	Outcome under ICSID Convention & Rules	Relevant Provision in IBA Guidelines	Hypothetical Outcome under IBA Guidelines
Amco Asia	dismissed	3.1.4	depending on finding of justifiable doubts
Vivendi	dismissed	3.1.4	
Lemire	dismissed	3.1.4	
Universal Compression	dismissed	3.3.9	depending on finding of justifiable doubts
Nations Energy	dismissed	3.3.3, if within time frame	
Vannessa Ventures	resignation	3.3.9	
PIP	dismissed	3.1.5, if cases related	depending on finding of justifiable doubts
Repsol (Vicuña)	dismissed	3.1.5, if cases related	
Tidewater	dismissed	3.1.3	
Universal Compression	dismissed	3.1.3	
Ickale	dismissed	3.1.3	
Caratube	upheld	3.3.8	
S&T Oil	resignation	3.4.1	depending on finding of justifiable doubts
Blue Bank	upheld	3.4.1	
ConocoPhillips cases	dismissed	3.1.4, upon merger	
Favianca cases	dismissed	3.1.4, upon merger	

FIGURE 3 *ICSID challenges with unclear outcome under IBA guidelines* (cont.)

Basis for Challenge		
Familiarity with a Participant	**Contact with a Party**	**merely occasional contacts**
		previous public servant role
	Contact with a Counsel or Law Firm Representing a Party	**affiliation of law firms** (of arbitrator and counsel)
		previous collaboration (of arbitrator and counsel or law firm)
		shared educational history
	Role Switching	
	Repeat Appointment	**by a party or by a law firm / counsel**
Familiarity with Subject-Matter		**public servant role**
		law clerk discussed legal questions online
Connection to Adverse Third Party		**decision could impact parallel proceeding, in which related counsel is adverse to party**
		brother serves as arbitrator in parallel proceeding

ICSID Case	Outcome under ICSID Convention & Rules	Relevant Provision in IBA Guidelines	Hypothetical Outcome under IBA Guidelines
Zhinvali	dismissed	none	uncertain
Generation Ukraine	dismissed	none	
Amco Asia	dismissed	none	uncertain
Repsol (Wobeser)	dismissed	none	
Alpha Projektholding	dismissed	none	
SGS	dismissed	none	uncertain
Azurix	dismissed	none	
Siemens	dismissed	none	
OPIC	dismissed	none	uncertain
Saint-Gobain	dismissed	none	uncertain
Tanzania Electric	resignation	none	
Saint-Gobain	dismissed	none	uncertain
Getma	dismissed	none	

On the other hand, only three of the examined challenges were based on situations explicitly provided for in the Green List. None of the circumstances invoked as a basis for a challenge would be covered by the Red Lists:

FIGURE 4 *ICSID challenges covered by IBA guidelines' green list*

Basis for Challenge		**ICSID Case**	**Outcome under ICSID Convention & Rules**	**Relevant Provision in IBA Guidelines**	**Hypothetical Outcome under IBA Guidelines**
Familiarity with Subject-Matter	**academic publications**	Urbaser	dismissed	4.1.1	dismissed
Connection to Adverse Third Party	**relationship with third party which is potentially interested in outcome of proceeding**	EDF	dismissed	4.4.2	dismissed
		Suez I	dismissed	4.4.2	

Irrespective of the described deficiencies, it is noteworthy that at least some of the situations mentioned in the Orange List (such as repeat appointments beyond the defined thresholds) are strictly avoided by arbitrators and counsel. Even though, technically, such scenarios only call for a disclosure and may or may not be found to justify a disqualification, they are sometimes approached as if they were on a Red List. In this context, Judge Charles N. Brower – Judge of the Iran–US Claims Tribunal, and one of today's most influential arbitrators – has made the following statement:

> 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.[877]

877 Charles N. Brower, Sarah Melikian & Michael P. Daly, *Tall and Small Tales of a Challenged Arbitrator*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 320, 336 (Chiara Giorgetti ed., 2015).

In conclusion, the IBA Guidelines may effectively reduce the incidence of at least some quantifiable conflicts of interest, such as those caused by repeat appointments. Although they do not completely eliminate legal uncertainty with regard to arbitrator appointments, the uncertainty which remains (or which the Orange List creates) may actually have the beneficial effect of deterring arbitration users from making the specified appointments, in order not to be exposed to strategic challenges by the counterparty.[878] In practice, this may lead to mechanical conflict checks in the selection of arbitrators, which do not sufficiently factor in the circumstances of the specific case. However, even a mechanical sensitivity to ethical limits to arbitrator appointments is better than none.

4 *Sui Generis* Dispute Resolution Mechanisms

4.1 *Relevance*

The Iran-United States Claims Tribunal and the Permanent Court of Arbitration share the hybrid nature of ICSID arbitration:[879] Structurally set-up as arbitration systems, and modelled after commercial arbitration, they are treaty or convention-based, and substantively deal with the obligations of States under public and public international law.[880] This "special type of arbitration"[881] is generally termed a *sui generis* or hybrid dispute resolution mechanism.[882]

878 Stephan Wilske & Michael Stock, *Rule 3.3.7 of the IBA Guidelines on Conflicts of Interest in International Arbitration – The Enlargement of the Usual Shortlist?*, 23 ASA BULLETIN 45, 48–49 (2005) (referring to this effect as a "codification effect," and explaining that "the majority of arbitrators will wish to avoid a confrontation.").

879 The Permanent Court of Arbitration also deals with international (inter-State) arbitration, but currently administers more investor-State cases. *See Case Repository, Pending Cases*, PERMANENT COURT OF ARBITRATION, http://173.254.28.178/~pcacases/web/allcases/ (last accessed on Dec. 30, 2016).

880 In the context of investment arbitration, *see* DIEHL, *supra* note 463, at 3; Rainer Hofmann & Christian J. Tams, *International Investment Law: Situating an Exotic Special Regime within the Framework of General International Law*, *in* INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 9, 9 (Rainer Hofmann & Christian J. Tams eds., 2011); Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L. L. 151, 152–153 (2003).

881 David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L. L. 104, 104–106 (1990) [hereinafter Caron, *The Nature of the Iran–US Claims Tribunal*].

882 *See* Crawford, *supra* note 464, at 23 ("But to say that something is hybrid is really an English way of saying 'sui generis'. Lawyers have a habit of putting labels, especially Latin

4.2 *The Iran–United States Claims Tribunal*

The Iran-United States Claims Tribunal is an international arbitral tribunal set up to adjudicate the claims of American citizens against Iran, arising from the political crisis and the disruption of economic relations in the wake of the 1979 Islamic Revolution.[883] It is composed of nine arbitrators, of which three are appointed by each State party (the United States and Iran), and three (who are neither Iranian nor U.S. nationals) are appointed by agreement of the six party-appointed arbitrators.[884] The Tribunal hears cases in chambers of three arbitrators, consisting of one arbitrator from each of the described groups.[885] Only disputes between the two governments and cases referred to the tribunal from the chamber are heard by the tribunal en banc.

The Iran–US Claims Tribunal conducts its business in accordance with the UNCITRAL Arbitration Rules.[886] As provided therein, arbitrator challenges are decided by the Appointing Authority,[887] in application of a justifiable doubts standard, from the perspective of a reasonable third person.[888]

Since its inception, a number of arbitrator challenges have been lodged before the Iran–US Claims Tribunal.[889] Because the Tribunal was established

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labels, on things and thinking that this solves the problem … To say that something is sui generis is to postpone the analysis and not engage in it.").

883 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 art. 2, para. 1 [hereinafter Claims Settlement Declaration]; CARON AND CAPLAN, *supra* note 91, at 4; Posner and Yoo, *Judicial Independence*, *supra* note 119, at 8–9 and 33–34; Caplan, *supra* note 271, at 115.

884 Claims Settlement Declaration art. 3, para. 1.

885 Buechel, *supra* note 493, at 247; CARON AND CAPLAN, *supra* note 91, at 5.

886 Claims Settlement Declaration art. 3, para. 2. Since its decisions are public, it creates the most extensive body of case law on the rules (CARON AND CAPLAN, *supra* note 91, at 183; Caplan, *supra* note 271, at 119).

887 Four individuals have served as the Appointing Authority so far: Judge Charles Moons (former Chief Justice of the Supreme Court of the Netherlands), Sir Robert Jennings (former President of the ICJ and Professor at Cambridge University), W.E. Haak (former Chief Justice of the Supreme Court of the Netherlands), and Geert J.M. Corstens (also a former Chief Justice of the Supreme Court of the Netherlands). *See* Caplan, *supra* note 271, at 120 (highlighting that the fulfillment of all of the functions of the Appointment Authority by one individual, and on a permanent basis, has brought stability and consistency to the Tribunal's work and to the challenge case law).

888 *See supra* Part 2.2. UNCITRAL Rules art. 10–13 are incorporated by the Tribunal Rules of Procedure, Iran–U.S., art. 9–12, May 3, 1983 [hereinafter Tribunal Rules].

889 CARON AND CAPLAN, *supra* note 91, at 183–191; Caplan, *supra* note 271, at 138–139. Remarkably, none of the challenges were upheld. In three instances, however, the challenged arbitrators resigned, or were withdrawn by their appointing party. *See* Caplan, *supra* note 271, at 122.

for the resolution of disputes arising in a very specific setting, and the arbitrators have a quasi-judicial role, however, the conflict categories invoked before the Iran–US Claims Tribunal are often different from those arising in the investment and commercial arbitration context. For example, challenges based on an arbitrator's familiarity with the subject-matter of the proceeding would make little sense, since all arbitrators have previously adjudicated cases in which claims arising from the same or similar factual settings were at stake. Similarly, the Iran–US Claims Tribunal's arbitrators are continuously involved in cases between U.S. citizens and the Islamic Republic of Iran – accordingly, it would not make sense to base a challenge on the arbitrators' familiarity with either of the States. The permanent, quasi-judicial function of the nine arbitrators as members of the Iran–US Claims Tribunal's "bench" further logically excludes the issue of repeat appointments and role switching. Overall, an arbitrator's familiarity with one of the State parties or with the subject-matter of the case is an inadequate basis for a challenge.

As a result of this, most challenges of Iran–US Claims Tribunal arbitrators have been based on the arbitrators' behavior in the respective proceedings. The factual background of these challenges is often rather crass,[890] and the decisions are of limited relevance for the comparison with ICSID case law. These cases will not be analyzed hereinafter. Instead, only those decisions which are useful as a source of inspiration for the conflicts of interest alleged in the ICSID system[891] and analyzed in Chapter 2 will be examined.

In one case,[892] the Swiss third-party arbitrator Judge Briner was challenged based on his previous role as a director of an inactive Swiss subsidiary of Morgan Stanley. Morgan Stanley was now an important expert witness in the proceeding. The challenging party argued that because of his past relationship with Morgan Stanley, Judge Briner could not objectively assess the witness's credibility.

While it was generally agreed that an arbitrator's familiarity not only with a party, but also with another participant in the proceeding (such as a witness)

890 *See, e.g.,* the challenge of Judges Kashami and Shafeiei by the U.S. Government, based on their violent physical assault against a fellow member of the tribunal, *reported in* CARON AND CAPLAN, *supra* note 91, at 184 (case 2) and 225 (case 12). *See also* Caplan, *supra* note 271, at 116 (explaining that the many challenges to the Tribunal's arbitrators bear testimony the climate of distrust between the governments).

891 Challenges based on the arbitrator's behavior are not analyzed in detail, even where procedural or substantive flaws in their decisions were alleged. Such allegations are common to all dispute resolution systems and do not appear to raise specific concerns in the ICSID system.

892 Case No 55, Amoco Iran v. Islamic Republic of Iran, Challenge of Judge Briner by Iran, reported in CARON AND CAPLAN, *supra* note 91, at 184 (case 3) and 215 (case 1); Caplan, *supra* note 271, at 123–124.

could give rise to justifiable doubts, the challenge hinged on the determination whether the specific relationship between Judge Briner and Morgan Stanley was substantial enough.[893] An arbitrator's relationship with a subsidiary or affiliate of a large multinational corporation, it was argued, could not be automatically disqualifying, since it would otherwise be impossible for such corporations to find experienced and competent arbitrators.[894] This objection stands to reason where such multinational corporations are only indirectly connected to an arbitrator (for example, where another lawyer in the arbitrator's firm represents or advises the company). In this specific case, however, the arbitrator himself was closely involved with the company, and it appears unlikely that any other third country arbitrator on the tribunal had an equally close connection. The challenge did not need to be decided, however, since Judge Briner eventually recused himself, under protest.[895]

In another case,[896] the disqualification of the arbitrator appointed by Iran, Judge Noori, was requested. Judge Noori was the former general counsel of the parent corporation of the Respondent, the NIOI Legal Office. The Appointing Authority dismissed the challenge, stating that the situation did not raise justifiable doubts.

According to Caron and Caplan, this decision was made "much too readily"[897] and is out of line with the UNCITRAL practice. Rather than validating a lower expectation of independence and impartiality from party-appointed arbitrators, the decision should be seen as a reflection of the unusually low impartiality expectations placed on Iranian-appointed arbitrators in the Iran–US Claims Tribunal.[898] Apparently, a certain degree of partiality and dependence of the United States' and Iranian arbitrators came to be tolerated before the Claims Tribunal, based on the pragmatic observation that the disqualification of such arbitrators would ultimately result in the appointment of equally objectionable replacement arbitrators. Furthermore, obviously biased arbitrators were ineffective in deliberations, and therefore nothing to worry about.[899]

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893 CARON AND CAPLAN, *supra* note 91, at 215–216.

894 *Id.* at 216.

895 *Id.* at 184.

896 Case No 248, Carlson v. Melli Industrial Group, Challenge of Judge Noori by the U.S. Claimant, reported in CARON AND CAPLAN, *supra* note 91, at 186 (case 6) and 217 (case 4).

897 CARON AND CAPLAN, *supra* note 91, at 217.

898 *Id.* at 217. This interpretation is confirmed by the Appointing Authority in its decision on the Challenge of Judge Skubiszewski and Judge Gaetano Arangio-Ruiz by Iran in Case No B81 (*infra* note 900), where a lower standard for party-appointed arbitrators was expressly rejected. *See* CARON AND CAPLAN, *supra* note 91, at 199 and 222.

899 CARON AND CAPLAN, *supra* note 91, at 210.

In a third case,[900] Judge Skubiszewski and Judge Gaetano Arangio-Ruiz were challenged because they had been involved in an allegedly illegal revision of the partial award in a parallel proceeding (Case A15). The challenging party argued that the revision violated the principle of *res judicata*, and that it was prejudicial in the current case, because Iran had based many of its submissions on the partial award in Case A15. The Appointing Authority dismissed the challenge, since it was belated and because the violation of the principle of *res judicata* was unsubstantiated.[901] A much more fundamental question raised by this constellation, however, is whether arbitrators should adjudicate disputes whose outcome is prejudicial to other cases, in which they sit as arbitrators or represent a party. Unfortunately, this question could only have been broached if the challenge had been brought in Case A15.

Finally, an arbitrator was challenged based on his prior involvement with the subject-matter of the case. He had allegedly sat as an arbitrator in an ICC proceeding concerning the same facts thirteen years earlier. The challenge was dismissed because the claims in the two arbitration proceedings had different legal bases, and because the disqualification request was belated.[902]

4.3 *The Permanent Court of Arbitration*

The PCA was established at the Hague Peace Conferences of 1899 and 1907.[903] Despite its name, it is not a court in the traditional sense, nor is it a permanent arbitration body with mandatory jurisdiction. Instead, it is an optional facility for arbitration, which provides disputing parties with a roster of potential nominees which they may appoint as arbitrators, with secretarial and registry services for *ad hoc* arbitration, and with different sets of procedural rules.[904]

Originally, the Hague Conventions intended the roster of Members of the Court to be exhaustive: Each contracting State could nominate up to four

900 Case No B61, Challenge of Judge Skubiszewski and Judge Gaetano Arangio-Ruiz by Iran, reported in CARON AND CAPLAN, *supra* note 91, at 189–190 (case 13) and 222–223 (case 10).

901 CARON AND CAPLAN, *supra* note 91, at 190; Caplan, *supra* note 271, at 127–128.

902 Case No B61, Challenge of Judge Seyed Jamal Seifi by the U.S. Government, reported in CARON AND CAPLAN, *supra* note 91, at 190 (case 14).

903 *See* 1899 Convention for the Pacific Settlement of International Disputes, Jul. 29, 1899 [1899 The Hague Convention]; 1907 Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907 [1907 The Hague Convention] [collectively referred to as the Hague Conventions].

904 By providing such administrative assistance for arbitral proceedings, the PCA overcomes the most important hurdles faced by earlier arbitration mechanisms, namely difficulties regarding the appointment of arbitrators and regarding the applicable procedural rules. *See* Charles H. Brower, *The Functions and Limits of Arbitration and Judicial Settlement*

individuals for the Court, but disputing parties would then be restricted by the roster in their choice of arbitrators.[905] This does not, however, correspond to the practice of the PCA. The Hague Conventions enable parties to appoint whomever they wish to a "special Board of Arbitration."[906] Since this term is not defined, the provision is used for all arbitral tribunals; hence, parties can freely choose their decision-makers. Furthermore, the various PCA Arbitration Rules explicitly allow parties and the Appointing Authority to designate persons who are not members of the Court as arbitrators.[907]

Members of the Court are required to have a "known competency in questions of international law, [be] of the highest moral reputation, and [be] disposed to accept the duties of [an] Arbitrator."[908] While the Hague Conventions do not mention the terms independence or impartiality in the context of the Members of the Court or arbitrators,[909] both qualities are explicitly named as appointment criteria in various PCA Rules.[910] These rules also allow parties to challenge arbitrators if the circumstances give rise to justifiable doubts as to their independence or impartiality.[911] Such challenges are determined by an Appointing Authority, similarly to UNCITRAL challenges.[912]

Under Private and Public International Law, 18 DUKE J. COMP. & INT'L. L. 259, 276 (2008); Nisuke Ando, *Permanent Court of Arbitration* (*PCA*), *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 2 (2006), online edition, *available at* http://opil.ouplaw.com/home/epil; Karin Oellers-Frahm, *International Courts and Tribunals, Judges and Arbitrators*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 3 (2013), online edition, *available at* http://opil.ouplaw.com/home/epil.

905 1899 The Hague Convention art. 24; 1907 The Hague Convention art. 45.

906 1899 The Hague Convention art. 26; 1907 The Hague Convention art. 47.

907 PCA Optional Rules for Arbitrating Disputes Between two Parties of which only one is a State, Jul. 6, 1993 [hereinafter PCA Optional Rules] art. 8, para. 3; Permanent Court of Arbitration Arbitration Rules 2012, Dec. 17, 2012 [hereinafter PCA Arbitration Rules 2012] art. 10, para. 4. *See* DALY, GORIATCHEVA, AND MEIGHEN, *supra* note 637, ¶ 4.37–4.38.

908 1899 The Hague Convention art. 23; 1907 The Hague Convention art. 44.

909 On the contrary, 1907 The Hague Convention art. 62 allowed Members of the Court to also act as "agents, counsel, or advocates" for the State which appointed them. *See* Anja Seibert-Fohr, *International Judicial Ethics*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 757, 759–760 (2013).

910 Common art. 6, para. 4 of the PCA Optional Rules, the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (Jun. 19, 2001), the PCA Optional Rules for Arbitration Between International Organizations and Private Parties (Jul. 1, 1996), and the PCA Optional Rules for Arbitrating Disputes Between two States (Oct. 20, 1992).

911 *See, e.g.* PCA Optional Rules art. 10, para. 1; PCA Arbitration Rules 2012 art. 12, para. 1.

912 PCA Optional Rules art. 12. *See* Sheppard, *supra* note 32, at 135.

The PCA has recently been at the center of the debate about arbitrator independence and impartiality: Tapped phone conversations of Mr. Sekolec,[913] an arbitrator in a maritime border delimitation dispute between Croatia and Slovenia, revealed that he shared confidential information about the tribunal deliberations and the likely outcome of the proceeding with a member of Slovenia's foreign ministry, Ms. Drenik. Mr. Sekolec explained in great detail how he intended to influence other arbitrators on the tribunal, and place additional information before them during deliberations.[914] Together with Ms. Drenik, he meticulously planned how she was to prepare notes on the delimitation of a specific part of the border, which he would then present to the tribunal as his own, making sure they would be included as a "part of the future award."[915]

Mr. Sekolec, a former Secretary General of UNCITRAL and LCIA Vice President, resigned from the tribunal as a consequence of the scandal, while Croatia announced that it would withdraw from the "contaminated" proceeding, since its lawfulness and credibility had been compromised.[916] The reconstitution of the tribunal was disrupted several times, and therefore delayed: The replacement arbitrator appointed by Slovenia, Ronny Abraham,[917] resigned after only a short while – the Croatian parliament had voted in favor of the country's withdrawal from the arbitration, leading in turn to the resignation of the arbitrator appointed by Croatia, Budislav Vuvac.[918] The resulting vacancies on the tribunal were later filled by the president of the tribunal.[919]

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913 Mr. Sekolec had been appointed to the five member tribunal by Slovenia. *See* Alison Ross, Croatia says it will withdraw over Sekolec scandal, Global Arbitration Review (July 27, 2015), http://globalarbitrationreview.com/news/article/34009/croatia-withdraws-sekolec-scandal/ [hereinafter Ross, Croatia].

914 *Id.*

915 Alison Ross, The tapped conversations: what Sekolec said, Global Arbitration Review (Aug.19,2015),http://globalarbitrationreview.com/news/article/34070/what-sekolec-said/ [hereinafter Ross, Tapped Conversations].

916 Ross, Croatia, *supra* note 913.

917 Alison Ross, Slovenia replaces Sekolec, Global Arbitration Review (July 28, 2015), http://globalarbitrationreview.com/news/article/34017/slovenia-replaces-sekolec/.

918 Alison Ross, ICJ president backs out of Croatia-Slovenia dispute, Global Arbitration Review (Aug. 5, 2015), http://globalarbitrationreview.com/news/article/34038/icj-president-backs-croatia-slovenia-dispute/.

919 Douglas Thomson, New faces on troubled Balkan border panel, Global Arbitration Review (Sept. 25, 2015), http://globalarbitrationreview.com/news/article/34178/new-faces-troubled-balkan-border-panel/ (Slovenia had asked the president to appoint a replacement arbitrator, in order to preserve the integrity of the proceedings, while Croatia insisted that it withdrew from the arbitration, and refused to appoint a replacement arbitrator).

The thus reconstituted tribunal decided that Croatia was not entitled to withdraw from the proceeding: after a *de novo* consideration of all aspects of the case, the Tribunal would be able to render a final award independently and impartially.[920]

While this case is certainly exceptional, it serves as a reminder of the importance of arbitrators' independence and impartiality for the legitimacy of a proceeding, of a tribunal, and of the entire dispute resolution mechanism. Other breaches of the obligation to act independently and impartially may be more nuanced, and difficult to detect, but will have a similar effect in aggregate, if they are tolerated.

4.4 *Contextualization and Conclusion*

The *sui generis* character of the Iran–US Claims Tribunal's dispute resolution mechanism might suggest that its challenge decisions are of particular relevance for the ICSID system. A number of idiosyncrasies, however, limit the pertinence of its disqualification case law for the ICSID system. In particular, the permanent arbitral panel, predominantly stocked with arbitrators nominated by the only two participants to the mechanism, eliminates certain conflict categories from the outset.

Generally, the State parties have come to tolerate a certain degree of bias in their respective counterparty's appointees. As a consequence, most challenges are directed against third-country arbitrators.[921] These challenges are mainly based on the arbitrators' behavior. In the rare case where a disqualification request concerns an arbitrator appointed by the U.S. or by Iran, the standard applied is usually very lenient.

Such a practice may make sense from a pragmatic standpoint of procedural efficiency in the context of the Iran–US Claims Tribunal: The pool of available arbitrators is truly small and the same two States are involved in all cases. It is plausible that the disqualification and replacement of a State-appointed arbitrator would ultimately not lead to a more satisfactory result.[922] The Claims Tribunal is however very distinctive in this respect – accordingly, its case law should be interpreted as decisions "confined to the facts of a particular case

920 *See* PCA Press Release, Tribunal Issues Partial Award: Arbitration Between Croatia and Slovenia to Continue (June 30, 2016), *available at* https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PCA-Press-Release-30062016.pdf.

921 CARON AND CAPLAN, *supra* note 91, at 210. It is noteworthy, however, that while only one of twelve challenges brought by the Iranian government was directed against a U.S. arbitrator, all but one of the eight challenges brought by the U.S. government were directed against Iranian arbitrators. *See* Caplan, *supra* note 271, at 122 and 129.

922 Caplan, *supra* note 271, at 136.

and institution," which do not predetermine how the same constellations would be dealt with in another setting.[923]

The delimitation of independence and impartiality under the various PCA Arbitration Rules, and the interpretation of the justifiable doubts threshold stipulated therein, is undiscernible. It is likely that it corresponds with the PCA Secretary-General's interpretation in cases under the UNCITRAL Arbitration Rules[924] and under the ICSID Convention.[925]

5 Summary Analysis

5.1 *Basic Consensus*

Summing up the results of the comparative research laid out in this Chapter, there is a general consensus in all examined dispute resolution mechanisms: Decision-makers must fulfil certain minimum requirements of independence and impartiality. Parties can generally challenge arbitrators and *ad hoc* judges if they believe that those requirements are not met. Most systems provide for an actual challenge or disqualification proceeding, while the ICJ uses a different terminology, but with the same result: A disputing party has a right to voice its concerns, and can, under certain conditions, achieve the removal of an *ad hoc* judge from the proceeding.

5.2 *Prevalent Threshold*

The threshold for a disqualification is relatively uniform across the examined dispute resolution mechanisms. Justifiable doubts regarding an arbitrator's independence and impartiality will lead to a disqualification under all examined commercial arbitration rules, including the UNCITRAL Rules, as used in commercial disputes, but also by the Iran–US Claims Tribunal, and as transposed into various of the PCA Arbitration Rules. The IBA Guidelines provide for the same standard: Justifiable doubts suffice for a disqualification.

Only the two international adjudication mechanisms which were examined provide for different thresholds. The ICJ Rules authorize a party to file a disqualification request if it "desires to bring to the attention of the Court facts which it considers to be of possible relevance."[926] The scope of possibly

923 CARON AND CAPLAN, *supra* note 91, at 211. *See also* Caron, *The Nature of the Iran–US Claims Tribunal*, *supra* note 881, at 104.

924 *See Telekom Malaysia*.

925 *See Abaclat I*, *Generation Ukraine*, and *Perenco*.

926 ICJ Rules art. 34, para. 2.

relevant facts is however significantly narrowed down by Article 17 para. 2 ICJ-Statute, which Article 34 para. 2 has to be read in conjunction with. As a consequence, challenges are limited to an *ad hoc* judge's previous participation in the same case. In comparing this standard to disqualification standards in investment or commercial arbitration, it is important to keep in mind that the influence of an ICJ *ad hoc* judge on the outcome of a particular proceeding is very modest. Since she or he is only one of fifteen judges deciding on a case, the narrowly outlined challenge grounds are unlikely to have an effect on the outcome of the proceeding or on the legitimacy of a particular judgment. On a panel of three decision-makers, this question would have to be assessed differently.

The other international adjudication mechanism which provides for a different challenge threshold is dispute settlement in the WTO. Section VIII of the Rules of Conduct allows parties to challenge panelists based on material violations of their obligations of independence and impartiality, and of their duty to avoid conflicts of interest, which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism. As has been stated above, it is not entirely clear how this "proof of material violation" standard compares to the more common justifiable doubts standard. Presumably, it imposes a higher burden of proof on the challenging party. But as in the ICJ context, there is an important limitation to the comparability of this standard to disqualification standards in investment or commercial arbitration: WTO panelists are appointed in a less party-driven process, either by an agreement of the parties, or (more frequently) by the Director-General. Accordingly, both parties have the same degree of influence (or lack thereof) on the panelists. This might eliminate certain suspicions from the outset, and explain the appropriateness of a higher threshold.[927]

In summary, all examined dispute resolution mechanisms which are comparable with the ICSID system require justifiable doubts regarding the arbitrator's independence and impartiality in order for a challenge to succeed.

5.3 *Effect of the Threshold on the Outcome*

This raises the question whether challenges subject to a justifiable doubts standard have noticeably different outcomes than ICSID challenges. The answer to this question is not as simple as existing criticisms of ICSID arbitration suggest:

927 Nadakavukaren Schefer, *supra* note 82, at 235–238 (exploring the possible reasons for the scarcity of challenges and the lack of an academic discussion regarding arbitrator challenges in the WTO system).

First, the disqualification of decision-makers is an exceptional occurrence in all examined systems. This makes sense, given the disturbance of the proceeding and the delay which a disqualification entails, as well as the need to eliminate spurious challenges.

Second (and perhaps more surprisingly), challenges based on comparable circumstances are not adjudicated more strictly across the board when a justifiable doubts threshold is applied. The lower threshold only appears to lead to more disqualifications in some constellations, while other situations are similarly evaluated.

A Main Discrepancies

Arbitrators were more frequently disqualified in the examined dispute resolution mechanisms based on their familiarity with a party in the proceeding, in particular where an attorney-client relationship or repeat appointments were invoked.

Even superficial, infrequent or commercially irrelevant prior contacts with a party generally led to disqualifications under the SCC Arbitration Rules, while ICC challenge decisions took factors such as the timing of the contacts, the closeness of the relationship and its commercial significance into account, before making a precautionary decision.

Attorney-client relationships between an arbitrator (or the arbitrator's law firm) and a party were generally held to be incompatible with the role of commercial arbitrators – irrespective of whether the issues involved in the arbitration and the subject-matter of the attorney-client relationship were related or similar.

Repeat appointments by a party generally led to the arbitrator's disqualification – subject, of course, to the number and frequency of such appointments.

Arbitrators who previously dealt with the subject-matter of a proceeding were also more frequently disqualified in commercial arbitration than in the ICSID system.

Finally, an important difference in the evaluation of challenges based on an arbitrator's familiarity with a party or with the subject-matter came to light in the comparison: The requirement of an overlap of the parties, law and facts of the matters in which an arbitrator is simultaneously or successively involved – a condition which blocks numerous ICSID challenges – either does not exist, or is not applied as strictly in any of the examined dispute resolution mechanisms.[928] This condition is unique to ICSID challenge decisions.

928 *See Grand River* for an application of this requirement under the UNCITRAL Arbitration Rules. In this case, a "basic similarity" of the matters was affirmed, because both

B Main Similarities

Irrespective of the applicable threshold, arbitrators who have previously been involved in the same dispute were disqualified in all examined systems. Disqualifications have occurred under the SCC and ICC Arbitration Rules, while no such cases have been reported in the UNCITRAL and ICSID systems. Under the IBA Waivable Red List, arbitrators which were previously involved in the same dispute are presumed to be barred from sitting on the tribunal. Article 17 para. 2 ICJ-Statute prohibits the involvement of *ad hoc* judges at different stages of the same proceeding – but only in certain functions. This broad consensus is not surprising: It epitomizes an elementary guarantee of procedural fairness.

In all examined systems, previous contacts between an arbitrator and a counsel are presumed to be unproblematic. They have only led to disqualifications in exceptional circumstances, for example where the arbitrator's law firm and the law firm of counsel shared office space and held joint seminars, or where the arbitrator's spouse was a partner in the law firm which had nominated him.

Furthermore, challenges were generally dismissed in all examined systems when brought on the basis of an arbitrator's previous public servant role, whether the challenging party found fault with the arbitrator's ensuing connection to a party or her or his familiarity with the subject-matter.

Challenges based on academic publications on the subject-matter of the dispute appear to only have been filed (and dismissed) in the ICSID system. The IBA Guidelines' listing of such publications on the Green List implies a broad consensus that they should not lead to an arbitrator's removal.

Finally, an analogy affecting several conflict categories is worth mentioning: Decisions in the ICSID and UNCITRAL systems have similarly dealt with the question whether an arbitrator who exercises two conflicting roles at the same time should be able to avoid disqualification by ceasing one of these roles, and answered in the affirmative.[929] These cases raise interesting questions, not

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proceedings dealt with the United States' compliance with its international commitments. Challenges based on repeat appointments have been upheld under the ICC Arbitration Rules where the same particular or even general subject-matter was at issue, even if the facts and parties did not overlap. Finally, the provisions of the IBA Guidelines' Orange List concerning repeat appointments only require the issues to be related where repeat appointments against a party are at issue, but not in the context of repeat appointments by a party or a counsel or law firm.

929 Challenges in the *ConocoPhillips* and *Favianca* cases have been dismissed based on Mr. Fortier's resignation from Norton Rose. In *Azurix* and *Siemens*, Mr. Sureda's

only from the perspective of cognitive psychology, but also theoretically: Can justifiable doubts, once they have arisen, effectively be dispersed based on a formal act of the arbitrator which serves his own purpose?

C Gaps in the Case Law

Apart from the above-mentioned differences and similarities, there are also gaps in the case law of the examined dispute resolution mechanisms. Some circumstances which have been the basis for challenges in the ICSID system have not (yet) been invoked very often in any of the other systems, or have led to widely disparate outcomes. In these categories, there is no sufficient basis for a comparative analysis of ICSID challenge decisions.

Very few challenges have been filed based on an arbitrator's previous collaboration with counsel for one of the parties, or with the law firm representing one of the parties. Role switching has also only been invoked infrequently.[930] The same can be said for repeat appointments by a law firm or counsel[931] and repeat appointments against a party.[932]

Challenges based on an arbitrator's connection with an adverse third party have led to varying results. Two UNCITRAL challenges were upheld, while another two were dismissed. The ICC challenge in *Saudi Cable* was also dismissed. How this category of cases should be dealt with appears not to be settled.

The following Chapter will analyze existing improvement suggestions based on these findings.

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termination of his employment with Fulbright & Jaworski allowed him to avoid disqualification. In *Grand River* and *Telekom Malaysia*, the respective arbitrators' disinvolvement in other matters has enabled them to remain on the tribunals. In *Vito Gallo*, the arbitrator recused himself, but could have foregone disqualification by discontinuing his advisory services to Mexico.

930 The scarcity of challenges based on such circumstances might be due to the larger size of the pool of commercial arbitration professionals, compared to the size of the investment arbitration community.

931 It is conceivable that arbitration practitioners consciously refrain from repeat appointments which would be covered by the IBA Guidelines' Orange List, in order to avoid excessive exposure to challenges by their counterparty. *See* Wilske and Stock, *supra* note 878, at 48–49.

932 Repeat appointments against a party are likely to be less common in systems where the pool of potential respondents is larger.

CHAPTER 4

Analysis of Existing Reform Proposals

Various scholars have addressed the issue of ICSID arbitrators' independence and impartiality since the beginning of this project. To the extent that they provide any explanation for their preoccupation with this topic at all, they predominantly very generically refer to the increasing number of arbitrator challenges in the past years,[933] and to the resulting "discomfort" or "concern" regarding arbitrator independence and impartiality.[934] Only a few scholars specify this observation and make assumptions as to the potential causes for the increase: The inadequacy of the relevant standard of independence and impartiality or a rise in uncalled-for dilatory challenges could be the source of the surge in arbitrator challenges, they surmise.[935] Interestingly, scholars have only exceptionally broached the issue based on the belief that ICSID arbitration suffers from an acute and prevalent, systemic lack of independence and impartiality.[936] Only very rarely did the impression of an irreconcilable conflict between independence and impartiality and systemic characteristics of investment arbitration motivate scholars' analysis of this subject.[937]

Nevertheless, in the course of their analysis of the topic, several scholars have reached the conclusion that certain characteristics of arbitration in general, or investment arbitration more particularly, are diametrically opposed to independence and impartiality. These irreconcilable conflicts, they argue, require a comprehensive reform of the (ICSID) arbitration system, instead of a piecemeal approach. Several grounds for challenges would thereby be eliminated all at once.

933 Fry and Stampalija, *supra* note 31, at 190; Reinisch and Knahr, *supra* note 24, at 103–104; Slaoui, *supra* note 85, at 103. *But see* Kinnear and Nitschke, *supra* note 13, at 35 (demonstrating that the increasing number of challenges "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."); Schreuer, *Dynamic Evolution*, *supra* note 5, at 19 ("The last ten years have seen a dramatic increase in activity").

934 Levine, *supra* note 45, at 2.

935 Giorgetti, *Challenges*, *supra* note 32, at 303; Markert, *supra* note 21, at 239.

936 Van Harten, Investment Treaty Arbitration, *supra* note 7, at 167–174.

937 Paulsson, The Idea, *supra* note 22, at 155, 156 and 159 ("The practice of unilateral appointments of co-arbitrators … is fundamentally at odds with the very concept of arbitration.").

Paulsson, for example, argues that party-appointments inherently contradict the obligation to be independent and impartial, and therefore proposes that party-appointments should be abolished, or at least restricted to closed arbitrator panels. Horvath and Berzero, as well as Bernasconi-Osterwalder et al. hold ICSID arbitrators' dual functions (as arbitrators and counsel) to be incompatible with their obligation of independence and impartiality. Thus, they propose a prohibition of such dual functions, in order to eliminate an entire range of potential conflicts. The consolidation of the pool of arbitrators which such a prohibition would entail, however, raises questions of diversity and the perceived impenetrability of the community of investment arbitrators,[938] which are closely related to the issue of independence and impartiality.

These reform proposals will be analyzed in detail in this Chapter. While there are clearly tensions between independence and impartiality on the one hand, and other characteristics or objectives of investment arbitration on the other hand, this Chapter concludes that there is no irreconcilable contradiction, and that the suggested comprehensive reforms would therefore be unwarranted and unsuitable to resolve existing deficiencies of the system.

Based on the finding that the indeterminacy of the challenge threshold is the main flaw of the regulation of independence and impartiality in the ICSID system, the third Part of this Chapter argues that existing concerns would effectively be reduced by clarifying the challenge threshold, and by bringing it into line with the threshold applied in the vast majority of the dispute settlement mechanisms examined in Chapter 3.[939] Objections regarding the inadequacy of a lower threshold for arbitrator challenges – in light of the small size of the investment arbitration community and of alleged negative repercussions on arbitrators' expertise – are addressed and rejected.

In the fourth Part of this Chapter, the European Union's initiative for an Investment Court System as the most tangible reform proposal (which incorporates the doctrinal proposals discussed in Parts 1 and 2) is outlined and scrutinized.

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938 *See* Puig, *Social Capital*, *supra* note 36, at 411; Rivkin, *supra* note 18, at 356.

939 *See also* Sheppard, *supra* note 32, at 155; Giorgetti, *Challenges*, *supra* note 32, at 318; PAULSSON, THE IDEA, *supra* note 22, at 160; DAELE, *supra* note 51, ¶¶ 5–035 and 5–106; Sobota, *supra* note 27, at 293 and 317. *Contra* LUTTRELL, *supra* note 31, at 245–246; Markert, *supra* note 21, at 273 and 275 (suggesting, however, that in certain exceptional cases, the arbitrator should resign).

1 Abolishment or Modification of the System of Party-appointments

Disputing parties do not chose the arbitrators they appoint merely on the basis of their experience and skills. While such factors certainly matter, what is pivotal for the parties is whether a particular nominee will enhance their chances of winning a case.[940] This fact was openly acknowledged by the unchallenged arbitrators in the ICSID challenge decision in *OPIC*:

> The suggestion … 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. In a dispute resolution environment, a party's choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute. In our view, multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.[941]

Disputing parties and their counsel thus vet arbitrators, and seek them out on account of their previous appointments, the awards rendered by tribunals on which they have served, their positions on particular legal questions and general political and ideological views.[942] In contrast to commercial arbitration, the relative transparency of the investment arbitration system simplifies this vetting process: Previous appointments of the arbitrator and the outcome of the respective proceedings are relatively easily procurable, making it less necessary to rely on informal information networks among arbitration practitioners.[943]

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940 PAULSSON, THE IDEA, *supra* note 22, at 155; Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, COLUMBIA FDI PERSPECTIVES NO. 33 (2010), http://ccsi.columbia.edu/files/2014/01/FDI_33.pdf [hereinafter Smit, *Pernicious Institution*]; DAELE, *supra* note 51, ¶ 7–002 ("It is common knowledge that parties select their arbitrator to maximize their chances of prevailing."); Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L. 395, 395 (1998).

941 *OPIC*, ¶ 47.

942 *See* DAELE, *supra* note 51, ¶ 7–002; Paulsson, *Moral Hazard*, *supra* note 477, at 352; Shany, *supra* note 106, at 482–483; ROGERS, ETHICS, *supra* note 98, ¶¶ 8.85–8.88 (describing the vetting process in detail); Brower and Rosenberg, *supra* note 122, at 17.

943 *See* Magdalene D'Silva, *Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration*, 5 J. INT'L. DISP. SETTLEMENT 605, 633 (2014). Due to

This strategic alignment of the appointing party's interests and the nominee's preexisting views, viewed in isolation, is not problematic from the point of view of independence and impartiality, as long as the arbitrator appears to be able to objectively and rationally analyze the case and apply the law to it.[944] After all, no one who would seriously be considered as a possible arbitrator is a blank slate. While parties are required to appoint arbitrators who are independent and impartial, they are not restricted to inexperienced or ignorant arbitrators.[945] Independence and impartiality guarantee a fair proceeding, and not a random or unpredictable outcome.

In practice, however, arbitrators have a personal incentive to satisfy their appointing parties' expectations: They are competing for (re)appointments. As a result, anecdotal evidence[946] suggests, arbitrators tend to favor their

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the confidentiality of the tribunal deliberations (ICSID Arbitration Rule 15, para. 1), the outcome of a proceeding cannot directly be ascribed to the views of any particular arbitrator. Accordingly, informal information networks are not entirely dispensable, and choosing an arbitrator on the basis of her or his previous appointments includes a certain degree of guesswork, unless the arbitrator has expressed his personal view on certain issues in a dissenting opinion.

944 Bishop and Reed, *supra* note 940, at 396; SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 40, ¶ 24; Brower and Rosenberg, *supra* note 122, at 17 ("[T]here is a critical difference between, on the one hand, Paulsson's feared 'advocate-arbitrator' who 'will help me win the case', and, on the other hand, an arbitrator who is appointed by a party because that party perceives, based on the arbitrator's judicial and/or professional track record, that the arbitrator might be more likely than not to share the party's view of the case. While the former is clearly improper, the latter is benign and in fact commonly practiced.").

945 *See* Douglas Thomson, "An open mind, not a blank mind": Hanotiau survives challenge by Kazakhstan, Global Arbitration Review (Nov. 26, 2015), http://globalarbitrationreview.com/news/article/34376/an-open-mind-not-blank-mind-hanotiau-survives-challenge-kazakhstan/ ("'Parties are entitled to have their claims adjudicated by persons with an open mind, not a blank mind unencumbered by prior experience and learning.' To disqualify arbitrators for having previously considered points of treaty arbitration would 'put a premium on ignorance.'").

946 The actual bias of investment arbitrators has been studied from an empirical perspective by Susan D. Franck (*The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VIRGINIA J. 977 (2011); INTERNATIONAL INVESTMENT ARBITRATION: WINNING, LOSING AND WHY, COLUMBIA FDI PERSPECTIVES NO. 7 (2009), http://ccsi.columbia.edu/files/2014/01/FDI_7.pdf; *Development and Outcomes*, *supra* note 33; *Empirically Evaluating Claims*, *supra* note 33), Daphna Kapeliuk (*Collegial Games*, *supra* note 33; *Repeat Appointment*, *supra* note 33), Albert Jan van den Berg (*Dissenting Opinions*, *supra* note 34), and Gus Van Harten (*Arbitrator Behaviour*, *supra* note 35). However, inherent methodological limitations of empirical research render reliable proof of bias

appointing party, sometimes to a point where they take on the role of representatives, and the chairperson remains the only independent and impartial decision-maker on the tribunal.

In a best case scenario, partisan co-arbitrators cancel each other out, or defend their appointing parties' interests with such fervor that a strong chairperson will ignore them, and draft an award without paying attention to their tactics.[947] But even such a seemingly unscathed outcome is unsatisfactory: If the parties had wanted their dispute to be resolved by a sole arbitrator, they would have agreed so.[948] If they have not derogated from the default rule of a tribunal composed of three arbitrators, the assumption must be that they intended for three independent and impartial decision-makers to contribute their knowledge, deliberate on the decision, and share the responsibility for a fair outcome of the proceeding.[949] By transferring decision-making authority to three arbitrators, the parties did not acquiesce to the impartiality of only one of them.[950] More importantly, even if the parties did consent to partial co-arbitrators, it would not matter: Independence and impartiality are pivotal to the legitimacy of the individual decision, and the institution as a whole,[951] and as such are not subject to party autonomy.[952]

Furthermore, the reciprocal neutralization of partial party-appointed arbitrators appears to be a theoretical construct which is rather unlikely to occur in practice. It is more probable that if partiality were tolerated, this would trigger drastic positions in party-appointed arbitrators, leaving the chairperson as

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impossible. *See* Rogers, *Politics*, *supra* note 17, at 228 and 233; see also Franck, Structure, *supra* note 41, at 254.

947 Franck, *The Role of International Arbitrators*, *supra* note 24, at 12; Mourre, *supra* note 113.

948 *See* ICSID Convention art. 37, para. 2.

949 Schreuer et al., Commentary, *supra* note 16, Art. 39, ¶¶ 2 and 7 (corroborating that the restrictions on national arbitrators imposed by the ICSID Convention seek to avoid a situation in which the chairperson of the tribunal is the only neutral arbitrator, akin to a sole arbirator, who has no choice but to side with one of the partisan arbitrators to achieve a majority).

950 Paulsson, The Idea, *supra* note 22, at 17 (conceding that such an agreement at least did not exist *ex ante*, for as the proceedings evolve, parties might lose sight of the goal of resolving a dispute, and mostly care about winning).

951 Paulsson, The Idea, *supra* note 22, at 147.

952 ICSID Convention art. 40, para. 2 in connection with art. 14, para. 1. *See* Daele, *supra* note 51, ¶ 5–111 ("The right to appoint an arbitrator … is … qualified by the requirement that … each of the arbitrators shall be independent and impartial."); Schreuer et al., Commentary, *supra* note 16, Art. 37, ¶ 2 (listing the requirement of arbitral independence and impartiality pursuant to ICSID Convention art. 40 para. 2 as a limit to the parties' freedom of choice in the constitution of tribunals).

the only remaining independent and impartial decision-maker on the tribunal with no other option than to pick a side, in order to achieve a majority.[953] Clearly, this would undermine the system's procedural fairness, and thus its legitimacy.

Several scholars, most notably Jan Paulsson, therefore advocate the abolishment of party-appointments.[954] Criticizing that party-appointments risk skewing the deliberations process by introducing an adversarial element into it,[955] he concludes that they are "incompatible with the very concept of impartial dispute resolution."[956] Others more cautiously point out the inherent tension between the concepts of independence and impartiality on the one hand, and the desire for an ally on the tribunal on the other hand.[957]

The abolishment of unrestricted party-appointments,[958] however, is not the only possible way of dealing with arbitrator bias. Alternative appointment methods would therefore have to entail a higher degree of independence and impartiality, without compromising the valid interests served by party-appointments, in order to be supportable. Two possible alternatives will be examined hereinafter,[959] with regard to the extent to which they would

953 In the context of the drafting process of ICSID Convention art. 39, s*ee* SCHREUER ET AL., COMMENTARY, *supra* note 16, Art. 39, ¶¶ 2 and 7.

954 Paulsson, *Moral Hazard*, *supra* note 477, at 348 and 352. *See also* Smit, *Pernicious Institution*, *supra* note 940 (advocating a ban on party-appointed arbitrators, unless their role as advocates for the party that appointed them is fully disclosed and accepted).

955 PAULSSON, THE IDEA, *supra* note 22, at 156–157.

956 *Id.* at 162.

957 Park, *Arbitration's Discontents*, *supra* note 24, at 594; Shany, *supra* note 106, at 473 and 488; DAELE, *supra* note 51, at 238–239 n.66.

958 Paulsson suggests that party-appointments should either be abolished altogether, or modified, by requiring appointments from a roster. Both suggestions are herein referred to as abolishing unrestricted party-appointments, for the sake of brevity. It is not thereby suggested that under the current ICSID regime, party-appointments are entirely unrestricted.

959 The suggestion of joint appointments by the parties (Paulsson, *Moral Hazard*, *supra* note 477, at 352) will not be analyzed, because the experience with the appointment of WTO panelists demonstrates the ineffectiveness of such an appointment mechanism: The disputing parties rarely reach an agreement on the panelists, leaving the appointment to the Director-General in most instances. *See* VAN DEN BOSSCHE AND ZDOUC, *supra* note 517, at 216; Spak and Kendler, *supra* note 517, at 167. In commercial and investment arbitration, the joint appointment of the chairperson by the parties (or their counsel) is often a protracted process, despite the unilateral appointment of the co-arbitrators. Accordingly, it appears unrealistic to expect the parties to agree on all arbitrators, within a reasonable delay. The constitution of a permanent panel of arbitrators, or of an investment court,

increase arbitrators' independence and impartiality, as well as parties' confidence in the process, while guaranteeing the high quality of arbitrators and awards.[960]

1.1 *Appointment by a Neutral Body*

One of the alternatives to party-appointments proposed by Paulsson is to interpose an institution into the appointment process, so that arbitrators would no longer be directly connected to the parties.[961] The institution which first comes to mind in this context, because it is already in charge of appointing arbitrators who have not been appointed by the parties, as well as members of *ad hoc* Committees in annulment proceedings, is the ICSID Secretariat, in particular the ICSID Secretary-General.[962] There are however several objections to having the Secretary-General appoint all three arbitrators:

First, the power monopoly of the Secretary-General is already criticized today, and referred to as a "monarchy, and an absolute rather than a constitutional one."[963] At the core of this criticism lies the perception that the appointment of all *ad hoc* Committees by only one person concentrates too much power in one hand. While it is unclear whether it is indeed only the Secretary-General who makes those appointments, or whether the President of the World Bank, the parties and the Secretary-General cooperate,[964] there seems to be widespread agreement that the criteria applied to such appointments lack transparency: Although appointments should be made from the Panel of Arbitrators,[965] this requirement is often foregone, and waived by the disputing parties, or their counsel. Accordingly, the process is said to be highly discretionary and random. Due to the lack of oversight (except for the

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is not examined because this study focuses on improving arbitrator independence and impartiality within the current institutional system, i.e. in an arbitration setting.

960 *See also* Mourre, *supra* note 113.

961 Paulsson, *Moral Hazard*, *supra* note 477, at 352. *See also* Smit, *Pernicious Institution*, *supra* note 940.

962 Under ICSID Convention art. 38 and art. 52, para. 3, this is the competence of the ICSID Chairman (i.e. the President of the World Bank). In practice, however, it is often delegated to the Secretary-General, who is more familiar with the potential nominees. *See* Douglas Thomson, Is ICSID a "Monarchy"?, Global Arbitration Review (Jan. 4, 2016), http://globalarbitrationreview.com/news/article/34415/is-icsid-monarchy/ [hereinafter Thomson, Monarchy].

963 *Id.*

964 *Id.* (statement by Antonio Parra, a former senior counsel, legal adviser and deputy secretary general at ICSID).

965 ICSID Convention art. 40, para. 1.

possibility of challenging the appointed arbitrators or *ad hoc* Committee members), some authors refer to the role of the Chairman as an autocratic one.[966] As a result, it is unlikely that the appointment of arbitrators by the Secretary-General would elicit more confidence in the dispute resolution process from the parties.

Second, the transfer of the appointment authority from the parties to the Secretary-General would not solve existing independence and impartiality issues, but would transform them into doubts regarding the arbitrators' political neutrality and institutional independence. Prominent arbitration practitioners and scholars have criticized the ICSID Secretariat for what they perceive to be politically motivated interventions in the annulment context,[967] and a poor selection of *ad hoc* Committee members.[968] Others have voiced their distrust towards the President of the World Bank, because he allegedly reflects the dominance of the United States in the decision-making process of the World Bank.[969] Appointments by the Secretariat or the President might therefore be perceived to be political. In contrast to party-appointments, the potential influence on the decision-makers would be monopolized in the hands of one appointing body, whether it would be the Secretary-General or the ICSID Chairman. With no one to offset and neutralize the appointing body's power, arbitrators would be exposed to accusations of deciding in a way that pleases the institutional appointing body, in order to be reappointed.[970] The resulting appearance of institutional dependence would be at least as pernicious as bias towards one of the parties.

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966 David Collins, *ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?*, 30 J. INT'L. ARB. 333, 338 (2013); Mourre, *supra* note 113.

967 *See Vivendi*, Decision on the Argentine Republic's Request for Annulment of the Award rendered on Aug. 20, 2007, Separate Opinion of Professor Jan Hendrik Dalhuisen (Aug. 10, 2010), ¶¶ 2, 9 (pointing out the Secretariat's interference with and substantive involvement in annulment proceedings, which in his view presumably aims to ensure a restrictive interpretation of the provisions on annulment, in order for a majority of awards to be upheld).

968 Mourre, *supra* note 113; Paulsson, *Moral Hazard*, *supra* note 477, at 354 ("arbitral institutions … are … exposed to suspicions of poor selection of arbitrators, and maybe even worse: cronyism and other forms of corruption."); Brower and Rosenberg, *supra* note 122, at 24.

969 Collins, *supra* note 966, at 338.

970 *Vivendi*, Decision on the Argentine Republic's Request for Annulment of the Award rendered on Aug. 20, 2007, Separate Opinion of Professor Jan Hendrik Dalhuisen (Aug. 10, 2010), ¶¶ 22 and 25.

Third, due to arbitrator information asymmetries[971] and the consolidation of the arbitration community over the past decades, it is unlikely that the Secretary-General or the ICSID Chairman would appoint other arbitrators than the current frequent players. Accordingly, the transfer of the appointment authority to ICSID would have an "acratic effect," as defined by D'Silva:[972] Beyond the comforting appearance of a resolution of the independence and impartiality issue, no real change would be achieved in practice. Currently, appointments by the Secretary-General only fare marginally better than party-appointments in terms of diversity,[973] and potential conflicts of interest arising from repeat appointments are apparently not sufficiently paid attention to by the Secretariat.[974] Also for this reason, it is doubtful that arbitration users would have confidence in the selection of the decision-makers by the Secretary-General or the ICSID Chairman,[975] and that existing independence and impartiality issues would be resolved.

Last but not least, the institution appears to already be reaching its capacity limits with the appointments it is now making. As a response to criticism regarding the delegation of the appointment competency from the ICSID Chairman to the Secretary-General, it has been argued that the "sheer number of appointments" handled by ICSID make such an arrangement indispensable.[976] It is worth highlighting that just over a quarter of all appointments (including

971 ROGERS, ETHICS, *supra* note 98, ¶¶ 8.84–8.93.

972 D'Silva, *supra* note 943, at 610 and 613.

973 ICSID, *Caseload-Statistics 2016–1, supra* note 3, at 19 and 31.

974 Thomson, Monarchy, *supra* note 962 (illustrating this allegation with the appointment of Albert Jan van den Berg as a chair of an *ad hoc* Committee, despite the fact that he had authored an award which one of the parties relied upon in the proceeding, and which had been annulled just three weeks earlier). *See also* REED, PAULSSON, AND BLACKABY, *supra* note 13, at 173–174 ("In recent years, ICSID has made serial appointments to *ad hoc* committees from a small pool of highly experienced arbitrators, … 'to promote coherence in the application of the Convention and Rules by annulment committees'. As a result, the 20 *ad hoc* committees constituted by ICSID between January 2007 and September 2010 have been made up primarily of arbitrators serving on multiple committees. Out of a total of 60 *ad hoc* committee member positions, 15 arbitrators have held over three-quarters of the appointments (49 out of 60 positions, or 81 percent).").

975 Paulsson, *Moral Hazard*, *supra* note 477, at 354; Brower and Rosenberg, *supra* note 122, at 24 ("[I]t is highly to be doubted that any institution can ever achieve a level of user confidence that even approaches that of selections made by sophisticated parties and counsel.").

976 Thomson, Monarchy, *supra* note 962 (comment by Eloise Obadia, a former senior counsel at ICSID).

appointments to *ad hoc* Committees) are currently made by the institution[977] – if this workload brings ICSID to its limits, it is unlikely that it could manage the appointment of all arbitrators.

In summary, the appointment of arbitrators by the Secretary-General or the ICSID Chairman would neither increase arbitrators' independence and impartiality, nor parties' confidence in the process. Due to the lack of knowledge of the particular needs of the disputing parties with regard to the arbitrator's expertise, the appropriate specialization of the appointed decision-makers could not be guaranteed, either.[978] On balance, this alternative is not considered an avenue worth pursuing.

Another possibility for interposing an institution into the appointment process would be to charge the ICSID Administrative Council[979] or a committee established within the Administrative Council with arbitrator appointments. This has been suggested by Collins, in the context of the appointment of *ad hoc* Committees, and is inspired by the appointment procedure for the WTO Appellate Body.[980]

Undoubtedly, this solution would be more transparent, participatory and democratic than having the Secretary-General or the ICSID Chairman appoint the arbitrators. It is however doubtful that the Administrative Council could deal with the number of appointments that would need to be made. The appointment of the WTO Appellate Body members is limited to seven nominations within four years. ICSID, on the other hand, has registered between thirty-eight and fifty-two cases a year over the past five years.[981] In addition, annulment proceedings were commenced in thirty-one cases since 2011 – more than a third of the eighty-two awards which were rendered.[982] Assuming that the same body would appoint arbitrators and *ad hoc* Committee members, it would have to make more than one hundred and fifty appointments

977 ICSID, *Caseload-Statistics 2016–1*, *supra* note 3, at 19 and 31.

978 Brower and Rosenberg, *supra* note 122, at 19 ("Naturally, the parties and their counsel know more about the specific nuances of their case than anyone else, including an Appointing Authority. The parties likewise are in the best position to identify the corresponding knowledge, skills, and expertise desired (or needed) in a tribunal to adjudicate the dispute.").

979 ICSID Convention art. 4–8. The ICSID Administrative Council is the governing body of ICSID. It is composed of one representative from every contracting State.

980 Collins, *supra* note 966, at 340.

981 ICSID, *Caseload-Statistics 2016–1*, *supra* note 3, at 7.

982 International Centre for Settlement of Investment Disputes, *The ICSID Caseload-Statistics (Issue 2015–2)*, at 17, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf.

a year, overall. This is a considerable workload. Finding consensus on such a large number of appointments, and on potential replacements, without compromising the suitability and qualifications of the arbitrators, is likely to be difficult.

The suggestion of transferring the appointment authority to a committee within the Administrative Council appears to be more practicable, but harbors a considerable risk of either a politicization of the process,[983] or of no effect on the outcome of appointments: Like the Secretary-General, a committee within the Administrative Council would lack the necessary insight to identify arbitrators who are particularly suited to decide a specific dispute.[984] In contrast to arbitration practitioners, it is also unlikely to be aware of qualified and motivated newcomers who could serve as arbitrators.[985] As a consequence, such a committee would largely rely on seasoned ICSID arbitrators in its nominations, just like the Secretary-General or the ICSID Chairman.

Consequently, also this alternative (should it be practicable) would not effectively improve arbitrators' independence and impartiality, without impairing parties' confidence in the process.

1.2 *Party-appointment from a Roster*

The second alternative to *prima facie* unrestricted party-appointments would be to limit appointments by the parties to an exhaustive roster of qualified arbitrators.[986]

To date, attempts to create such rosters have been unsuccessful in several dispute resolution mechanisms: In the ICSID system, many States fail to nominate arbitrators to the Panel of Arbitrators provided for in Article 12 ICSID Convention.[987] The roster of arbitrators of the PCA was originally intended to be closed, but is mostly insignificant today, and parties can freely appoint anyone

983 *See infra* Part 1.2.

984 Brower and Rosenberg, *supra* note 122, at 19.

985 *Id.* at 24.

986 Paulsson, *Moral Hazard*, *supra* note 477, at 352; Wouters and Hachez, *supra* note 19, at 637.

987 The Panel of Arbitrators binds the ICSID Chairman in his appointment of arbitrators and *ad hoc* Committee members. Under ICSID Convention art. 13, each Contracting State may designate four persons to the Panel of Arbitrators. In addition, the ICSID Chairman may designate ten persons. If every Contracting State made use of this right, there would accordingly be 618 arbitrators on the panel (including those appointed by the ICSID Chairman). To date, there are however only 243 arbitrators on the panel. *See Database of Panel Members – Panel of Arbitrators*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Panel-Members.bak.aspx (last accessed on Mar. 7, 2016).

as an arbitrator.[988] A roster for NAFTA investment disputes (the equivalent of the ICSID Panel of Arbitrators) still has not been created,[989] just like the list of substitute third-country Members for the Iran-United States Claims Tribunal.[990] But even if the member States of the ICSID Convention succeeded in creating a roster of arbitrators,[991] such a roster would be problematic in several ways:

First, there appears to be no appropriate size of a roster which would reduce the risk of dependence and partiality without unnecessarily curtailing the diversity and the expertise of the decision-making body. From the perspective of arbitrators' independence, a large roster would be ineffective. Its members would not be assured of receiving appointments, and would therefore continue to compete for nominations. They might, of course, enter the competition for appointments by offering particular qualifications, experience in a specific area of expertise, or a high degree of impartiality. The parties' focus on winning, however, would likely lead to the appointment of arbitrators who discreetly but unmistakably signal their political and ideological preferences, and defend their appointing parties' positions on the tribunal. There is no objective reason why arbitrators who are part of a large roster would be less tempted to attract (re)appointments by favoring their party than arbitrators in the current system.[992] The panel would therefore have to be small. It would have to be so small that the competition for appointments among arbitrators would be largely eliminated. Being included on the roster would virtually have to guarantee an arbitrator that she or he will get appointed to tribunals. Such a short roster would however not only *de facto* eliminate the parties' freedom of choice; it would also increase the chances of repeat appointments and of the arbitrators' familiarity with counsel and with the subject-matter of a case.[993] The most frequently invoked bases for arbitrator challenges therefore would not be eliminated, and favoritism could still occur.[994] At the same

988 DALY, GORIATCHEVA, AND MEIGHEN, *supra* note 637, ¶ 4.38.

989 Brower and Rosenberg, *supra* note 122, at 12.

990 Iran-United States Claims Tribunal Rules of Procedure, 2 Iran-U.S. Cl. Trib. Rep. 403, art. 13 note (1983). *See also* Brower and Rosenberg, *supra* note 122, at 12.

991 The current Panel of Arbitrators (ICSID Convention art. 12) serves a more limited purpose than if all arbitrators were appointed from it. Accordingly, it would have to be renewed, and (probably) enlarged if it were to list all available candidates for arbitrator and *ad hoc* panels.

992 *See also* Santens, Move Away, *supra* note 127.

993 *Id.*

994 A short roster might even aggravate arbitrators' bias. In the context of the Court of Arbitration for Sport (CAS), for example, a stricter standard of independence and impartiality

time, diversity and expertise on such a small roster would be significantly curtailed.

Second, as argued above, in the context of the suggestion for an institutional appointment of arbitrators, it is questionable whether a closed roster of arbitrators would list other arbitrators than those who currently dominate the investment arbitration scene. This is not to say that it would be desirable not to list the current arbitrators on the roster. On the contrary, the system is dependent on these specialists, who have the necessary expertise and experience. These arbitrators, however, would not suddenly wipe the slate clean and abdicate their political and legal views, their past decisions, or their positions and functions within the investment arbitration network, only because they are listed on a roster. If parties appoint them based on these criteria today, they would continue to do so. Accordingly, a roster would not bring about as much change as one might expect. At the same time, limiting the number of potential decision-makers would take a toll on diversity and expertise[995] – especially if the roster was kept short, in the interest of independence. It would also constitute an additional hurdle to new entrants.[996] These drawbacks are too significant, in the light of the minor improvement (if any) which could be achieved in the independence and impartiality context.

Third, a roster would inevitably lead to a politicization of ICSID arbitration. Whether the member States would nominate the members of the Panel of Arbitrators, as is the case in current international adjudication and *sui generis* mechanisms which provide for rosters,[997] or whether the ICSID Chairman would participate in the nomination process,[998] potential arbitrators would have difficulties getting listed if they did not entertain close connections with the contracting States or the ICSID Secretariat.[999] Appointments which would go beyond the current pool of investment arbitrators are likely to be guided

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has been advocated – precisely because the roster is closed and relatively short, and therefore increases the likelihood of repeat appointments. *See* Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT'L. DISP. SETTLEMENT 217, 239 (2010).

995 Brower and Rosenberg, *supra* note 122, at 24.

996 *Id.* at 23; Santens, Move Away, *supra* note 127.

997 DSU art. 8, para. 4 ("Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list."); 1899 The Hague Convention art. 24; 1907 The Hague Convention art. 45.

998 ICSID Convention art. 13, para. 2.

999 Brower and Rosenberg, *supra* note 122, at 23 ("Politics … create an artificial barrier to entry, which conflicts with, for example, the '[n]eed for additional qualified arbitrators on the ICSID Panels due to the increasing caseload', as recently emphasized by the ICSID Secretary-General.").

by the appointees' general political and ideological views. Such nominations often entail extensive lobbying campaigns and subsequent allegiances,[1000] which are no less problematic than dependence on or partiality towards one of the parties.[1001] Furthermore, the periodic renewal of the roster and possibility of a re-election of its members would pose similar problems as tenure and re-election in international adjudication, and would most likely result in similar national and geopolitical biases.[1002]

As a consequence, any potential gains a closed roster might have are likely to be offset by the problems it would create. In summary, the party-appointment of arbitrators – paired with clear rules on arbitrators' independence and impartiality, and the enforcement of these rules in an objective and effective process – is preferable to any of the alternative suggestions.[1003]

2 Prohibition of Dual Functions

The non-exclusive nature of the arbitrator function is frequently at the core of disqualification requests. In particular, the primary (or coequal) activity of arbitrators as legal advisors and counsel can cause an apprehension of bias under certain circumstances. For example, when one of the parties in the arbitration has an attorney-client relationship with the arbitrator, sympathies or the identification with this party's general position might influence the arbitrator's decision. If the arbitrator is faced with a legal question which she has previously argued as a counsel, she might not approach it as open-mindedly as if it was new to her. If the arbitrator is involved (as a counsel) in a parallel proceeding concerning similar legal issues, the awareness that his award might support or impede his arguments as a counsel might influence his decision-making.

1000 *Id.* at 22–24. *See*, in the context of ICJ *ad hoc* judges, Kooijmans, *supra* note 128, ¶ 7 (stating that *ad hoc* judges predominantly cast their votes in favor of their appointing State); Mackenzie and Sands, *supra* note 510, at 278.

1001 Santens, Move Away, *supra* note 127.

1002 *See* Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 Am. Polit. Sci. Rev. 417, 421 (2008); Erik Voeten, *International Judicial Independence*, *in* Interdisciplinary Perspectives on International Law and International Relations. The State of the Art 421, 431–434 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012); Posner and de Figueiredo, *supra* note 516, at 28–29; Mackenzie and Sands, *supra* note 510, at 278. *But see* Smith, *supra* note 120, at 200.

1003 Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. Pa. J. Int'l. L. 431, 473–474 (2013).

Based on the multitude of (conscious or unconscious) conflicts of interest which such dual functions can entail, various scholars suggest that they should be prohibited altogether. Arbitration professionals should be faced with the choice of either practicing an adjudicatory or a counsel role, and should not be allowed to switch between the two.[1004] The merits of three different versions of such a ban are examined hereinafter.

2.1 *Complete Prohibition*

A complete prohibition of dual functions would undoubtedly prevent various situations of potential conflict from arising in the first place. Role switching between counsel and arbitrators, for example, would be completely forestalled. Situations in which arbitrators could adjudicate disputes involving their current clients would be avoided. Potential conflicts based on an arbitrator's previous collaboration with one of the counsel in the proceeding would eventually become less frequent. Procedurally, a complete prohibition would simplify conflict checks and disclosures. Fewer dilatory challenges based on the interests arbitrators have in their role as counsel would mean less delays in the resolution of disputes. Completely banning dual functions, however, would also be a very drastic and far-reaching measure – one whose disadvantages would outweigh any potential benefits.

First, banning arbitrators from working as counsel would be over-inclusive, and therefore disproportionate. A complete ban of dual functions would also cover situations in which the two functions do not interfere with each other, and where no danger of a conflict of interest exists.[1005] In these situations, the ban would eliminate the positive implications of dual roles,[1006] without improving arbitrators' independence and impartiality. Because arbitrator and counsel functions do not always conflict, the rare cases in which they do can better be managed with clear and targeted rules on conflicts of interest, which would require the recusal, or (*ultima ratio*) the removal of an arbitrator in such a situation. The clarification of conflict of interest rules would accomplish more legal security and predictability across the board than an outright ban of

1004 Mouawad, *supra* note 252, at 12; Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 51; Horvath and Berzero, *supra* note 37, at 18.

1005 Arbitrators who consistently ensure that their appointments are not connected to their work as counsel (i.e. neither to a client, nor to a specific legal issue they have previously dealt with), for example, would also be affected by the ban. Not an open, but a blank mind of arbitrators would be ensured by such an over-inclusive ban on dual functions.

1006 The availability of experienced professionals, who know all aspects of investment arbitration proceedings, from all perspectives, for example, is said to be an advantage of the dual function of arbitrators. Horvath and Berzero, *supra* note 37, at 12.

dual functions, which only aims at a small subset of potential conflicts, and is over-inclusive.

Second, a complete prohibition of dual functions would be ineffective, if not counterproductive. By eliminating arbitrators' main and most reliable source of income[1007] – counsel fees – arbitrators would be made more, instead of less dependent on party (re)appointments.[1008] It is realistic to assume that a prohibition of dual functions would significantly reduce the number of available arbitrators, since counsel work is both more reliable, and more lucrative than arbitrator appointments.[1009] The pool of investment arbitrators, which is already small as it is, would thus become even more concentrated.[1010] Seasoned arbitrators would likely be the only ones for whom it would be economically viable to pursue a career which is exclusively focused on the arbitrator function. It is imaginable that they would decide a vast majority of all investment disputes if dual functions were prohibited, probably in relatively constant roles (appointed by a particular category of parties, or serving as the chairperson) on different tribunals. Such a consolidation of the investment arbitrator community would entail a loss of diversity, and a tightening of the existing network and interdependencies. Repeat appointments by the same parties or counsel, against the same parties, or in similar matters would be virtually unavoidable, and the positions of the remaining arbitrators would likely become more entrenched.

1007 LUTTRELL, *supra* note 31, at 239; STIPANOWICH AND ULRICH, *supra* note 105, at 19–23 (providing empirical data on the work time utilization of commercial arbitrators).

1008 *See* DAELE, *supra* note 51, ¶ 6–191 ("If the arbitrator has independent income sources, he/she will be less tempted to vote in favour of the appointing party so as to secure future appointments and future income.").

1009 *See* ICSID, Schedule of Fees, § 3, https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/Schedule-of-Fees.aspx (last accessed on Dec. 30, 2016) ("In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators, commissioners and *ad hoc* Committee members are entitled to receive a fee of US$3,000 per day of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation. Any request for a higher amount shall be made through the Secretary-General."). *See also* REED, PAULSSON, AND BLACKABY, *supra* note 13, at 16–17 ("These fees remain modest when compared with those typically charged by leading arbitration professionals in their other work."); Puig, *Social Capital*, *supra* note 36, at 398 n.61.

1010 *Contra* Horvath and Berzero, *supra* note 37, at 13 ("[I]t is not true that prohibiting practitioners to wear double-hats would reduce the available 'pool' of experienced arbitrators. Rather, it can be argued that it would result in the convergence of professors, civil servants, diplomats etc. which would, at the end of the day, enrich the arbitral process.").

An outright ban of dual functions further only helps to avoid conflicts which arise from an arbitrator's personal and concurrent function as a counsel. This only covers a very small portion of possible conflicts. Arbitrators would presumably remain integrated into law firms, and receive appointments through their law firms' networks. Some of the connections of those law firms, or of their colleagues, would have to be imputed to them, as is already the case today. Such conflicts would not be eliminated by a ban of dual functions. Neither would conflicts arising from an arbitrator's previous work as a counsel. Since most arbitrators serve as counsel to arbitration parties, tribunal secretaries and tribunal assistants, long before they receive their first appointments, it is inevitable that they build their professional network and connections at that time. It might even be realistic to assume that they are most actively building up their network before they even become appointed for a first time, because they are working towards precisely that goal: a first appointment. A prohibition of dual roles would not change this dynamic, despite the acute potential for conflict. It would only hinder the formation of additional connections (in the capacity as counsel), after a lawyer has become an arbitrator. Accordingly, a large proportion of potentially conflicting connections would not be covered.

In summary, a complete ban of dual functions would not solve all independence and impartiality concerns. It would be over-inclusive in some respects, and under-inclusive in others, while the ensuing consolidation of the investment arbitrator community would likely compound existing concerns.

2.2 *Temporary Prohibition and Vesting Period*

An attenuated version of a complete ban would be a temporary incompatibility, paired with a vesting period, as provided for with respect to ICJ *ad hoc* judges in Practice Directive VII.[1011] Practice Directive VII obliges ICJ *ad hoc* judges to avoid serving as counsel in ICJ cases within a three year period of their service as an *ad hoc* judge. The prohibition is not restricted to the service in cases which are related, or in which the facts, the law or the parties overlap. Instead, it intends to "create a certain distance between the bench and the bar."[1012] The simultaneous or recently sequential exercise of the two roles is generally prohibited. Despite this strict rule (which is not binding, but is generally obeyed), the pool of individuals qualified enough to act as *ad hoc* judges has not become so small as to pose a problem to the functioning

1011 *See supra* Chapter 3, Part 1.2 A.

1012 Kooijmans, *supra* note 128, ¶ 19.

of the ICJ, as had been feared.[1013] Some scholars have voiced the view that if the ICJ requires a temporary separation of counsel and adjudicator roles, this should also (or all the more) be the case in investment arbitration.[1014]

ICJ *ad hoc* judges, however, are an anomaly in this context. In all other examined dispute resolution mechanisms, the decision-makers are free from any restrictions with regard to the professional activities they otherwise pursue. None of the examined commercial arbitration rules provide for incompatibilities, nor do the arbitration rules of the PCA. WTO panelists are frequently government trade officials, academics or private trade law practitioners – clearly unrestricted by any rules on incompatibilities. Furthermore, the vesting period provided for in Practice Directive VII is less of a threat to the functioning of the ICJ than it would be in any other examined system, since expertise on the ICJ is ensured by its permanent members. In the ICSID system, such a temporary incompatibility would likely have the same effect as a complete prohibition, with the same drawbacks.

As a result, a temporary prohibition of dual functions also has to be rejected. Dual functions should only be prohibited where they actually conflict, i.e. where issues which are key or outcome-determinative in one of the arbitrator's roles also arise in the other role.[1015] Such a resolution of potential conflicts on an individual basis, with a view to the specific circumstances of the situation, is more proportionate and more effective.

2.3 *Disinvolvement upon Challenge?*

An interesting question arising in cases where the concurrent counsel role or membership in a law firm raises doubts about the arbitrator's independence or impartiality, is whether the arbitrator's disinvolvement should be considered to resolve any such doubts, and prevent a disqualification. Under the UNCITRAL Arbitration Rules, several arbitrator challenges have resulted in an invitation to the arbitrator to discontinue either of her or his roles to avoid disqualification.[1016] Similarly, in a number of ICSID arbitration proceedings,

1013 Watts, *supra* note 489, at 254; Couvreur, *Article 17*, *supra* note 488, ¶ 17. Inferences for the ICSID system should however not be made incautiously, since ICJ and investor-State arbitration proceedings differ in important respects. *See* Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 37.

1014 FIONA MARSHALL, DEFINING NEW INSTITUTIONAL OPTIONS FOR INVESTOR-STATE DISPUTE SETTLEMENT 12 (2009), *available at* http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf.

1015 Mouawad, *supra* note 252, at 12.

1016 *See Grand River*, *Telekom Malaysia*, and *Vito Gallo*.

arbitrators have left their law firms to (successfully) avoid their removal from the tribunal.[1017]

To consider doubts regarding an arbitrator's independence and impartiality dispersed or evaded because of a purely formal act would however be inconsistent with the importance of appearances and perceptions for disqualification decisions, and overly formalistic. Where an arbitrator has concurrently acted in two incompatible roles, the doubts this creates persist, even if the arbitrator discontinues one of the roles. The reciprocal influence of the conflicting roles cannot be undone by the arbitrator's resignation. This is even more so if the arbitrator has acted as a counsel in the problematic case for a long time, and if stepping down was not her or his own choice, but a reaction to the request of an authority deciding on a disqualification request. Such a disinvolvement is not precautionary, but a mere formality to avoid a disqualification. In the view of a reasonable third person, it is unlikely to change anything about the arbitrator's mind-set.

3 Clarification of the Threshold for Arbitrator Challenges

The analysis of past ICSID challenge decisions in Chapter 2 has shown that the interpretation of the manifest lack requirement stipulated in Article 57 ICSID Convention is anything but settled. Its interpretation by arbitrators and by the ICSID Chairman ranges from requiring the objective proof of manifest bias to accepting inferences of a reasonable appearance of partiality or justifiable doubts as to the arbitrator's independence and impartiality. A series of challenge decisions rendered between 2013 and 2015 seemed to be signaling a more consistent application of a justifiable doubts threshold. The most recent disqualification decisions, however, have interrupted this trend. As a consequence, the threshold for arbitrator challenges under Article 57 ICSID Convention is still ambiguous. This opacity is problematic for four main reasons:

First, an indeterminate standard fails to reduce the number of unsuccessful challenges.[1018] While a clear standard has a gatekeeping function by signaling to the parties what the minimum requirements for a successful disqualification request are, an indeterminate threshold cannot fulfill this function. Accordingly, more challenges than necessary are filed and proceedings are needlessly delayed.

1017 *See Azurix*, *Siemens*, the *ConocoPhillips* challenges, and the *Favianca* challenges.

1018 ROGERS, ETHICS, *supra* note 98, ¶ 2.67.

Second, in light of the contradictory interpretations of the threshold for challenges, the participants in an arbitration proceeding (parties, counsel and arbitrators) are never assured that an appointment will withstand their counterparty's challenge. This insecurity is likely to either lead to an overly cautious or to an overly sanguine approach to the choice of arbitrator. Both reactions are undesirable: The cautious party will appoint a less qualified, but undoubtedly impartial arbitrator, while the confident party will appoint a potentially partial arbitrator, instead of looking for a more neutral candidate. A combination of the two approaches inevitably leads to the constitution of a lopsided tribunal.[1019]

Third, the uncertainty of the threshold might prevent parties which have justified objections to an arbitrator's appointment from filing a challenge, based on the unpredictability of the outcome.

And fourth, the contrast between the inconsistency of the applicable challenge threshold on the one hand and the uniformity of the outcome of challenge decisions on the other hand (namely, the dismissal of all but three disqualification requests) could create the impression that challenges are decided without any regard to the relevant standard.

All of these drawbacks of an uncertain challenge threshold would undermine the legitimacy of ICSID arbitration as a superior, fair and rules-based dispute resolution mechanism. Accordingly, a clarification of the relevant threshold is urgently needed.

3.1 *Excessive Rigor of the Strict Proof Threshold*

The strict proof threshold established in *Amco Asia* and applied in numerous subsequent challenge decisions imposes an excessive burden of proof on the challenging party. As previously stated, independence and impartiality are states of mind which are not open to the scrutiny of the observer. Accordingly, the production of objective proof for an arbitrator's bias is only possible in the most exceptional cases.[1020] According to Paulsson, it is more likely to be available if an inexperienced arbitrator inadvertently breaches his duty of impartiality.[1021] On the other hand,

> [t]he truly harmful cases remain unknown, because improper behavior is shrouded in urbane subterfuge and hypocrisy. It is extraordinarily difficult to police.[1022]

1019 *Id.* ¶ 8.81.

1020 *See also* Tupman, *supra* note 43, at 49.

1021 *See* the example given in PAULSSON, THE IDEA, *supra* note 22, at 159.

1022 *Id.* at 160.

Since such a heavy burden of proof makes it virtually impossible for parties to achieve the disqualification of an arbitrator, it renders their right to an independent and impartial decision-maker illusory.[1023] Arbitrators are effectively insulated from any adverse consequences of unethical behavior. As a result, the application of a strict proof threshold to challenges of ICSID arbitrators would further exacerbate the oft-cited perception of the international arbitrator community as a "mafia."[1024] Such a reputation would harm the legitimacy of the system, and must therefore be avoided.

3.2 *Adequacy of the Justifiable Doubts Threshold*

Based on the prevalence of the justifiable doubts standard in most comparable dispute resolution mechanisms,[1025] various scholars suggest that the same threshold should govern challenges of ICSID arbitrators.[1026] Others disagree, cautioning that this standard would be inappropriate in the ICSID system.[1027] Their objections evolve around a common theme: The small size of the investment arbitration community, and the resulting incidence of contacts between its members. They argue that given this particular environment, disqualifications would more frequently occur if a justifiable doubts standard was applied – so much so, that the availability of qualified arbitrators would be limited.[1028] Furthermore, harmless contacts within the arbitration community – which are argued to be beneficial for the arbitrators' expertise – would be impeded, because the threat of a disqualification would forthwith hover over the arbitrators' heads like the sword of Damocles. As a consequence, the prioritization of independence and impartiality (in the form of a lower

1023 Giorgetti, *Challenges*, *supra* note 32, at 317; Fry and Stampalija, *supra* note 31, at 263. DAELE, *supra* note 51, ¶ 5–034 (highlighting that this is "all the more true in the early stages of the arbitration proceedings, when the parties have not yet been in the position to evaluate the arbitrator's actual behaviour and attitude."); Sobota, *supra* note 27, at 312 and 316.

1024 YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE. INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 50 (1996). *See also* ROGERS, ETHICS, *supra* note 98, ¶ 2.03.

1025 *See supra* Chapter 3, Part 5.2. The ICJ Rules and the WTO Rules of Conduct are singular exceptions to the otherwise predominant applicability of the justifiable doubts standard.

1026 Sheppard, *supra* note 32, at 155; Giorgetti, *Challenges*, *supra* note 32, at 318; PAULSSON, THE IDEA, *supra* note 22, at 160; DAELE, *supra* note 51, ¶¶ 5–035 and 5–106; Sobota, *supra* note 27, at 293 and 317. The persuasive authority of the relevant standards in other international arbitration systems was acknowledged in *Alpha Projektholding* (¶ 33) and *Vivendi* (¶ 24).

1027 LUTTRELL, *supra* note 31, at 245–246; Markert, *supra* note 21, at 273 and 275 (suggesting, however, that in certain exceptional cases, the arbitrator should resign).

1028 Trakman, *supra* note 819, at 126; Kee, *supra* note 22, at 194.

challenge threshold) would impair the quality of the system, and have a negative impact on arbitrators' expertise.

As far as these objections result in the demand for a strict proof of bias, the previous Part has demonstrated the inadequacy of such a threshold. The argument that the justifiable doubts standard is too strict in view of the small size of the investment arbitration community is incorrect for the following reasons:

The justifiable doubts threshold is an objective standard, which requires the facts on which the challenge is based to raise doubts as to the arbitrator's independence and impartiality in a third person, and not just in the challenging party. Thus, challenges based on innocuous circumstances will be dismissed under the justifiable doubts standard, just like they would be dismissed if a higher threshold was applied. The concept of justifiable doubts is inherently malleable, and adapts to the context of the specific dispute resolution mechanism. ICSID challenge decisions in which a justifiable doubts threshold was applied bear witness to this flexibility: A vast majority of the requests were dismissed, proving that the standard is not too strict, and certainly adequate to thwart unmeritorious challenges. Accordingly, vexatious challenges would be no more successful under the justifiable doubts standard than under any stricter threshold,[1029] and concerns about a potential chilling effect on beneficial professional contacts within the arbitration community are unfounded.

Far from impairing the quality of ICSID arbitration, as critics claim, a lower threshold for arbitrator challenges could actually contribute to a solution of many issues which the small size of the investment arbitration community entails. A more realistic approach to potential conflicts of interest would disqualify certain arbitrators from adjudicating specific disputes, or from being appointed by a particular party. This would open the door for a more frequent appointment of arbitrators who now only rarely (or never) serve on tribunals, but who have gathered enough experience as counsel in arbitration to take on such a role. It would encourage entirely new appointments of equally qualified arbitration practitioners, scholars or former government officials. This lowering of the entry barriers to the market for arbitrator services would lead to an incremental enlargement of the arbitrator community. In turn, problematic

1029 *See also* DAELE, *supra* note 51, ¶ 5–110. Daele convincingly demonstrates that the numbers of challenges are not increasing in other international arbitration systems, in which a reasonable doubts test is applied. He also clarifies that there is no correlation between the applicable threshold and the incidence of dilatory challenges, because "if a party really wants to make a bad faith challenge to frustrate and delay the proceedings, it will simply do so, irrespective of how high or low the disqualification standard is set." As a consequence (and since the majority of challenges are brought in good faith), the challenge threshold should not remain prohibitively high, in an attempt to dissuade dilatory tactics.

connections between arbitrators, counsel and parties would become less prevalent.[1030]

Such an enlargement of the pool of investment arbitrators is met with profound skepticism by various scholars. They argue that having a small group of adjudicators is a guarantee for their expertise.[1031] Clearly, arbitrator expertise is an important factor for a fair and effective proceeding – accordingly, the requirement of decision-makers' competence is often cited alongside the requirements of independence and impartiality.[1032] The correlation of a small circle of professionals and a high level of expertise, however, is by no means self-evident. On the contrary, the substantive quality and fairness of an award, which the requirement of arbitrators' expertise seeks to guarantee, depends on various factors which conflict with a small circle of arbitrators. Diversity is one of those factors. Competition within the arbitration community – based on the quality and fairness of each member – is another one. The independence and impartiality of decision-makers, finally, is the procedural counterpart to the pursuit of high quality output. All of those elements of a proper and legitimate proceeding would be strengthened if the barriers to entry were lowered, along with the threshold for arbitrator challenges.

Expertise itself has many faces. The qualities sought after in an expert arbitrator have substantially changed since the rise of arbitration as a dispute settlement mechanism,[1033] and parties' expectations further vary depending on the kind of arbitrator concerned (party-appointed or chairperson). Experience in investment arbitration is only one – although certainly an important – element of expertise. Thus, it would be wrong to assume that newcomers do not have sufficient skills to sit on a tribunal. For one, the designation as a "newcomer" is relative. Anyone who is appointed to an investment tribunal is highly likely to have substantial expertise to show – either as a commercial arbitrator, as a tribunal secretary or assistant, as a scholar, or as a (former) government official. Each such candidate brings different qualities to the tribunal, which complement those of her or his co-arbitrators. Most importantly, they share one common trait: That their views on legal and political questions

1030 For a similar argumentation in the context of the IBA Guidelines, *see* Ball, *supra* note 45, at 51.

1031 Bishop and Reed, *supra* note 940, at 412.

1032 ICSID Convention art. 14, para. 1; ICJ-Statute art. 2; DSU art. 8; SCC Arbitration Rules art. 15, para. 1.

1033 *See* DEZALAY AND GARTH, *supra* note 1024; Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth*, 28 ARB. INT'L. 161 (2012); Franck, *The Role of International Arbitrators*, *supra* note 24, at 1–2.

are likely to be less cemented than those of seasoned arbitrators, and their ties to other participants in the system less close.

Even if arbitrators' independence and impartiality on the one hand, and their expertise on the other hand, did indeed counteract each other,[1034] arbitrators' integrity should be given precedence over expertise. In the words of Paulsson:

> Great ability may be corrupted; if so, the process is irredeemably flawed. Honest but mediocre arbitrators may fall short of perfection, but still perform adequately.[1035]

The objection that newcomers are more susceptible to conflicts, since their positions in the arbitration community are not safeguarded yet,[1036] must be dismissed. Of the ICSID challenges examined in Chapter 2, several were directed against some of the oldest and most frequently appointed members of the pool of arbitrators. Others were directed against relative newcomers. Of the three disqualifications which occurred, one concerned Professor Francisco Orrego Vicuña – one of the most central arbitrators in the system.[1037] The other two were directed against what Franck terms "one-shot-arbitrators."[1038] The case law and empirical information[1039] are not conclusive as to which group is more susceptible to conflicts of interest. The most realistic answer is that each group – experts and newcomers – is prone to its own kinds of dependencies and biases. The uncertain disqualification threshold has not done much to counteract these enticements. A clearer and stricter standard could be an effective deterrent which would positively influence the parties' and counsel's appointment strategies, as well as the behavior of arbitrators.

In summary, the justifiable doubts standard would be an adequate threshold for the examination of arbitrator challenges under the ICSID Convention. It would lower the entry barriers to the market for arbitrator services and bring about a gradual enlargement of the arbitrator community. Arbitrators' previous familiarities with other participants in the proceeding or with the subject-matter of the dispute would consequently become less prevalent.

1034 *See* Reinisch and Knahr, *supra* note 24, at 118.

1035 PAULSSON, THE IDEA, *supra* note 22, at 149.

1036 Franck, *The Role of International Arbitrators*, *supra* note 24, at 20; Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 65 (2005). Mourre, *supra* note 113.

1037 *Burlington.*

1038 *Blue Bank* and *Caratube.*

1039 Kapeliuk, *Collegial Games*, *supra* note 33, at 309–311.

At the same time, the more realistic threshold would signal a stricter standard of independence and impartiality to seasoned arbitrators as well as newcomers, thereby increasing the chances for ethical behavior. Unmeritorious challenges based on innocuous circumstances would still be dismissed.

The application of a justifiable doubts standard would be possible without an amendment of the Convention. It is not contrary to the wording of Article 57 ICSID Convention, since such an interpretation corresponds with the legislative history and the regulatory purpose of the ICSID Convention.[1040]

4 The Investment Court System Proposed by the European Union

The European Union has been negotiating two major trade and investment agreements with Canada[1041] (CETA) and the United States[1042] (TTIP) since 2009 and 2013. While the initial negotiation mandates instructed the European Commission to provide for investor-State dispute settlement in the form of arbitration in the agreements,[1043] the Commission has reacted to a fiercely critical public debate and opposition to ISDS[1044] by launching an initiative for the resolution of investor-State disputes in a so-called Investment Court System

1040 *See supra* Chapter 1, Part 1.2; DAELE, *supra* note 51, ¶ 5–035.

1041 *See* Comprehensive Economic and Trade Agreement Between Canada and the European Union and its Member States (CETA) (signed Oct. 30, 2016), http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf.

1042 The Transatlantic Trade and Investment Partnership, *see* European Union Proposal for Investment Protection and Resolution of Investment Disputes, http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (hereinafter the EU Proposal). *See also* Commission Draft Text TTIP – Investment (EU), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (following the targets set in the Commission Concept Paper (EU) of May 5, 2015, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF).

1043 Council Recommendation (EU) No. 12838/11 of 14 July 2011, at 5, ¶ 26d, *available at* http://data.consilium.europa.eu/doc/document/ST-12838-2011-EXT-2/en/pdf; Council Directive No. 11103/13 (EU), at 9, ¶ 23, *available at* http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf ("provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism" in the form of "a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements").

1044 *See* Commission Report (EU), Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), *available at* http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf; European Commission, European Commission Launches Public Online Consultation on Investor Protection in TTIP (Mar. 27, 2014), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1052; *see also* AUGUST REINISCH, THE

(ICS). According to the European Union, ICS is intended to strengthen the general confidence in investor-State dispute settlement. It is therefore "[b]uilt around the same key elements as domestic and international courts."[1045] ICS implements several of the reform proposals analyzed in Parts 1 to 3 of this Chapter.

This Part briefly outlines the proposed ICS mechanisms under both CETA and TTIP, and examines whether the European Union's portrayal of ICS as an answer to risks of a lack of independence and impartiality in investor-State arbitration withstands critical scrutiny.

4.1 *Investor-state Dispute Settlement under CETA*

The inclusion of ICS in CETA, as signed at the EU-Canada Summit of October 30, 2016 in Brussels,[1046] marks a first success of the European Union in its initiative to reform ISDS. Earlier drafts of the agreement had provided for *ad hoc* investor-State arbitration – as a result of the public consultation on ISDS in TTIP,[1047] however, these provisions were replaced by ICS.[1048] CETA will become effective once it is approved by the European Parliament and ratified by all Member States through their respective national procedures. Upon the European Parliament's approval, parts of CETA will be provisionally applied, with the exception of ICS.[1049]

European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to Permanent Investment Court 1 (2016).

1045 Commission Press Release (EU), Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sep. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

1046 *See* Council Decision (EU) on the Signing on Behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one Part, and the European Union and its Member States, of the Other Part (Oct 26, 2016), *available at* http://data.consilium.europa.eu/doc/document/ST-10972-2016-REV-1/en/pdf.

1047 *See supra*, note 1044.

1048 Remarkably, this shift took place after the end of the negotiations in August 2014, while the text underwent a thorough legal review ("legal scrubbing") until February 2016. *See* Barrie McKenna, Canada, EU revise trade deal, add investor-state dispute tribunal, The Globe and Mail (Feb. 29, 2016), http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/ottawa-says-legal-review-of-canada-eu-free-trade-deal-completed/article28946075/ (referencing Todd Weiler, who warns that "[t]he changes could lead to a tribunal that is seldom used," and that "[i]nvestor guarantees in the Canada-EU deal could be 'rendered ineffectual' if the government-appointed arbitrators apply overly conservative interpretations.").

1049 As a novelty on which public debate is not yet finished, ICS was excluded from the scope of provisional application of CETA. It will only be implemented once all Member States conclude their national ratification procedures. Until such time, the details of the system

Chapter 8 of CETA governs investment and provides for investor-State disputes to be submitted to the Tribunal constituted under Section F.[1050] The Tribunal will consist of fifteen Members appointed by the CETA Joint Committee, of which five will be nationals of each Contracting Party (Canada and the EU member States, respectively) and five will be nationals of third countries.[1051] Individual disputes will be handled by divisions of three Tribunal Members – one Member from each of the above-mentioned groups – to be chosen on a random and unpredictable rotational basis by the President of the Tribunal.[1052] In addition to this Tribunal of First Instance, Article 8.28 CETA provides for an Appellate Tribunal, the exact contours of which remain to be carved out.[1053]

As for the requisite qualifications of the Tribunal Members, Article 8.27.4 CETA provides that they shall be jurists of recognized competence or persons who would qualify for judicial office in their respective country. They shall have demonstrated expertise in public international law, preferably in international investment law, international trade law, and in dispute resolution under international trade or investment agreements.

In contrast to these exigent qualification requirements, CETA does not provide for the Tribunal Members to receive a regular salary. Instead, the payment

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(i.e. the selection of Tribunal Members, access by smaller businesses, and the appeals mechanism) will be further elaborated. *See* Council Decision (EU) on the Signing, on Behalf of the Union, and Provisional Application of the Strategic Partnership Agreement between the European Union and its Member States, of the one Part, and Canada, of the Other Part (Sep. 13, 2016), art. 3, *available at* http://data.consilium.europa.eu/doc/document/ST-5367-2016-INIT/en/pdf.

1050 *See* CETA art. 8.18. State-State disputes concerning the interpretation or application of CETA (CETA art. 29.2) and financial services disputes (CETA art. 13.20.1), on the other hand, are resolved through arbitration under Chapter 29. Disagreements regarding the Parties' right to regulate in the fields of labor standards (CETA art. 23.10) and environmental protection (CETA art. 24.15) are examined by Panels of Experts under the respective Chapters. The Code of Conduct established under Chapter 29 and provided for in Annex 29-B to CETA applies to all of these arbitrators and experts, but not to Tribunal Members under Chapter 8, i.e. decision-makers in investment disputes.

1051 CETA art. 8.27.2. A failure of the CETA Joint Committee to appoint all 15 Tribunal Members within 90 days from the submission of a claim would result in the appointment of a division of 3 Members by the ICSID Secretary-General, by random selection from the existing nominations (CETA art. 8.27.17). This continuing involvement of ICSID in what is touted as a new and innovative system is noteworthy.

1052 CETA art. 8.27.6 and 7. The President of the Tribunal is drawn by lot from among the third country nationals and appointed for a two-year term (CETA art. 8.27.8).

1053 CETA art. 8.28.7 (leaving issues as fundamental as the number of Appellate Tribunal Members, their remuneration, and the procedures for an appeal open, and to the CETA Joint Committee to decide).

of a monthly retainer fee[1054] shall ensure their availability.[1055] Members who serve on a division constituted to hear a specific claim shall receive fees and expenses in accordance with Administrative and Financial Regulation 14(1) of the ICSID Convention.[1056] Article 8.27.15 authorizes the CETA Joint Committee to transform the retainer fee and fees and expenses into a regular salary eventually. Until such time, Tribunal Members will be part-time adjudicators, who must pursue some other form of gainful employment to support themselves, at least while they are not serving on a Tribunal division.

With respect to independence and impartiality, CETA contains some widely accepted standard rules, as well as surprisingly far-reaching provisions. In the first category, Article 8.30 CETA provides that Tribunal members may not take instructions from any organization or government with regard to matters related to the dispute, and shall not consider disputes which would create a direct or indirect conflict of interest.[1057] In the second category, according to Article 8.30.1 CETA, Tribunal Members shall refrain from acting as counsel, as party-appointed experts, or as witnesses in other (pending or new) international investment disputes. The wording of this provision ("upon appointment") implies that dual functions as a Tribunal Member and as a legal advisor and counsel are banned completely, and not just temporarily (i.e. during a Tribunal Member's service on a division).

Under Article 8.30.1 CETA, the IBA Guidelines appear to represent a baseline of independence and impartiality which the Tribunal Members must observe, at least as long as the Contracting Parties have not adopted a specific Code of Conduct for the Tribunal Members.[1058] Such a Code of Conduct has already been agreed by the Contracting Parties with regard to Chapter 29 arbitrators (i.e. arbitrators which resolve State-State trade and investment disputes),[1059] and has been widely lauded as an important innovation in investment arbitration. It is not, however, applicable to Chapter 8 Tribunal Members – the Code of Conduct for Members of the Tribunal under CETA Chapter 8 remains to be agreed by the Committee on Services and Investment.[1060]

1054 The retainer fee shall be determined by the CETA Joint Committee (CETA art. 8.27.12) and paid equally by Canada and the European Union (CETA art. 8.27.13).

1055 CETA art. 8.27.12.

1056 CETA art. 8.27.14.

1057 CETA art. 8.30.1.

1058 "[The Members of the Tribunal] shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration *or* any supplemental rules adopted pursuant to Article 8.44.2." (emphasis added).

1059 *See* CETA Annex 29-B.

1060 *See* CETA art. 8.44.2 ("The Committee on Services and Investment shall … adopt a code of conduct for the Members of the Tribunal to be applied in disputes arising out of this Chapter").

Finally, a welcome improvement in guaranteeing decision-makers' independence and impartiality is the decision of challenges by an outsider, namely the President of the ICJ.[1061] Where a Tribunal Member's behavior is inconsistent with the specific obligations of independence set out in Article 8.30.1 CETA, she or he may even be removed from the tribunal.[1062]

4.2 *Investor-state Dispute Settlement under TTIP*

A very similar mechanism has been proposed by the European Union in the context of the ongoing negotiations on investment dispute settlement under the TTIP: A standing body of fifteen Judges (five nationals of EU member States, five U.S. nationals and five third country nationals) would be appointed for a six-year term, renewable once.[1063] Divisions of three Judges, appointed at random and on a rotational basis by the President of the Tribunal (a third country national), would hear individual cases.[1064] These divisions would always be comprised of one EU, one U.S. and one third country national, with the latter acting as the chair.[1065] Except for the nomination of their nationals for the standing body of Judges, the Contracting Parties would have no influence over the involvement of any particular Judge in a specific proceeding.

The first instance investment Tribunal would be supplemented by an Appeal Tribunal consisting of six Members, each appointed for a six year term, of whom two would be EU nationals, U.S. nationals, and third country nationals, respectively.[1066] The Appeal Tribunal would hear appeals in divisions of three Members (an EU member State national, a U.S. national and a third country national). These divisions would be established by the Appeal Tribunal's President (a third country national) in a random and unpredictable way.[1067] The Appeal Tribunal would ensure that (to quote the Commission) there "could

1061 CETA art. 8.30.2 and 3. Challenges of Chapter 29 arbitrators, by contrast, are decided by the chairman of the panel if a co-arbitrator is challenged, or by the two co-arbitrators if the chairman is challenged. CETA does not provide for a fallback jurisdiction on the challenge of a chairman, in case the two co-arbitrators do not agree. *See* CETA Annex 29-B, ¶ 23–24.

1062 CETA art. 8.30.4 (requiring a reasoned recommendation from the President of the Tribunal, or both Contracting Parties, and a decision of the CETA Joint Committee).

1063 EU Proposal art. 9 (2) and (5). The appointing body remains to be determined – the Proposal states that "The [...] Committee shall ... appoint fifteen Judges to the Tribunal".

1064 EU Proposal art. 9 (6) and (7).

1065 EU Proposal art. 9 (6).

1066 EU Proposal art. 10 (2).

1067 EU Proposal art. 10 (8) and (9).

be no doubt as to the legal correctness of the decisions of [first instance] tribunals."[1068]

The qualifications required of the First Instance Tribunal Judges and of the Members of the Appeal Tribunal are the same as those under CETA: The adjudicators shall be jurists of recognized competence or persons who would qualify for judicial office (for the highest judicial offices, in the case of Appeal Court Members) in their respective country. A demonstrated expertise in public international law, preferably in international trade and investment law, and in dispute resolution under international trade or investment agreements, is also required.[1069]

As is the case under CETA, a regular salary for First Instance Tribunal Judges and Members of the Appeal Tribunal is not planned. Instead, they shall be paid a monthly retainer fee. For First Instance Tribunal Judges, the European Union proposes a retainer fee which amounts to one third of the retainer fee for WTO Appellate Body members (approximately 2000 Euro), to ensure their availability "at all times and on short notice."[1070] For Members of the Appeal Tribunal, a retainer fee roughly equivalent to that of WTO Appellate Body members (7000 Euro per month) was suggested by the EU.[1071] The actual service on a Tribunal or Appeal Tribunal Division is remunerated with fees and expenses in accordance with Administrative and Financial Regulation 14(1) of the ICSID Convention.[1072] The various fees may eventually be replaced by a regular salary, if the competent Committee (which remains to be specified) decides so. Only then will the adjudicators serve on a full-time basis and be prohibited from exercising another occupation.[1073]

Certain dual functions are however already banned in the semi-permanent system suggested by the European Union, in line with CETA: Upon appointment, adjudicators shall "refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute."[1074] In contrast, they may be government officials or receive income from the

1068 European Commission Reading Guide, Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (Sep. 15, 2015), http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm.

1069 EU Proposal art. 9 (4) and 10 (7).

1070 EU Proposal art. 9 (11) and (12).

1071 EU Proposal art. 10 (12).

1072 EU Proposal art. 9 (14). The *per diem* fee of Appeal Tribunal Members remains to be determined by a Committee which has not yet been specified (*see* EU Proposal art. 10 (12)).

1073 EU Proposal art. 9 (15) and 10 (14).

1074 EU Proposal art. 11 (1).

government, as long as they are "otherwise independent of the government"[1075] and as long as they do not take instructions from the government regarding the dispute. They may also serve as arbitrators under other international investment agreements, subject to their general obligation of independence and impartiality.[1076]

The EU Proposal further contains a Code of Conduct which would apply to both First Instance Tribunal Judges and Members of the Appeal Tribunal.[1077] It spells out the adjudicators' independence, impartiality and confidentiality obligations and highlights the importance of the appearance of independence and impartiality for the system's integrity.[1078] While the Code of Conduct describes possible threats to adjudicators' independence and impartiality more illustratively than common Arbitration Rules, its specifications of prohibited behaviors and relationships are not nearly as detailed as the IBA Guidelines. As a result, the Code's application will likely leave a lot of room for interpretation.

Challenges of Judges and Appeal Tribunal Members would be decided by the President of the relevant Tribunal. Requests for the disqualification of one of the Presidents would be decided by the other President, respectively.[1079] As an *ultima ratio* measure, adjudicators can be removed from the Tribunals.[1080]

4.3 *ICS – Panacea or Chimera?*

The Investment Court System suggested by the European Union implements several of the reform proposals analyzed in Parts 1 to 3 of this Chapter: It

1075 EU Proposal art. 11 (1) and footnote 6 thereto.

1076 EU Proposal art. 11 (1) ("They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.").

1077 EU Proposal Annex II (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators).

1078 *See* EU Proposal Annex II art. 2 ("shall avoid impropriety and the appearance of impropriety"), art. 3 ("shall disclose any … matter that … might reasonably create an appearance of impropriety or bias in the proceeding"), art. 5 (1) ("Members must be independent and impartial and avoid creating an appearance of bias or impropriety"), art. 5 (2) ("Members shall not … incur any obligation or accept any benefit that would … appear to interfere, with the proper performance of their duties."), art. 5 (3) ("Members shall avoid actions that may create the impression that they are in a position to be influenced by others."), art. 5 (5) ("Members must avoid entering into any relationship or acquiring any financial interest that … might reasonably create an appearance of impropriety or bias.").

1079 EU Proposal art. 11 (2)-(4).

1080 EU Proposal art. 11 (5).

abolishes the party-appointment of adjudicators, completely prohibits certain dual functions, and the Code of Conduct for investment dispute adjudicators proposed in the context of TTIP appears to lower the threshold for challenges. Since these proposals have been examined in detail above, only a few more concrete remarks shall be made at this point.

The abolishment of party-appointments is the most important move away from investor-State arbitration in the Investment Court System: Both CETA and the EU Proposal for ISDS under the TTIP envisage the random appointment of adjudicators to individual divisions, from the respective Tribunals. These Tribunals, in turn, will be set up by Joint Committees under the relevant agreements – political bodies made up of representatives of the Contracting Parties, and co-chaired by their trade ministers.[1081] It is realistic to surmise that in their appointment of adjudicators to the Tribunals, the Joint Committees are likely to be guided by the appointees' legal, political and ideological views, or that they will rely on important actors in the current ISDS systems, who are able to bring in the necessary expertise and experience. Thus, while delegating the choice of the adjudicators to Joint Committees is certainly an effective way of avoiding appointing party preference on the one hand, it might (on the other hand) at best have an acratic effect and at worst, reinsert nationality bias and re-politicize the system. At the same time, the limitation of eligible adjudicators to fifteen individuals (or even six candidates in the case of the Appeal Tribunal suggested in the context of TTIP) would severely curtail the diversity and expertise on the Tribunals.

Whether the Contracting Parties will be successful in setting up the Tribunals appears unclear: Functionally, the Tribunals are equivalent to closed rosters of candidates, as long as the adjudicators are not employed on a full-time basis, and banned from pursuing other occupations. In other settings, States have so far often failed in their attempts to fill such rosters.[1082]

Another problem is the ban of (certain) dual functions. This measure seems disproportionate, for two reasons: First, the choice of occupations which appointed Tribunal Members, Judges and Appeal Tribunal Members may no longer pursue upon appointment is inconsistent. While adjudicators must

1081 CETA art. 26.1. The Appointing body under the TTIP remains to be specified (EU Proposal art. 9 (2) and (5)), but it appears likely that the authority will be delegated to a similarly composed body.

1082 *See supra*, Part 1.2. Closed rosters were provided for, but not set up as planned in the context of ICSID Convention art. 12, the PCA, NAFTA, and the Iran-United States Claims Tribunal (substitute third-country Members).

refrain from acting as legal advisors or counsel,[1083] dual functions as a Tribunal Member / Judge and as a government official are generally admissible, even when they are concurrent.[1084] The dual function as an adjudicator and as an arbitrator in investment disputes under other international agreements is also permitted in the ICS. Such a dissimilar treatment of different dual functions (in the public and private sector, but also as a counsel in arbitration proceedings and as an arbitrator) calls for an explanation, lest it give rise to reproaches of discrimination, or concerns of a re-politicization of ISDS. How are some of these dual roles more pernicious for the adjudicators' perceived independence and impartiality than others?

Second, the lack of a regular salary of adjudicators implies that their work will be neither full-time, nor exclusive. The modest retainer fee of 2000 Euro per month proposed in the context of TTIP[1085] suggests that appointees to the Tribunals will have to support themselves by pursuing some other gainful employment, while they will not be serving on a division. How this fundamental need will be brought in line with a complete ban of the most common dual function (i.e. consultancy work) remains to be seen. From a practical perspective, the ban is likely to severely limit the pool of sufficiently qualified and experienced decision-makers available.[1086] The parallel investment arbitration systems, which remain open to the same professionals to bring in their expertise and dispute settlement skills – with close to no limitations on their counsel work, and under much more lucrative conditions – may be given preference by many of the most qualified adjudicators.

The apparent lowering of the challenge threshold to an appearance-based standard in the Code of Conduct proposed in the context of ISDS under the TTIP is very welcome. However, the Code of Conduct is otherwise rather rudimentary and vague, and fails to address various issues which are likely to arise as long as adjudicators do not serve on a full-time basis, and exclusively. Accordingly, there is both a significant potential for a large initial wave of challenges, and a risk that the Code of Conduct's provisions may become

1083 CETA art 8.30.1 and EU Proposal art. 11 (1) (both provisions require adjudicators to refrain from acting as counsel, as party-appointed expert, or as witness in other (pending or new) international investment disputes, upon appointment).

1084 *See* CETA art. 8.30.1, and footnote 8 thereto (clarifying that "the fact that a person receives remuneration from a government does not in itself make that person ineligible"); EU Proposal art. 11 (1) and footnote 6 thereto. As long as the adjudicators are "otherwise independent of the government" (and, in particular, they do not take instructions from the government regarding the dispute), their dual function appears to be unproblematic.

1085 EU Proposal art. 9 (11) and (12).

1086 *See also* REINISCH, THE EU AND ISDS, *supra* note 8, at 25.

meaningless over time, if they are interpreted too narrowly. A more specific, illustrative Code, in the style of the IBA Guidelines, would be preferable.

Such a Code of Conduct could still be drawn up under the CETA, where its enactment was left to the Committee on Services and Investment.[1087] While it is regrettable that the Code of Conduct under CETA Chapter 8 was not drawn up simultaneously with the Code of Conduct for Chapter 29 arbitrators – which would have allowed for structural differences in dispute settlement under Chapters 29 and 8 to be discussed transparently, and provided for accordingly – at least, this omission opens the door for a better, more comprehensive and detailed formulation of the Code.

This leads to the last, and most neuralgic point of ICS: Both CETA and the EU Proposal for ISDS under the TTIP are adamant in terminologically contrasting the Investment Court System and existing investor-State arbitration systems. It is questionable, however, how meaningful the differences between the two systems really are, and how "new and innovative"[1088] or "[b]uilt around the same key elements as domestic and international courts"[1089] ICS is.

At first blush, the technical terms used in Chapters 8 and 29 of CETA, and in the EU Proposals for ISDS and for State-State arbitration[1090] under the TTIP, suggest that the dispute settlement mechanism chosen for investment disputes (ICS) is entirely different from arbitration. Investment dispute adjudicators are referred to as Members of the (Appellate / Appeal) Tribunal or Judges, and not as arbitrators; the dispute settlement mechanism is referred to as an Investment Court System, which should eventually be refined and developed

1087 *See* CETA art. 8.44.2 ("The Committee on Services and Investment shall … adopt a code of conduct for the Members of the Tribunal to be applied in disputes arising out of this Chapter"). *See also* Céline Lévesque, CETA's New System for the Resolution of Investment Disputes: What a Difference a Few Months Make, Centre for International Governance Innovation (CIGI) Investor-State Arbitration Commentary Series No. 3 (May 6, 2016), https://www.cigionline.org/publications/cetas-new-system-resolution-investment-disputes-what-difference-few-months-make (explaining the absence of a Code of Conduct for Tribunal Members with the "speed and late stage at which the changes were made to CETA.").

1088 European Commission, European Commission Launches Public Online Consultation on Investor Protection in TTIP (Mar. 27, 2014), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1052.

1089 Commission Press Release (EU), Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sep. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

1090 *See* European Union Proposal for Dispute Settlement (Government to Government) in TTIP, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf.

into a permanent International Investment Court.[1091] Upon closer inspection, however, the similarities between the two systems are striking. Under CETA, both the fifteen Tribunal Members under Chapter 8 and the fifteen Candidates on the roster under CETA Chapter 29 are appointed by the CETA Joint Committee. Both bodies are composed of five nationals from each Contracting Party and five nationals from a third State.[1092] The decision-making divisions (under Chapter 8) or panels (under Chapter 29) are then appointed randomly, by the President of the Tribunal (under Chapter 8) or by the Chair of the CETA Joint Committee, if the Parties fail to agree (under Chapter 29).[1093] While the remuneration of Chapter 29 arbitrators is not provided for in CETA, it appears likely that there will not be much of a difference between the fees and expenses paid to arbitrators (under Chapter 29) and those owed to Tribunal Members under Chapter 8 of CETA, who (at least initially) will not be permanent salaried employees.[1094] The same parallels exist in the EU Proposals for ISDS and for State-State arbitration under the TTIP.

All things considered, the differences in nomenclature should not take away from the fact that Tribunal Members or Judges and arbitrators under the same agreements are probably very similarly positioned.[1095] While the arbitrators under the agreements are not archetypical *ad hoc* party-appointed

1091 *See* Commission Press Release (EU), Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sep. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

1092 CETA art. 8.27.2 and 29.8.1.

1093 CETA art. 8.27.6 and 7, and 29.7.2 and 3. This is also where CETA's most important step away from investor-State arbitration lies: Under Chapter 8, the Parties do not have a right to participate in the selection of their adjudicators.

1094 CETA art. 8.27.12-14. Of course, arbitrators will not receive a retainer fee, in contrast to Tribunal Members and Judges. The suggested retainer fee, however, is so low that it is unlikely to make a difference with regard to the likelihood of conflicts of interest arising from dual functions of the adjudicators.

1095 *See also* REINISCH, THE EU AND ISDS, *supra* note 8, at 25 ("These tribunals are, in fact, hybrids between courts and arbitral tribunals. They consist of appointed 'judges' serving for renewable six-year terms, but they render 'awards' in order to make them enforceable under the rules of the ICSID Convention or, more likely, under the New York Convention."); CÉLINE LÉVESQUE, THE EUROPEAN COMMISSION PROPOSAL FOR AN INVESTMENT COURT SYSTEM: OUT WITH THE OLD, IN WITH THE NEW? 3-4(2016) ("The use of existing arbitration institutions and rules as well as the reliance on international conventions for the enforcement of arbitral awards would seem to indicate that the mechanism is still fundamentally an arbitration one."); ARMAND DE MESTRAL, CETA Chapter 8: The Investment Tribunal, Centre for International Governance Innovation (CIGI) Investor-State Arbitration Commentary Series No. 1 (May 2, 2016), https://www.cigionline.org/publications/ceta-chapter-8-investment-tribunal ("The most intriguing question – which will only be resolved as the investment tribunal decides concrete

decision-makers, the Tribunal Members and Judges in the ICS are not judges on a permanent tribunal (at least not yet), and are therefore similarly exposed to risks of a conflict of interest. In other words, ICS adjudicators are not as immune against potential biases as the EU terminology implies.

By nature, the Investment Court System is an arbitration system, even if its decision-makers are not appointed by the parties, and certain dual functions are banned. While it could not be referred to as arbitration by the EU, due to a categorical public opposition against investor-State arbitration, elements of arbitration rules and terminology have been interspersed in Chapter 8 of CETA and the EU Proposal for ISDS under the TTIP.[1096] These references are not accidental, but deliberate and purposeful. They demonstrate the proximity of the Investment Court System to traditional investment arbitration mechanisms. Most importantly, they ensure the execution of awards rendered by the Tribunal divisions under the ICSID Convention and New York Convention.[1097]

From the point of view of democratic legitimacy, the EU would have been better advised to be more transparent with regard to its intentions, and to either devise a truly new and innovative system (built around a permanent court and appellate body), or to base the ISDS chapters of both agreements on existing arbitration systems, and to make incremental but meaningful and effective improvements to those systems.

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cases – is whether this institution is actually a form of arbitration or some new form of dispute settlement that is neither judicial nor arbitral?").

1096 *See*, e.g., CETA art. 8.23.2 and EU Proposal art. 6 (2) (according to which a claim may be submitted under the ICSID Convention and Arbitration Rules, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules on agreement of the disputing parties), CETA art. 8.25.5 and EU Proposal art. 7 (2) (clarifying that the Contracting Parties' consent to arbitration in the agreement, together with the submission of a claim by an investor, shall satisfy the requirements of written consent under the ICSID Convention, the ICSID Additional Facility Rules and the New York Convention), CETA art. 8.27.14 and EU Proposal art. 9 (14) (referring to Administrative and Financial Regulation 14(1) of the ICSID Convention for the determination of Tribunal Members' fees and expenses), CETA art. 8.27.16 and EU Proposal art. 9 (16) and 10 (15) (delegating secretarial services for the Tribunal to the ICSID Secretariat), CETA art. 8.27.17 (authorizing the ICSID Secretary-General to appoint Tribunal Members to divisions, if the CETA Joint Committee fails to make the required appointments in a timely manner).

1097 *See* CETA art. 8.41 and EU Proposal art. 30 (referring not to judgments, but to final *arbitral awards* (under the ICSID Convention, the ICSID Additional Facility Rules, and the UNCITRAL Arbitration Rules), which shall qualify as enforceable awards (relating to claims arising out of a commercial relationship or transaction) under the New York Convention and the ICSID Convention).

CHAPTER 5

Improvement Suggestions

This final Chapter makes suggestions for the enhancement of arbitrator independence and impartiality (and their perception) under the ICSID Convention. Proposals for institutional reforms are complemented by practical suggestions on how specific conflict situations should be dealt with, in order to safeguard the parties' right to an open-minded, rational, and objective evaluation of their claims. Together, the suggestions intend to ensure a predictable standard of independence and impartiality, and its effective enforcement. A short description of how these recommendations can be implemented rounds off the Chapter.

1 Institutional Reforms

The following suggestions are based on the realization that certain reforms which transcend the mere clarification of the threshold for arbitrator challenges are needed, in order to effectively improve the perception of ICSID arbitrators' independence and impartiality, and of the entire system's legitimacy. The reforms proposed hereinafter are significantly more conservative than the advances made by other scholars, or by the European Union in the context of CETA and TTIP, as analyzed in the previous Chapter. They focus on three main goals: First, on ensuring that the views of both party-appointed arbitrators are effectively included in the deliberations of the arbitral tribunal; second, on reducing the number of challenges and avoiding particularly problematic conflicts of interest from the outset, before the proceeding even begins; and third, on avoiding that disqualification decisions appear illegitimate, because those who make them are perceived to be insufficiently independent and impartial to do so.

1.1 *Appointment of the Chairperson from a Roster*

As previously stated, tensions between the parties' autonomy to appoint their arbitrators and the requirement of independence and impartiality must be resolved in favor of the latter.[1098] For this purpose, this Chapter makes a proposal

1098 ICSID Convention art. 40, para. 2 in connection with art. 14, para. 1.

for clear, quantitative rules on conflicts of interest, and suggests procedural modifications of arbitrator appointments and challenges. These proposals aim to safeguard the parties' right to decision-makers who will evaluate their claims open-mindedly, rationally, and objectively.

Realistically, however, it is impossible to entirely avoid the participation of pre-conceived arbitrators on tribunals. Pre-conceptions might not rise to the level of bias, but be more general and abstract. An appointing party may appoint a like-minded arbitrator, who is nevertheless able to approach the specific case open-mindedly, and to analyze the relevant facts objectively and rationally. If the views of the arbitrator appointed by the opponent are just as aligned with the views of her or his appointing party (but the adjudicator's independence and impartiality is guaranteed), a certain antagonism or opposition between the party-appointed arbitrators (on a very abstract and professional level) is inevitable.

Furthermore, requests for the disqualification of dependent or partial arbitrators might fail. The lowering of the threshold for arbitrator challenges, and the guidelines on the interpretation of the threshold aim to reduce the incidence of bias. However, the grounds for arbitrators' disqualification inevitably contain loopholes. Not only is it grammatically impossible to cover all incidences of dependence or bias,[1099] but excessively far-reaching grounds for arbitrators' disqualification would also undermine the parties' right to co-determine the decision-makers in ICSID arbitration proceedings, and would open the door to dilatory challenges and guerilla tactics.[1100] Thus, it is impossible to entirely avoid the participation of a dependent or biased arbitrator on a tribunal.

As a consequence, it is necessary to deal with such residual pre-conceptions and biases in other ways than through disqualification. This book argues that the opposing positions of the party-appointed arbitrators can not only be neutralized, but can actually enrich the decision-making on the tribunal, and lead to a better thought-out and reasoned award,[1101] as long as they are effectively

1099 *See also* Ball, *supra* note 45, at 324.

1100 Markert, *supra* note 21, at 241; LUTTRELL, *supra* note 31, at 245; Park, *Arbitration's Discontents*, *supra* note 24, at 609; Park, *Arbitrator Integrity*, *supra* note 808, at 634.

1101 *See also* ROGERS, ETHICS, *supra* note 98, ¶¶ 8.60–8.61 ("By systemically but constructively second-guessing the majority, and expressly challenging it when appropriate, party-appointed arbitrators can improve the process, within tribunal deliberations, in the process of drafting the award and by, in some cases, actually writing a dissent.... Under this view, party-appointed arbitrators are not a necessary evil that must be tolerated to make parties feel comfortable or because there are no viable alternatives. They are, instead, an important structural feature of international arbitral tribunals.").

incorporated into the deliberations process. How such an involvement of all views can be achieved, and how the excessive control of a potentially predisposed party-appointed arbitrator over the proceedings can be avoided, is an important question.

One possible answer is the strengthening of the chairperson's influence, by ensuring that she or he has the highest possible degree of experience, authority and neutrality. By ensuring that the chairperson is experienced and skilled at managing arbitral proceedings and deliberations on the tribunal, that he or she has authority over the party-appointed arbitrators, and that he or she is neutral, any excessive influence of one of the party-appointed arbitrators could be avoided, and the incorporation of the positions of both party-appointed arbitrators into the deliberations ensured.[1102] Tribunal chairs should therefore be appointed from an exhaustive roster, compiled of the most experienced arbitrators who have a track-record of neutrality – i.e. who have received roughly the same number of appointments from claimants and respondents, respectively – and authority (hereinafter the Panel of Chairmen).

Already today, the experience and authority of the most frequently appointed chairpersons is beyond doubt. The top fifty chairpersons in investor-State dispute settlement proceedings – all of whom have been appointed as chairpersons in at least four investor-State arbitrations – are either very experienced investment arbitrators or otherwise highly regarded international lawyers.[1103]

1102 *See also* Kapeliuk, *Collegial Games*, *supra* note 33, at 293 (stressing the importance of "an arbitrator's persistence and the effectiveness of his ability to communicate and convince the other arbitrators."); Sergio Puig, Social Capital and the Limits of Network Analysis, EJIL: Talk! Blog of the European Journal of International Law (Sept. 29, 2014), http://www.ejiltalk.org/response-to-comments-on-social-capital-in-the-arbitration-market/ (highlighting the importance of the deliberative process and the diversity of views for a fair process and outcome). The need for a strong chairperson is further illustrated by the recent independence and impartiality fiasco in the PCA proceeding between Slovenia and Croatia (*see supra* Chapter 3, Part 4.3). The tapped phone conversations between Mr. Sekolec and Ms. Drenik suggest that the chairman had effectively excluded the party-appointed arbitrators from a part of the deliberations, in order not to compromise the unbiased outcome of the proceeding. Mr. Sekolec nevertheless intended to "work on Simma," the chairman in the proceeding (Ross, Tapped Conversations, *supra* note 915).

1103 *See* List of Presiding Arbitrators, UNCTAD INVESTMENT POLICY HUB, INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, http://investmentpolicyhub.unctad.org/ISDS/FilterByArbitrators (chairpersons appear in order of the number of their appointments in the drop-down entitled "President"). The number of party-appointments received by the top fifty chairpersons (*see id.*, search "Appointed by claimant" and "Appointed by / Designated to Respondent" for respective arbitrator names) shows that only fourteen of them have arbitrated less than three investor-State disputes (i.e. "publicly known

Many of them, however, have acted as party-appointed arbitrators in the past, and have as such predominantly been appointed by one side – whether by investors[1104] or by States.[1105] Even though such appointment patterns may be objectively justifiable, and need not be an indication of bias, they are likely to raise doubts regarding the neutrality of these chairpersons in the eyes of a reasonable third person. By only including arbitrators who do not raise such doubts, who exhibit a balanced appointment pattern when appointed by the disputing parties, and who therefore appear particularly neutral, on the Panel of Chairmen, the parties' confidence in the neutrality of the dispute settlement system could be strengthened.

IIA-based international investor-State arbitration proceedings," as defined by UNCTAD, *see id.*, "About" tab) as party-appointed arbitrators. All of these fourteen arbitrators are otherwise highly experienced commercial arbitrators, or have gained meaningful dispute settlement expertise by virtue of their service on the Iran-US Claims Tribunal, on national Supreme Courts or international courts. Yet others have served in important functions with the World Bank or are scholars specialized in investment dispute settlement.

1104 *See id.* (search "Appointed by claimant" and "Appointed by / Designated to Respondent" for respective arbitrator names). Professor Kaufmann-Kohler, for example, who served as a chair in thirty proceeding registered in the database, was appointed by claimants in fourteen instances, but only twice by respondents. Mr. Fortier chaired twenty-one tribunals, and received twenty-two appointments by claimants, but only one by a respondent. Professor Orrego Vicuña was appointed by claimants in twenty-five cases, compared to three appointments by respondents. He served as the chairman in seventeen proceedings. Mr. Hanotiau served as the chairman in eleven cases, as the claimant-appointed arbitrator in fourteen investor-State arbitration proceedings, and was appointed by respondents in three instances. Mr. Lalonde and Mr. David A.R. Williams both chaired eight tribunals, and have predominantly been appointed by claimants when acting as party-appointed arbitrators: Mr. Lalonde received nineteen appointments from claimants and four by respondents, while Mr. Williams was appointed by claimants in thirteen cases, but never by a respondent. Finally, Gary Born and Charles N. Brower both chaired one investor-State arbitration tribunal each, and have never been appointed by respondents, but served as claimant-appointed arbitrators in fourteen and thirty-nine instances, respectively.

1105 *See id.* (search "Appointed by claimant" and "Appointed by / Designated to Respondent" for respective arbitrator names). For example, Mr. Oreamuno Blanco chaired eleven investor-State arbitration tribunals, and served as the respondent-appointed arbitrator in fifteen cases. He has never been appointed by a claimant. Professor Dupuy was the chairman in seven instances, and was appointed by respondents in fourteen investor-State disputes. He was only appointed by the claimant in one case. Professor Stern chaired four tribunals and was appointed by respondents in seventy-four disputes, but never served as the claimant-appointed arbitrator. Mr. von Wobeser served as the chairman in four investor-State arbitrations, as the respondent-appointed arbitrator in twelve cases, and as the claimant-appointed arbitrator in one instance.

A useful resource for the compilation of the Panel of Chairmen would be the network analysis conducted by Puig,[1106] which could help to identify potential candidates who have frequently served as chairmen in the past, who have not predominantly been appointed by a particular category of parties (investors or States), and who are widely respected in the investment arbitration community.

The Panel of Chairmen should be compiled by a committee established within the ICSID Administrative Council (hereinafter referred to as the Appointment and Confirmation Committee),[1107] which would ensure that the above-mentioned criteria are met. By delegating the choice of candidates for the panel to such a committee, instead of letting the Contracting States choose their nominees, politically motivated wrangling and ensuing delays in the selection process could be avoided.

Potential concerns about the transparency and legitimacy of such a nomination process[1108] would be mitigated by the fact that the Appointment and Confirmation Committee would only choose the candidates for inclusion on the Panel of Chairmen. Meanwhile, the choice of the chairperson among these candidates, in a specific arbitration proceeding, would remain the prerogative of the parties, their counsel or the co-arbitrators. Thus, the parties would retain the control over the appointments which they value so highly.

The workload of the Appointment and Confirmation Committee would be manageable, since it would not be required to make appointments in specific disputes. Furthermore, the risk of political appointments would be reduced to one of three arbitrators, and largely eliminated if the requirements for nomination to the Panel of Chairmen were spelled out explicitly. Even if the Panel of Chairmen were very small and repeat appointments would therefore be common, an increased risk of conflicts of interest seems unlikely, because the chairpersons would be jointly appointed by both parties. Chairpersons are therefore never incentivized to please only one of the disputing parties, but rely on both parties' perception of their neutrality and fairness.

1.2 *Institutional Confirmation of Party-appointed Arbitrators*

The confidence of parties in the ICSID system can be impaired by the sheer number of challenges alone, irrespective of their merits. The most frequent

1106 Puig, *Social Capital*, *supra* note 36.

1107 *See*, in the context of a proposed revision of the appointment method for *ad hoc* Committees, Collins, *supra* note 966, at 340.

1108 Susan D. Franck & Leah D. Harhay, *Bridging the Divide Between Theory and Practice – An Introduction by the Conference Co-Chairs*, 6 World Arb. & Mediation Rev. 561 (2012).

explanation given by scholars for their engagement with the question of independence and impartiality bears testament to this: Neither specific deficiencies of the challenge threshold or its application, nor a finding of an acute lack of independence and impartiality have led a multitude of scholars to deal with this issue. Instead, it is the increase in the number of arbitrator challenges in the past years, which has predominantly aroused their interest.[1109] Against this background, a reduction in the overall number of challenges, and the avoidance of particularly problematic conflict situations from the outset would significantly improve the system's perceived legitimacy. Both goals could be achieved by requiring an institutional confirmation of the arbitrators nominated by the parties, similarly to the system under the ICC Arbitration Rules.[1110]

The requirement of a confirmation of party-nominated arbitrators by the Appointment and Confirmation Committee[1111] would allow for compulsory disqualification grounds (see below, Chapter 5, Part 2.1) to be examined prior to the commencement of the proceeding. By performing routine checks for the most serious grounds for disqualification, particularly striking conflicts of interest could be avoided from the outset, without the drawback of a procedural delay[1112] which a challenge would entail. Furthermore, the overall number of challenges would be reduced.[1113] As a consequence, the parties' confidence in the arbitral tribunal, and in the dispute settlement system as a whole, would be improved.[1114]

The Appointment and Confirmation Committee should not only investigate whether imperative disqualification grounds exist, but should also examine the merits of parties' objections against arbitrators. In order to avoid subsequent procedural delays to the largest extent possible, party objections regarding all circumstances which are known at this early stage of the arbitration, and which could raise justifiable doubts as to the arbitrators' independence and impartiality, should be heard. Most objections against arbitrators could thus be dealt with prior to the commencement of the arbitral proceeding. This anticipated verification of arbitrators' independence and impartiality would

1109 Fry and Stampalija, *supra* note 31, at 190; Reinisch and Knahr, *supra* note 24, at 103–104; Levine, *supra* note 45, at 2.

1110 ICC Arbitration Rules art. 13.

1111 *See* Collins, *supra* note 966, at 340 (suggesting the establishment of such a committee in the context of a proposed revision of the appointment method for *ad hoc* Committees).

1112 *See* DAELE, *supra* note 51, ¶ 6–079 (explaining that a procedural delay might result, inter alia, from the replacement arbitrator's need to study the file, and a possible repetition of certain procedural steps, such as the hearings on the merits).

1113 SCHWARTZ AND DERAINS, *supra* note 87, at 136.

1114 Whitesell, *supra* note 719, at 13 (in the context of arbitral tribunals under the ICC Arbitration Rules).

signal to parties, counsel and arbitrators – but also to the wider public – that unbiased decision-making is an issue which is taken seriously in the ICSID system. Only potential conflicts of interest which are not yet known, or which arise in the course of the proceeding, would not be covered by the institutional confirmation requirement. By examining a majority of potential grounds for dependence or bias prior to the commencement of the proceeding, dilatory challenges could be reduced to some extent.

Objections raised by the parties at this stage of the proceedings should not be communicated to the arbitrators.[1115] Although this would prevent arbitrators from providing potentially helpful information on the relevant circumstances,[1116] it would also avoid the discomfort and embarrassment of a challenge,[1117] and prevent any grudge or bias of the arbitrator toward the objecting party. Concerns about the relevant arbitrator's partiality would not be reinforced as a consequence of the challenge.

Overall, the number of challenges could significantly be reduced if compulsory disqualification grounds and parties' allegations of bias were examined before the commencement of the proceeding. By not disclosing the parties' objections to the relevant arbitrator, the aggravation of the perception of bias could be avoided. This suggestion would retain the parties' control over the appointment of the decision-makers, but limit it procedurally, and ensure the pre-eminence of independence and impartiality, by requiring the institution's confirmation of the candidates.

By involving a permanent institution such as the above-suggested Appointment and Confirmation Committee, information about the arbitrators' previous appointments and challenges could be centralized and made fruitful for

1115 In the context of arbitrator challenges after the commencement of the proceeding, ICSID Arbitration Rule 9, para. 3 offers the arbitrator an opportunity to provide explanations. In practice, however, many arbitrators merely reaffirm their ability to decide the matter independently and impartially, without furnishing explanations. *See* Kinnear and Nitschke, *supra* note 13, at 47.

1116 *See,* in the context of the AAA Rules, ROGERS, ETHICS, *supra* note 98, ¶ 2.65 n.113; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1965 (2014). Since the situation is to be assessed from the perspective of a reasonable third person, the arbitrator's insider view and explanations are beyond the scope of enquiry, and her or his input is negligible.

1117 DAELE, *supra* note 51, ¶ 5–110 ("the challenged arbitrator will sit in judgment over the challenging party who had the audacity to attack his/her integrity."); ROGERS, ETHICS, *supra* note 98, ¶ 2.65 ("For arbitrators, being challenged is generally an uncomfortable process. Their conduct is being questioned in front of their colleagues. The prospect of professional embarrassment can be quite real, even for the most esteemed and established arbitrators.").

the confirmation process. Thus, the success of objections or challenges would not be as dependent on arbitrators' (possibly incomplete) disclosures. At least problematic repeat appointments, role switching und issue conflicts could be taken into account *ex officio*. For the sake of predictability, it would even be conceivable that such a committee would give arbitrators an advance warning in confirmation decisions, for example in the case of repeat appointments, by clarifying that the appointment at issue is the last acceptable appointment by a certain party or counsel, within a set time-frame.

1.3 *Institutional Jurisdiction for Arbitrator Challenges*

Finally, the competence to decide arbitrator challenges should be left to the Appointment and Confirmation Committee, instead of the unchallenged co-arbitrators.

The decision of arbitrator challenges by the unchallenged arbitrators is a unique feature of the ICSID system, which has frequently been criticized: It is generally assumed that the members of the close-knit community of investment arbitrators are sympathetic towards each other, and that they might have a tendency to protect each other against challenges.[1118] Some scholars even raise concerns about cronyism.[1119] Since most challenges are directed against party-appointed arbitrators, at least one of the decision-makers in such challenge proceedings (the chairperson) usually owes their position to the challenged arbitrator. Accordingly, the unchallenged arbitrators do not appear as free in their decision-making as would be desirable. At least subconsciously, they might be guided by sympathies and allegiances, and by the distant thought that they might one day find themselves in the same situation, and depend on their co-arbitrators' loyalty and trust.

Aside from potential sympathies for the challenged arbitrator, the co-arbitrators' evaluation of a challenge after the commencement of the proceeding risks to either be influenced by their preliminary views on the merits of the case (and hence their sympathies for one or another party), or even worse, to affect their view on the substance of the proceeding. The merits of a challenge and the merits of a party's claim for damages, however, are entirely unrelated, and should not impact each other.

1118 Markert, *supra* note 21, at 248–250 (including further references); Fry and Stampalija, *supra* note 31, at 257–258; Tupman, *supra* note 43, at 32; Reinisch and Knahr, *supra* note 24, at 123; Rubins and Lauterburg, *supra* note 32, at 163; Nadakavukaren Schefer, *supra* note 82, at 233.

1119 Giorgetti, *Challenges*, *supra* note 32, at 316–317; Rubins and Lauterburg, *supra* note 32, at 163.

Another factor which may influence the co-arbitrators' decisions on arbitrator challenges is their embedding in the arbitration community. They might effectively be so used to certain customs, that they are unable to examine a disqualification proposal from the perspective of an (uninvolved) reasonable third person.[1120] They are more likely to find certain connections between arbitrators and other participants in the proceeding to be ubiquitous, and inherent in the system, and to dismiss doubts about an arbitrator's independence or impartiality on this basis.

Decisions on arbitrator challenges should therefore be delegated to distinct decision-makers. The transfer of the decision-making authority to an institutional body would also improve the consistency of future challenge decisions, and allow for a thorough consideration of the challenging party's claims.[1121] The certainty that challenges are "comprehensively investigated and subject to rigorous legal scrutiny"[1122] would ensure the parties' acceptance of unfavorable decisions, and strengthen the system's perceived legitimacy. Last but not least, assigning the same institution with the confirmation of arbitrators and with deciding arbitrator challenges would make sense from the perspective of procedural economy, specialization, and in order to allow for a centralization of the pertinent information.[1123]

2 Guidance on the Interpretation of a Justifiable Doubts Threshold

As stated above, the concept of justifiable doubts is inherently malleable.[1124] As useful as this is for the adaptability of the threshold to various dispute resolution mechanisms, it is also potentially harmful for the effectiveness of the

1120 *See also* Kee, *supra* note 22, at 195.

1121 *See*, in the context of the Iran-US Claims Tribunal, Caplan, *supra* note 271, at 120–121 ("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 … have fostered the development of a rich and largely consistent jurisprudence."). The Appointing Authority of the Iran-US Claims Tribunal conducted interviews with the challenging party and the challenged arbitrator, since documentary evidence was often considered insufficient – a course of action which would be equally advisable in ICSID arbitration.

1122 Caplan, *supra* note 271, at 121.

1123 *See Id.* at 120 in the context of the Iran-US Claims Tribunal ("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.").

1124 *Supra* Chapter 4, Part 3.2, p. 209.

parties' right to an independent and impartial decision-maker. The qualitative standard[1125] provides little guidance for appointments, challenges and recusals, and leaves tremendous discretion to those dealing with disqualification requests.[1126] In light of the limited precedential value which arbitrators accord to past challenge decisions, the vagueness of the threshold can lead to inconsistencies in decisions on arbitrator challenges. A consistent application of the threshold in disqualification decisions, however, is pivotal for improving the perception of arbitrators' independence and impartiality, and for enhancing the legitimacy of ICSID arbitration. The only way to achieve such consistency is by putting the justifiable doubts threshold into more concrete terms – in the words of Rogers: into quantitative standards.[1127]

The IBA Guidelines already contain quantitative standards of arbitrator independence and impartiality. They are however of limited usefulness in the investment arbitration context. In most situations, the outcome of a challenge is inconclusive – either because the specific circumstances are not provided for in the Application Lists, or because they are merely listed in the Orange List (which refers back to the general justifiable doubts threshold, instead of conclusively settling the question of disqualification). Furthermore, the valuations implied in the Application Lists reflect that the IBA Guidelines were drawn up mainly with commercial arbitration in mind. As highlighted by the unchallenged arbitrators in *Highbury*, a stricter approach is warranted in investment arbitration, because of the public interests which are frequently affected.[1128]

In order to clarify the permissibility of frequently arising potential conflict situations, application lists similar to those of the IBA Guidelines should be drawn up specifically for ICSID arbitration. Such a course of action would be in line with the frequent criticism of the IBA Guidelines' one-size-fits-all approach,[1129] and would present a unique opportunity to transcend the minimum agreement that the IBA Guidelines represent.[1130] It would further allow

1125 ROGERS, ETHICS, *supra* note 98, ¶ 6.69.

1126 Trakman, *supra* note 819, at 127 ("[T]his is an age old debate that offers no new insights except to observe that the reasonable person is amorphous, not a fixed and constant being."); ROGERS, ETHICS, *supra* note 98, ¶ 2.67.

1127 ROGERS, ETHICS, *supra* note 98, ¶ 6.73.

1128 *Highbury*, ¶¶ 84–85.

1129 Mouawad, *supra* note 252, at 1 and 11; ROGERS, ETHICS, *supra* note 98, ¶ 6.80; Rubins and Lauterburg, *supra* note 32, at 164 ("[T]he IBA Guidelines may in certain respects be inherently ill-suited to the investment arbiration context."); Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 31.

1130 Horvath and Berzero, *supra* note 37, at 18; Trakman, *supra* note 819, at 126; Ball, *supra* note 45, at 325. The IBA Guidelines are a "lowest common denominator" in several ways.

for an open and transparent discussion of the practical implications of the categorization, and reduce the uncertainty that arbitrators, parties and those who have to decide challenges otherwise face.

A first proposal for such ICSID-specific conflict of interest guidelines will be made hereinafter, with the intention of inspiring a further discussion of the issue. It is informed by past disqualification decisions in the ICSID system as well as in the other dispute resolution systems examined in Chapter 3.

2.1 *Compulsory Grounds for Disqualification*

Certain situations raise such grave doubts about an arbitrator's independence and impartiality that he or she should not accept the appointment, or should recuse him- or herself. Besides the possibility of challenging an arbitrator based on such circumstances, the existence of such constellations should be examined prior to the commencement of the proceeding, in a confirmation proceeding before the above-mentioned Appointment and Confirmation Committee.[1131] If a compulsory disqualification ground exists, and the arbitrator refuses to step down voluntarily, he or she should not be confirmed, and the relevant appointing party should be given another opportunity to appoint an appropriate, independent and impartial arbitrator.

By performing such routine checks for the most serious grounds for disqualification, certain particularly striking conflicts of interest could be avoided from the outset, without the drawback of a procedural delay which a challenge would entail. A clear list of compulsory disqualification grounds and their effective enforcement in confirmation and disqualification procedures would signal to parties, counsel and arbitrators – but also to the wider public – that unbiased decision-making is an issue which is taken seriously in the ICSID system, so much that its core content is not subject to the parties' timely complaint. Such an approach would enhance the general perception of the ICSID system's legitimacy, and of its decision-makers' integrity.

The imperative disqualification grounds should be enumerated in an exhaustive list which is formally similar to the IBA Guidelines' Red Lists.[1132] In investment arbitration, however, all situations included on a red list should

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They are the minimum protection on which an international community of commercial, financial and investment arbitrators was able to agree. Accordingly, they have often been criticized for lacking the potential to answer the most pressing questions. *See, e.g.*, Levine, *supra* note 45, at 62.

1131 Similarly to the system under ICC Arbitration Rules art. 13, *see supra* Chapter 3, Part 2.4; BÜHLER AND WEBSTER, *supra* note 720, ¶¶ 11–31 (1st ed. 2005).

1132 Wouters and Hachez, *supra* note 19, at 636.

lead to the arbitrator's disqualification, without the possibility of a waiver. The frequent involvement of public interests requires situations which are of such gravity as to be on a red list to be imperative grounds for the arbitrator's removal, and not subject to party autonomy.

Because of the far-reaching consequences of including a constellation on this list, it is important that the list be narrowly construed. The grounds for disqualification should first of all be informed by the ICSID disqualification decisions which have been upheld in application of the justifiable doubts standard. These decisions should represent a baseline for situations which imperatively require an arbitrator's disqualification (similarly to the IBA Guidelines' Red Lists).

The list should further be expanded with situations which have consistently led to disqualifications in the other examined dispute resolution mechanisms. Where a consensus requiring the arbitrator's disqualification in certain conflict categories spans most comparable dispute settlement mechanisms,[1133] such situations should imperatively lead to an arbitrator's disqualification in the ICSID system, too. As explained, investment arbitration rules should be stricter than international commercial arbitration with regard to disqualification grounds, if anything, and not more lenient.

Accordingly, attorney-client relationships between an arbitrator or the arbitrator's law firm[1134] and a party should be considered incompatible with the arbitrator's appointment, irrespective of the subject-matter of the attorney-client relationship. For the same reasons, all circumstances on the Non-Waivable and Waivable Red Lists of the IBA Guidelines should be included on the list of compulsory disqualification grounds.

Certain constellations which are specific to investment arbitration should be dealt with more strictly than they have been so far: They should invariably

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1133 CARON AND CAPLAN, *supra* note 91, at 211–213 (explaining that there is large consensus in the international commercial arbitration community regarding the "circumstances thought to provide 'absolute' grounds for challenge," such as an arbitrator's direct financial and personal interest in the outcome of the proceeding and certain specified close ties between the arbitrator and a party.).

1134 Connections of the arbitrator's law firm should generally be imputed to the arbitrator. It is impossible to effectively police the separation of the law firm's and the arbitrator's interests (e.g. through Chinese Walls), and the risk of an indirect influence on the arbitrator's decision-making is therefore too serious to be ignored. The diffusion of international arbitration practice groups and revenue sharing practices in international law firms, together with the important governance function of arbitrators and the public interest nature of investment disputes warrants a strict approach. *See* Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 32; Mullerat OBE, *supra* note 714, at 64.

lead to the arbitrator's non-confirmation or disqualification. One such situation is the repeat appointment of the arbitrator by the same party or a party and its affiliate (or a counsel or law firm) in proceedings concerning claims based on the same or highly similar factual circumstances and / or on the same or similar legal grounds. Irrespective of whether the appointments in question were parallel or subsequent, the arbitrator is asked to deal with the same or highly similar issues, in the expectation that she or he would ensure coherent outcomes in favor of the appointing party in both proceedings. It is realistic to assume that the appointing party values the arbitrator's favorable influence on the tribunal's deliberations more highly than the coherence of the decisions. Thus, the parallel or subsequent appointments of the same person are indicative of the appointing party's trust towards the arbitrator and its confidence that he or she will reach a beneficial result. To a reasonable third person, the appointments create the appearance that either the arbitrator feels allegiance to the appointing party, or that his or her opinion is set in stone from the outset, so that the appointing party can rely on achieving its desired outcome. In both situations, the arbitrator would lack the requisite independence or impartiality.

The described doubts regarding the arbitrator's objective and rational decision-making are not attenuated if only the facts or only the legal questions of the cases overlap. Past ICSID challenge decisions have required an overlap of all elements: the appointing party, the legal questions and the factual circumstances.[1135] The threat to the arbitrator's unprejudiced decision-making, however, is just as pronounced if only some of these elements overlap, or if the factual or legal questions are only similar. In such situations, the danger of seeing a familiar pattern in a situation which is only similar to a previous case, and of missing important differentiating elements, might be even more serious.

Another situation that begs for a non-confirmation or disqualification is the appointment of an arbitrator who has co-authored a previous award which was either directed against one of the parties to the arbitration, or which concerned the same (narrow) subject-matter as the current proceeding, if the previous award was annulled (in both situations). Since the reasons for an annulment of an award are strict, and annulments are therefore rare, it is not unreasonable to assume that arbitrators who have participated in the making of an award are taken aback by its annulment. They may perceive the annulment of the award as a criticism of their work and be prejudiced towards the party which requested the annulment, or feel the urge to justify the considerations that led to the annulled award, by deciding similarly in a subsequent proceeding.

1135 *See supra* Chapter 2, Part 2.5.

Such arbitrators might effectively appear to "[make] the case [their] own" – a mindset which is generally held to justify the decision-maker's disqualification.[1136] It appears unlikely that an arbitrator would change his or her mind on a legal issue, as a consequence of an annulment – in particular in light of the lack of a system of binding precedent in arbitration – or that he or she would have a neutral attitude towards a party which has requested the annulment of the award co-authored by the arbitrator. The appointment of arbitrators with such a record is not a coincidence, but rather a calculated move by the appointing party, which seeks to ensure a particular outcome of the case. This expectation, together with the potential biases mentioned above, raises justifiable doubts about the arbitrator's ability to dispassionately analyze the case and to objectively and rationally apply the law to it. It is understandable that such a situation would impair the counterparty's confidence in the proceeding, and its ultimate acceptance of the award – in particular if the annulment of the previous award and the arbitrator's appointment are chronologically close together. Accordingly, such arbitrators should not be confirmed within a transitional period of three years after the annulment.

Furthermore, role switching between an arbitrator and a counsel in concurrent proceedings should imperatively lead to non-confirmation. As Fry and Stampalija highlight, the awareness that a counsel in the present proceeding will adjudicate a matter in which the arbitrator serves as a counsel might (subconsciously, at least) influence the arbitrator's decision, or appear to influence it.[1137] In cases in which the outcome is not evident, at least, the arbitrator might be reluctant to decide against the party represented by a counsel who will later decide on a dispute argued by the arbitrator, in order not to diminish his or her chances in said proceeding. The risk which such constellations entail for the parties' confidence in the ICSID system is conveyed by the comparison of the arbitration community to a "mafia," based on such circumstances:

> Now why is it a mafia? It's a mafia because people appoint one another. You always appoint your friends – people you know.
>
> They nominate one another. And sometimes you're counsel and sometimes you're arbitrator.[1138]

Such constellations should be avoided. Instead of removing the arbitrator in the first proceeding, who might appear at risk of being biased, however, the

1136 FRANCK, STRUCTURE, *supra* note 41, at 251–252.

1137 Fry and Stampalija, *supra* note 31, at 251.

1138 DEZALAY AND GARTH, *supra* note 1024, at 50.

confirmation of the arbitrator in the second proceeding should be withheld. Thereby, a conflict of interest in the ongoing proceeding could be avoided, without any unnecessary delay, simply by requiring the appointment of another arbitrator in the second proceeding. For the avoidance of doubt, such serious consequences should only ensue if the two proceedings in which the role switching occurs overlap chronologically, so that the arbitrator in the first case could be aware of the counsel's function in the second proceeding, before the award is made.

Situations in which an arbitrator could prejudge a proceeding in which he serves as a counsel – i.e. a concurrent proceeding in which the same specific legal questions are outcome-determinative – must also be avoided. Accordingly, such arbitrators should be disqualified.[1139]

2.2 *Potential Grounds for Disqualification*

Circumstances which neither imperatively call for the arbitrator's removal, nor are exempt as grounds for disqualification, shall be examined in application of the justifiable doubts standard on a case-by-case basis. They should be enumerated illustratively on a list of potential grounds for disqualification, which should further be subdivided into two categories: situations which presumably raise justifiable doubts, unless the arbitrator can dispel them, and situations in which justifiable doubts are not presumed, but must be demonstrated by the challenging party. This subdivision – and the reversal of the burden of proof in the first subcategory – intends to reduce the unpredictability for all participants in the proceeding, and to signal which situations are considered to be particularly problematic.

Some uncertainty with regard to an arbitrator's qualification to serve in a specific dispute is however inevitable. The described situations are abstract simplifications of more complex real world constellations, which considerably vary on a very detailed level. Just like the IBA Guidelines, ICSID-specific guidelines cannot possibly provide for all contingencies, and must therefore remain flexible enough to allow for a case-by-case analysis. The uncertainty thereby created can however have advantages in practice, if all participants in the system seek to avoid such constellations, in order not to be vulnerable to the counterparty's challenges. The IBA Guidelines' provisions on repeat appointments, which are only on the Orange List, appear to have such a deterrent effect.[1140]

1139 DAELE, *supra* note 51, ¶ 7–003; Park, *Arbitrator Integrity*, *supra* note 808, at 648–649.

1140 *See supra* Chapter 3, Part 3.3.

By construing this list of potential disqualification grounds narrowly, with a focus on problematic situations which frequently occur in practice, the predictability of challenge proceedings would be improved for parties, counsel and arbitrators: Reputational risks would be diminished for arbitrators, while parties and counsel could make their appointments prudently, so as not to expose themselves to strategic challenges by their counterparties.

A Reversal of the Burden of Proof

The following situations should be included on the first list of potential grounds for disqualification, which entails a presumption of justifiable doubts:

Repeat appointments by the same party or counsel in three or more cases within three years should be presumed to raise justifiable doubts as to the arbitrator's independence and impartiality, irrespective of the arbitration rules which govern the relevant proceedings.[1141] The same presumption should apply if the arbitrator is appointed in three or more cases against the same party within three years, if those appointments make up for a significant part of her or his overall appointments. The threshold suggested for those constellations is the same as that provided for in § 3.1.3 IBA Guidelines, with respect to repeat appointments by a party: three years.[1142] By limiting the number of admissible repeat appointments, this suggestion takes into account that repeat appointments may raise justified concerns about arbitrators' dependence on their

1141 *See also* Sobota, *supra* note 27, at 317. As in most other systems, party and counsel appointments should be added up in challenges under the ICSID Convention and Arbitration Rules, for parties and their counsel act together from the perspective of the challenging party, and the disputing parties' choice of arbitrator is often significantly influenced by their counsel (*see* DAELE, *supra* note 51, ¶ 6–191).

1142 From a practical perspective, it appears easier to implement a rule which many practitioners (who are active in different arbitration systems, *see* Horvath and Berzero, *supra* note 37, at 15) are already familiar with it. *See*, in this context, the statement of one of today's most influential arbitrators, and a Judge of the Iran-US Claims Tribunal, Charles N. Brower: "I do not 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 are more nuanced." (Brower, Melikian, and Daly, *supra* note 877, at 335–336). This work therefore emulates the three year thresholds provided for in the IBA Guidelines, despite noted criticism. *See* Trakman, *supra* note 812, at 135 ("[W]hy should it be three years and three appointments? Is there any magic in the number three?").

appointing party or counsel,[1143] or arbitrators' bias.[1144] The reversal of the burden of proof reflects the increased importance of independence and impartiality in the ICSID system, due to the public interests involved in the proceedings.[1145] The proposal does not, however, draw an arbitrary line beyond which arbitrators cannot serve. Arbitrators who surpass the stipulated thresholds may still serve, if they can dispel any justifiable doubts about their independence and impartiality, and thereby remove the presumption of bias. Thus, the parties' autonomy to appoint suitable and qualified arbitrators is not unnecessarily or disproportionately constrained.

This proposition equates party-appointments and appointments by counsel in terms of the limits on repeat appointments, based on the belief that there is no objective reason to apply a higher threshold to appointments by counsel than to party-appointments, as is done in the IBA Guidelines.[1146] Arbitrators are most often appointed by counsel, and not by the parties themselves. Accordingly, their incentive to please a particular law firm is at least as high as the temptation to favor "their" party. Justifications of a higher threshold for repeat appointments by counsel appear to be based on the view that contacts between an arbitrator and a counsel are inevitable.[1147] Mere contacts or prior acquaintances, however, are not the same as prior appointments. Thus, there is no justification for a disparate treatment of repeat appointments by parties or by counsel. By imposing the same limits on parties and counsel, this suggestion would noticeably disentangle long-term co-operations between law firms and arbitrators which reinforce the perception of the arbitrator as an extension of counsel, and would rebut accusations that the investment arbitration community is a mafia.

Another innovation of this proposal is to limit repeat appointments against a party, subject to the same thresholds, and if they make up for a significant part of the arbitrator's overall appointments. There is no point of reference on how to handle such appointments in any of the examined dispute resolution

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1143 DAELE, *supra* note 51, ¶ 6–157; Slaoui, *supra* note 85, at 103; Shany, *supra* note 106, at 485 n.64; Smit, *Pernicious Institution*, *supra* note 940.

1144 Sobota, *supra* note 27, at 295. *See also* the arguments of the investors in *Tidewater* and *Universal Compression*.

1145 *See Highbury*, ¶¶ 84–85 (holding that the thresholds stipulated in the IBA Guidelines should be stricter in the ICSID system, because of the public interest involved in investment arbitration); DAELE, *supra* note 51, ¶ 5–107.

1146 IBA Guidelines, Application Lists, § 3.1.3 (setting the threshold at three appointments within three years for appointments by a party) and § 3.3.8 (setting the threshold for appointments by counsel at four appointments within three years).

1147 *See* Sobota, *supra* note 27, at 298; Markert, *supra* note 21, at 255.

systems or in the IBA Guidelines, because the problem is specific to investment arbitration. Repeat appointments against a party are systemically less likely to occur in commercial arbitration (and hence in proceedings governed by the IBA Guidelines), because private respondents are just as numerous as claimants. In ICSID arbitration, however, the pool of respondents is limited.[1148] Accordingly, appointments by different claimants in proceedings against the same State are possible, and have become a reality in proceedings against States which are frequently sued in the ICSID system. For example, Professor Francisco Orrega Vicuña has served in at least five proceedings against Argentina,[1149] and was challenged on this basis. In such constellations, similar legal questions and factual circumstances are often at stake. Even when the cases are dissimilar, however, an appearance of bias can arise. Repeat appointments against a State are often based on prior statements of the arbitrator or on the outcome of previous proceedings, and premised on the expectation that the arbitrator will take a position which is favorable for the investor. The arbitrator has an incentive to comply with this expectation, in order to be reappointed in future disputes against the same State. If his or her views on legal or political issues relevant in the proceeding are aligned with the investor's interest to begin with, the prospect of being appointed in the future acts as a disincentive to critically and rationally reconsider the issues at stake. In principle, repeat appointments against a State should therefore generally be scrutinized just as critically as any other kind of repeat appointment. However, in order to take account of the limited pool of potential respondents and the resulting possibility of coincidental repeat appointments against a State, this proposal imposes an additional requirement on challenges based on such circumstances: namely, that they make up for a significant part of the arbitrator's overall appointments. In such constellations, the arbitrator would appear to be particularly likely to ensure future appointments by supporting his or her appointing party's position on the tribunal.

In all three repeat appointment constellations covered by this proposition – repeat appointments by a party, by a counsel, or against a party – no overlap of the law and facts should be required. Such an overlap certainly intensifies existing doubts about the arbitrator's impartiality, it is however not necessary

1148 The pool of respondents is formally limited to the ICSID Contracting States. Even considering the possibility of proceedings under the Additional Facility Rules, the pool of potential respondents is not nearly as virtually unlimited as in commercial arbitration.

1149 *Repsol*, *Sempra*, *CMS*, *Enron* and Camuzzi International S.A. v. Argentine Republic (I), ICSID Case No. ARB/03/2.

for the appearance of dependence or bias to arise. Furthermore, repeat appointments in cases concerning the same or highly similar factual circumstances and / or the same or highly similar legal questions are covered by § 3.1 of the proposed list of compulsory disqualification grounds.

If the arbitrator has publicly expressed his or her view on questions which are relevant in the current dispute (by means other than academic publications), without however referring to the specific proceeding, this may also raise justifiable doubts as to his or her independence or impartiality. Unless the arbitrator can rebut the appearance of prejudgment created by such statements, he or she should be disqualified.

Justifiable doubts as to the requisite independence and impartiality should also be presumed if the arbitrator and one of the counsel in the proceeding have acted as co-counsel in more than three proceedings within three years. Setting the threshold at three proceedings within three years still allows for substantial collaboration among arbitration professionals, but limits such activity in conformity with the above rules on repeat appointments, for the same reasons.

B Burden of Proof on the Challenging Party

The following situations should be included on the second list of potential grounds for disqualification, which does not entail a presumption of justifiable doubts, but requires their demonstration by the challenging party:

If an arbitrator has previously served as a counsel in a dispute, and one of the arbitrators in said proceeding now acts as a counsel to one of the parties, justifiable doubts regarding the arbitrator's independence and impartiality may arise if the proceedings are chronologically close together. While such constellations are less problematic than role switching in concurrent proceedings, they may still raise doubts about the arbitrator's ability to decide the case in an objective and rational manner. Whether the tribunal in the first proceeding (including the arbitrator who now represents one of the parties) decided in favor or against the arbitrator's client in that case, its decision might subconsciously influence the arbitrator's decision in the following proceeding. Doubts about the arbitrator's dispassionate and rational decision-making might be particularly strong if the proceedings are chronologically close, and the memory of the decision in the first case is still fresh. Accordingly, the time frame of three years, which is applied in the context of many other potential conflict situations in this proposal, as well as in the IBA Guidelines, should apply to this situation, as well.

If the arbitrator has previously adjudicated a dispute in which the same legal questions were relevant, and issued a dissenting or concurring opinion

on a point of law which is determinative in the current proceeding, this may raise justifiable doubts as to his or her independence or impartiality. Other scholars request that such arbitrators should resign or be disqualified.[1150] Such a strict approach would however discourage arbitrators from authoring dissenting or concurring opinions, and disregards the unique importance of dissenting opinions for the deliberative process on the tribunal,[1151] and for the development of the law.[1152] Thus, this proposal favors the determination of the arbitrator's independence and impartiality on a case-by-case basis, instead.

Academic publications may give rise to justifiable doubts as to the arbitrator's independence or impartiality, if they do not only concern general issues, but very specific legal questions which are decisive in the dispute at hand. Because such publications are important for the diffusion of knowledge and for the development of the law,[1153] they should not be dissuaded by generally presuming that their author is biased. However, if the appearance of prejudgment exceeds the extent of preconceptions with which any arbitrator would

1150 Mouawad, *supra* note 252, at 13.

1151 Peter Rees QC & Patrick Rohn, *Dissenting Opinions : Can they Fulfil a Beneficial Role?*, 25 Arb. Int'l. 329, 330 (2009) (arguing persuasively that dissents can ease the deliberative process by "operat[ing] as a valve that reduces the pressure in an arbitration where, even after drawn-out deliberations, the arbitrators are not able to reconcile their views."); Kapeliuk, *Collegial Games*, *supra* note 33, at 297; Hans Smit, *Dissenting Opinions in Arbitration*, 15 ICC Int'l. Court Arb. Bulletin 37, 41 (2004) (explaining that "the prospect of a dissenting opinion may stimulate the deliberative process by encouraging dialogue between the disagreeing arbitrators.").

1152 *See* Rogers, *Politics*, *supra* note 17, at 242 et seqq.; Brower and Rosenberg, *supra* note 122, at 34 (pointing out that a dissent "offers a unique tool to produce a better arbitral award, given that [it] is likely to stress the weaknesses in the plurality's decision and force the plurality to address them in the factual and legal analyses in its decision." (internal quotations omitted)). *Contra* van den Berg, *Dissenting Opinions*, *supra* note 34, at 831 (arguing that "dissenting opinions … barely serve a legitimate purpose in a system with unilateral appointments," and that investment arbitration would be "more credible if party-appointed arbitrators observe the principle *nemine dissentiente*," unless the majority opinion seriously violates due process or "the arbitrator has been threatened with physical danger absent a dissent."); Albert Jan van den Berg, *Charles Brower's problem with 100 per cent – dissenting opinions by party-appointed arbitrators in investment arbitration*, 31 Arb. Int'l. 381 (2015).

1153 Daele, *supra* note 51, ¶ 7–190 ("The development of arbitration as a separate area of law and a mature dispute resolution mechanism partly depends on the scholarly attention paid to this system and to the quality of the scholarly writing.").

approach a case,[1154] and justifiable doubts as to the arbitrator's impartiality arise, the arbitrator should be disqualified.[1155]

Justifiable doubts may also arise if the arbitrator and one of the counsel in the proceeding have co-authored academic publications in the past three years. Again, because of the importance of academic publications, justifiable doubts as to the arbitrator's independence should not be presumed, or the co-authoring of such publications would be unnecessarily dissuaded. However, the intensive intellectual exchange which a co-authorship entails can raise doubts as to the arbitrator's ability to approach the arguments of such a counsel with the required distance and criticism. Accordingly, challenges based on such circumstances should be decided on a case-by-case basis, in application of the justifiable doubts standard.

If the arbitrator has regularly dealt with the same legal questions which are relevant in the current proceeding in his previous role as a public servant, his views may be excessively preconceived. If justifiable doubts as to his impartiality arise, for example because he or she has repeatedly dealt with the relevant legal question on numerous occasions, the arbitrator should be disqualified.

2.3 *No Grounds for Disqualification*

Situations which are consistently considered not to raise justifiable doubts as to an arbitrator's independence and impartiality in all examined dispute resolution mechanisms, and in which there is no reason for a different conclusion in investment arbitration, should be enumerated in a list of innocuous circumstances. One such constellation is the acquaintance of an arbitrator with a counsel, absent exceptional[1156] circumstances. Another unproblematic

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1154 Markert, *supra* note 21, at 263 ("[I]t would be unrealistic to expect that an arbitrator approaches a case without any kind of a preconception of the legal issues in dispute. This might be due to the arbitrator's legal education or due to the particular expertise for which the arbitrator was appointed in the case.").

1155 Natalia Giraldo-Carrillo, *The "Repeat Arbitrators" Issue: A Subjective Concept*, Int'l. L., Revista Colombiana de Derecho Internacional 75, 97–98 (2011).

1156 A close co-operation between the arbitrator's law firm and the law firm of counsel, in the form of shared office space and held joint seminars, for example, would qualify as such exceptional circumstances, which might raise justifiable doubts as to the arbitrator's independence and impartiality. The same applies to the repeated co-operation of an arbitrator and a counsel as co-counsel in proceedings (*see infra* Chapter 5, Part 2.4 B., § 1.5). *See also* Daele, *supra* note 51, ¶ 6–187 (additionally listing the following qualifying circumstances: The employment of a close relative of the arbitrator in the same law firm as a counsel, a close friendship between an arbitrator and a counsel, the prior co-operation of

situation is the arbitrator's provision of a legal opinion on an issue which also arises in the arbitration, but without reference to the dispute, and in a very general manner. An arbitrator's remote contacts to another arbitrator or counsel, which merely consist in his or her membership in a professional association or the like, are also innocuous. Furthermore, certain constellations which are enumerated in the IBA Guidelines' Green List should also be included on the ICSID-specific list, as far they do not raise justifiable doubts as to the arbitrator's independence and impartiality.

2.4 *Proposal for ICSID-specific Guidelines on Conflict of Interest*

A Incompatibilities

An arbitrator should not accept his appointment, should recuse himself, or should not be confirmed in the following situations:

1. Incompatible interests of the arbitrator

1.1 The arbitrator has a significant direct or indirect financial or personal interest in one of the parties, or in the outcome of the case.[1157]

1.2 The arbitrator is a party in the proceeding, or a legal representative or employee of a party.[1158]

1.3 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.[1159]

1.4 The arbitrator holds shares, either directly or indirectly, in one of the parties, or an affiliate of one of the parties, this party or an affiliate being privately held.[1160]

1.5 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence in an affiliate of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration.[1161]

1.6 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.[1162]

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an arbitrator and a counsel as co-counsel, the previous employment of an arbitrator and a counsel in the same law firm, the arbitrator's and a counsel's membership in the same barristers chambers.).

1157 IBA Guidelines, Application Lists, § 1.3.

1158 IBA Guidelines, Application Lists, § 1.1.

1159 IBA Guidelines, Application Lists, § 1.2.

1160 IBA Guidelines, Application Lists, § 2.2.1.

1161 IBA Guidelines, Application Lists, § 2.3.4.

1162 IBA Guidelines, Application Lists, § 2.3.3.

1.7 The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.[1163]

1.8 The arbitrator has a close family relationship with one of the parties, or with a manager, director or member of the supervisory board, or any person having a controlling influence in one of the parties, or an affiliate of one of the parties, or with a counsel representing a party.[1164]

1.9 A close family member[1165] of the arbitrator has a significant financial or personal interest in the outcome of the dispute, or in one of the parties, or an affiliate of one of the parties.[1166]

1.10 The arbitrator, or a close family member of the arbitrator, has a close relationship with a non-party who may be liable to recourse on the part of the unsuccessful party in the dispute.[1167]

2. Incompatible legal services[1168]

2.1 The arbitrator or the arbitrator's law firm regularly advise or represent a party or its affiliate.[1169]

2.2 The arbitrator or the arbitrator's law firm currently advise or represent the party.[1170]

1163 IBA Guidelines, Application Lists, § 2.3.6.

1164 IBA Guidelines, Application Lists, § 2.3.8.

1165 Throughout the Application Lists, the term "close family member" refers to a spouse, sibling, child, parent or life partner, in addition to any other family member with whom a close relationship exists. The same definition should apply in the ICSID context.

1166 IBA Guidelines, Application Lists, § 2.3.9.

1167 IBA Guidelines, Application Lists, § 2.2.3.

1168 Such services may be provided by the arbitrator or his law firm, to a party or its affiliate (encompassing all companies in a group of companies, including the parent company). The attorney-client relationship of a law firm which the arbitrator has only recently left should be considered under this category, and be treated the same if the modalities of the arbitrator's resignation from the law firm and his former position in the law firm reasonably create the impression that the arbitrator's continuing bond of loyalty towards the firm interferes with his dispassionate, objective and rational analysis of the case. In particular, if the arbitrator has been a partner within the firm, the firm's attorney-client relationships shall be imputed to the arbitrator during a phase-out period of three years (*cf.* IBA Guidelines, Application Lists, § 3.3.3).

1169 IBA Guidelines, Application Lists, §§ 1.4, 2.3.7 and 3.2.3.

1170 IBA Guidelines, Application Lists, §§ 2.3.1 and 3.2.1 and *Blue Bank*, expanded based on the examined commercial arbitration case law, and to reflect the particularities of investment arbitration.

2.3 The arbitrator or the arbitrator's law has advised a party on the dispute, or provided an expert opinion.[1171]
2.4 The arbitrator or the arbitrator's law firm had a prior involvement in the dispute.[1172]
2.5 The arbitrator's law firm is currently acting adversely to a party or its affiliate.[1173]
2.6 The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties.[1174]
2.7 The arbitrator serves as a counsel in a concurrent proceeding, in which one of the counsel to a party in the present dispute serves as an arbitrator.
2.8 The arbitrator serves as a counsel in a concurrent proceeding, in which the same specific legal questions are determinative.

3. Incompatible appointments to arbitral tribunals

3.1 The same party (or its affiliate), the same counsel or the same law firm have appointed the arbitrator in a proceeding concerning the same or highly similar factual circumstances and / or the same or highly similar specific legal questions, within the past three years.[1175]
3.2 The arbitrator has previously served as an arbitrator in a proceeding involving one of the parties, and has as such co-authored an award to the detriment of said party, which was annulled within the last three years.
3.3 The arbitrator has previously served as an arbitrator in a proceeding, and has as such co-authored an award concerning the same factual circumstances and / or the same specific legal questions, which was annulled within the last three years.

4. Disqualifying behavior

4.1 The arbitrator has unnecessarily and harshly admonished counsel for one of the parties.[1176]
4.2 The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.[1177]

1171 IBA Guidelines, Application Lists, § 2.1.1.

1172 IBA Guidelines, Application Lists, §§ 2.1.2 and 2.3.5. General consensus in all dispute resolution mechanisms examined in Chapter 2.

1173 IBA Guidelines, Application Lists, § 3.4.1 and *Blue Bank*, expanded to reflect the particularities of investment arbitration.

1174 IBA Guidelines, Application Lists, § 2.3.2.

1175 *Caratube* reasonably expanded.

1176 *Burlington.*

1177 IBA Guidelines, Application Lists, § 3.5.2.

B Potential Grounds for Disqualification

The following situations should be presumed to raise justifiable doubts as to an arbitrator's independence and impartiality, and should lead to a disqualification, unless the arbitrator can dispel such doubts:

1.1 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), by the same counsel, or by the same law firm individually or collectively.[1178]

1.2 The arbitrator has, within the past three years, served as an arbitrator in two or more proceedings directed against the same State, and these appointments make up for a significant part of the arbitrator's overall appointments.[1179]

1.3 The arbitrator has within the past three years served as counsel for a party or its affiliate, or has previously advised or been consulted by a party or its affiliate in an unrelated matter, but the relationship is not ongoing.[1180]

1.4 By means other than academic publications, the arbitrator has publicly expressed his or her views on questions which are relevant in the current dispute.

1.5 The arbitrator and a counsel or law firm involved in the proceeding have, within the past three years, acted as co-counsel in more than three proceedings.[1181]

1.6 A lawyer in the arbitrator's law firm is an arbitrator or counsel in another dispute involving the same party or parties, or an affiliate of one of the parties.[1182]

The following situations may raise justifiable doubts as to the arbitrator's independence and impartiality. A case-by-case assessment should be made on a precautionary basis:

1178 IBA Guidelines, Application Lists, §§ 3.1.3 and 3.3.8, modified to reflect the particularities of investment arbitration.

1179 IBA Guidelines, Application Lists, § 3.1.5, modified to reflect the particularities of investment arbitration.

1180 IBA Guidelines, Application Lists, § 3.1.1, modified to reflect the particularities of investment arbitration.

1181 IBA Guidelines, Application Lists, § 3.3.9, modified to reflect the particularities of investment arbitration.

1182 IBA Guidelines, Application Lists, § 3.3.4, modified to reflect the particularities of investment arbitration.

2.1 The arbitrator has, within the past three years, served as a counsel in a proceeding, in which a counsel in the present proceeding served as an arbitrator.
2.2 The arbitrator has, in a previous proceeding, dealt with a legal question which could be determinative in the arbitration, and has issued a dissenting opinion.
2.3 The arbitrator has within the past three years served as counsel against a party or its affiliate in an unrelated matter.[1183]
2.4 The arbitrator's law firm has, within the past three years, acted for or against a party or its affiliate, in an unrelated matter without the involvement of the arbitrator.[1184]
2.5 The arbitrator has previously expressed a legal opinion concerning a specific legal issue which arises in the arbitration in an academic publication.
2.6 The arbitrator and a counsel have co-authored academic publications within the past three years.
2.7 The arbitrator has, in his previous role as a public servant, regularly dealt with the legal issues which arise in the arbitration.

C Unproblematic Circumstances

Absent exceptional circumstances, the following situations should be considered not to raise justifiable doubts as to an arbitrator's independence and impartiality, and should not lead to a disqualification:

1. The arbitrator and a counsel for one of the parties are acquainted.
2. The arbitrator has previously expressed an opinion concerning a general legal or political issue arising in the arbitration in an academic publication or in a public speech.[1185]
3. A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law

1183 IBA Guidelines, Application Lists, § 3.1.2.

1184 IBA Guidelines, Application Lists, § 3.1.4. The attorney-client relationship of a law firm which the arbitrator has only recently left should be considered under this category, and be treated the same if the modalities of the arbitrator's resignation from the law firm and his former position in the law firm reasonably create the impression that the arbitrator's continuing bond of loyalty towards the firm interferes with his dispassionate, objective and rational analysis of the case. In particular, if the arbitrator has been a partner within the firm, the firm's attorney-client relationships shall be imputed to the arbitrator during a phase-out period of three years (*cf.* IBA Guidelines, Application Lists, § 3.3.3).

1185 IBA Guidelines, Application Lists, § 4.1.1, modified to reflect the particularities of investment arbitration.

firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.[1186]

4. The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organization, or through a social media network.[1187]
5. The arbitrator and counsel for one of the parties have previously served together as arbitrators.[1188]
6. The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organization with another arbitrator or counsel for one of the parties.[1189]
7. The arbitrator was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties.[1190]
8. The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.[1191]
9. The arbitrator has, in a previous proceeding, dealt with a legal question which could be determinative in the arbitration.[1192]

3 Implementation of Suggested Reforms

As far-reaching as the presented improvement suggestions will appear to some, they are considerably more conservative and mindful of the established

1186 IBA Guidelines, Application Lists, § 4.2.1.

1187 IBA Guidelines, Application Lists, § 4.3.1.

1188 IBA Guidelines, Application Lists, § 4.3.2.

1189 IBA Guidelines, Application Lists, § 4.3.3.

1190 IBA Guidelines, Application Lists, § 4.3.4.

1191 IBA Guidelines, Application Lists, § 4.4.1.

1192 *See* DAELE, *supra* note 51, ¶ 6–191 ("[B]ecause in investment arbitration there is always overlap, the system would become unviable if this would constitute a ground for challenge.").

investment arbitration system than other reform proposals which have been made. Their implementation also appears more realistic.

The ICSID-specific guidelines on conflicts of interest (Chapter 5, Part 2.4) suggested above could be realized without a revision of the ICSID Convention, and without interpretive statements to the Convention:[1193] BIT parties could incorporate such guidelines into addendums to their BITs or IIAs whenever they are renewed.[1194] This would allow for a comprehensive regulation of the matter, and for the relatively easy amendment of such guidelines, without a need for the re-negotiation of the entire IIA.[1195]

The proposed institutional reforms (Chapter 5, Part 1), on the other hand, would require a revision of the ICSID Convention and Arbitration Rules.[1196] In particular, Chapter 1, Section 2 ICSID Convention would have to be amended to provide for an Appointment and Confirmation Committee established by the Administrative Council. The respective provision would have to list the competencies of the Committee, namely the nomination of arbitrators to the Panel of Chairmen, the confirmation of party-appointed arbitrators, and the Committee's jurisdiction on arbitrator challenges. Chapter 1, Section 4 ICSID Convention would need to be supplemented by an additional article on the Panel of Chairmen, setting out the number of members on the panel and their service terms, as well as the required qualities and the nomination of the candidates by the Appointment and Confirmation Committee. An article on the confirmation of party-appointed arbitrators by the Appointment and Confirmation Committee would have to be added to Chapter 4, Section 2 ICSID Convention. Finally, Chapter 5 ICSID Convention would have to be revised to reflect the requirement of the Appointment and Confirmation Committee's confirmation of party-appointed arbitrators, and its jurisdiction on arbitrator challenges. This would require changes to Articles 57 and 58. The ICSID Arbitration Rules would also have to be revised to reflect the suggested reforms.

Article 57 ICSID Convention does not need to be revised to allow for the application of a justifiable doubts standard, since this interpretation corresponds with the legislative history and the regulatory purpose of the ICSID

1193 *See* Horvath and Berzero, *supra* note 37, at 16 (suggesting that the prohibition of dual roles could be provided for in interpretive statements according to Vienna Convention art. 31, para. 3 (a) and (b)); Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 6.

1194 Bernasconi-Osterwalder, Johnson, and Marshall, *supra* note 32, at 6.

1195 Horvath and Berzero, *supra* note 37, at 18.

1196 The disputing parties' agreement on an institutional jurisdiction for arbitrator challenges, for example, would appear not to be binding without a revision of ICSID Convention art. 58 (*cf.* Kinnear and Nitschke, *supra* note 13, at 47.).

Convention.[1197] For the sake of legal certainty and in light of the comprehensive amendments required in the context of institutional reforms (including a revision of Article 57), it would however be advisable to explicitly clarify the challenge threshold in Article 57, by amending its wording as follows:

> A party may propose to the Appointment and Confirmation Committee the disqualification of any member of a tribunal or of an *ad hoc* Committee on account of any fact which from the perspective of a reasonable third person raises justifiable doubts as to 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.

Resistance against the presented reform proposals and difficult negotiations on the exact amendments of the ICSID Convention are inevitable. However, it appears more realistic that the ICSID Contracting States would agree on conservative amendments of the ICSID Convention and Arbitration Rules, rather than the abolishment of party-appointments, a prohibition of dual functions, or the delegation of the settlement of investment disputes to permanent international tribunals. If the legitimacy of the ICSID system is to be preserved, and the loss of confidence in its arbitrators halted, the proposed suggestions are the least intrusive, and most effective alternative to more fundamental reform proposals.

1197 *See supra* Chapter 1, Part 1.2; DAELE, *supra* note 51, ¶ 5–035.

Summary

The independence and impartiality of ICSID arbitrators is a key factor for the perceived legitimacy of dispute settlement under the ICSID Convention. The ICSID Convention was set up with the goal of furthering the rule of law, and providing a neutral, law-based and fair dispute resolution environment. Arbitrators are the main bearers of this responsibility. The lack of institutional checks and balances (in the form of a rule of precedent and an appeals mechanism) only reinforces the importance of arbitrators' unbiased decision-making.

Article 14 para. 1 ICSID Convention, read in conjunction with Article 40 para. 2 ICSID Convention, formalizes this expectation, and emphasizes the importance of the parties' full confidence in the arbitrators' independence and impartiality. Nevertheless, this essential quality of decision-makers, and its appropriate and predictable delimitation in the context of ICSID proceedings, have received too little attention in practice. To this day, the threshold for successfully challenging an arbitrator is unclear: Some disqualification decisions require a strict proof of the challenged arbitrator's actual bias, while others call for the proof of facts which would raise justifiable doubts about the arbitrator's independence and impartiality from the perspective of a reasonable third person.

The variability of the invoked challenge threshold hardly affects the outcome of challenge decisions. Irrespective of the applied threshold, a vast majority of all challenges is dismissed. On the one hand, the strict proof of actual bias – i.e. an arbitrator's state of mind – is virtually impossible. On the other hand, the justifiable doubts threshold is often ratcheted up by imposing additional requirements on the challenge. As a consequence, only disqualification requests which are based on the most extraordinary circumstances have been upheld so far. Challenging an arbitrator under the ICSID Convention and Arbitration Rules is fighting an uphill battle. The threshold imposed on challenge requests – both formally and *de facto* – is so exacting that it renders the parties' right to an independent and impartial decision-maker (and ultimately to a fair proceeding) illusory.

The ICSID challenge case law stands in contrast to related dispute settlement mechanisms' approaches to independence and impartiality. Most examined systems not only coherently apply a formally lower challenge threshold, but are also stricter in their application of the threshold to specific conflict categories (though not across the board). Although the high stakes involved in ICSID arbitration would suggest that the standard of independence and impartiality should provide at least an equivalent level of protection as the

standards applied in commercial arbitration, the opposite appears to be true. This is problematic in light of the significance of ICSID arbitrators' decisions.

To reduce the incidence of conflict situations and the number of arbitrator challenges, various authors have proposed far-reaching reforms of ICSID arbitration. Their suggestions range from abolishing party-appointments to requiring arbitrators' appointments to be made from a closed roster, to prohibiting the exercise of dual functions. This study rejects these proposals – some of which have been implemented in the European Union's Investment Court System –, and argues that they would likely lead to an unwelcome politicization of the dispute settlement mechanism, and to a further consolidation of the community of adjudicators. From a practical perspective, it is improbable that any of the examined reform suggestions would lead to extensive appointments of decision-makers from outside the current pool of seasoned arbitrators. As a consequence, existing concerns about the independence and impartiality of these actors would be aggravated, and the parties' confidence in a fair and rules-based proceeding would be jeopardized.

The incoherence and unpredictability of the ICSID challenge threshold, and the overwhelming dismissal of disqualification requests, are caused by three main factors: The uniqueness of the wording of the challenge threshold in Article 57 ICSID Convention, the co-arbitrators' decision-making authority on arbitrator challenges, and the flexibility of the vague standard of independence and impartiality, which exacerbates uncertainties about the standard's application to specific situations, and facilitates decisions which sustain the *status quo*. The reforms suggested herein directly target these three issues, in order to enhance the perception of the procedural fairness of ICSID proceedings, and the legitimacy of the system.

First, the threshold for arbitrator disqualification should be clarified, and the justifiable doubts standard (which is pertinent in most related dispute settlement mechanisms) should be operative. Second, ICSID-specific guidelines on conflicts of interest are suggested. Such guidelines could serve as a lead to parties and counsel in their appointments, to arbitrators in their acceptance of nominations, and to decision-makers in adjudicating challenges. While they would leave enough room for a case-by-case appraisal of challenge requests, they would also significantly increase legal certainty and the predictability of challenge decisions. Third, certain institutional reforms (mostly based on existing mechanisms in the examined related dispute settlement systems) are necessary. These institutional reforms would ensure the effective and consistent realization of the requirement of independence and impartiality, a reduction in the number of challenges, and effective, prolific deliberations on arbitral tribunals.

The most novel suggestion made herein would require the appointment of the arbitral tribunal's chairperson from a roster of particularly experienced, skilled and (most importantly) neutral elite arbitrators. This proposal is based on the belief that a certain antagonism between party-appointed arbitrators (be it in the form of predispositions which do not rise to the level of bias, or actual dependencies or biases which fall through the cracks in disqualification proceedings) is inevitable. The effect which such an opposition might have on the substantive outcome of a proceeding could considerably be reduced by ensuring the heightened neutrality of the chairperson, as well as her authority over the party-appointed arbitrators, and her strong process management skills. Opposing positions, perceptions and ideas could thus be introduced into objective, rational and open-minded deliberations, and made fruitful for the tribunal's decision-making process.

The author of this book is mindful of the prominence and success of ICSID arbitration, and of the integrity of its decision-makers. In order to preserve this standing, however, it is crucial that arbitrator independence and impartiality as the foundation of the system's legitimacy be visibly prioritized. If practices and customs which raise justifiable doubts about the arbitrators' ability to evaluate cases open-mindedly, rationally, and objectively are tolerated, parties' confidence in the system, and its perceived legitimacy are put on the line. The balanced solutions proposed herein would help to adequately redraw the contours of the independence and impartiality required of ICSID arbitrators.

Bibliography

David Anderson & Samuel Wordsworth, *Article 18*, *in* The Statute of the International Court of Justice: A Commentary 386 (Andreas Zimmermann et al. eds., 2nd ed. 2012).

Nisuke Ando, *Permanent Court of Arbitration* (*PCA*), *in* Max Planck Encyclopedia of Public International Law (2006), online edition, *available at* http://opil.ouplaw.com/home/epil.

Markham Ball, *Probity Deconstructed: How Helpful, Really, are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?*, 21 Arbitration International 323 (2005).

Axel H. Baum, *Editorial: Maintaining the Essence of Arbitration*, 4 Journal of International Arbitration 4 (1987).

Rachel Bendayan, *Interview with a Leading International Arbitrator: L Yves Fortier*, 18 IBA Arbitration News 18 (2013).

Nathalie Bernasconi-Osterwalder et al., *Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel*, iv Annual Forum for Developing Country Investment Negotiators, Background Papers (2010).

Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 Arbitration International 395 (1998).

Doak Bishop, James Crawford & W. Michael Reisman, Foreign Investment Disputes: Cases, Materials and Commentary (2nd ed. 2014).

Nigel Blackaby, Constantine Partasides, Alan Redfern & J. Martin Hunter, Redfern and Hunter on International Arbitration (6th ed. 2015).

Gary B. Born, International Commercial Arbitration (2014).

Gary B. Born, International Arbitration: Law and Practice (2012).

Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 Suffolk Transnational Law Review 341 (2009).

Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 Journal of International Dispute Settlement 553 (2013).

Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Recueil des Cours 331 (1972).

Charles H. Brower, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 Duke Journal of Comparative and International Law 259 (2008).

Charles N. Brower, *The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator* (*Keynote Address*), 5 Berkeley Journal of International Law Publicist 1 (2010), *available at* http://bjil.typepad.com/brower_final.pdf.

Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson – Van Den Berg Presumption That Party-Appointed Arbitrators are Untrustworthy is Wrong-Headed*, 29 Arbitration International 7 (2013).

Charles N. Brower, Sarah Melikian & Michael P. Daly, *Tall and Small Tales of a Challenged Arbitrator*, *in* Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals 320 (Chiara Giorgetti ed., 2015).

Markus Buechel, *The Independence of International Arbitrators*, *in* The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges 243 (Shimon Shetreet & Christopher Forsyth eds., 2012).

Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 22 Arbitration International 495 (2006).

Michael W. Bühler & Thomas H. Webster, Handbook of ICC Arbitration (1st ed. 2005).

Lee M. Caplan, *Arbitrator Challenges at the Iran-United States Claims Tribunal*, *in* Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals 115 (Chiara Giorgetti ed., 2015).

David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 513 Suffolk Transnational Law Journal (2008) [Caron, *Investor State Arbitration*].

David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 The American Journal of International Law 104 (1990) [Caron, *The Nature of the Iran-US Claims Tribunal*].

David D. Caron & Lee M. Caplan, The UNCITRAL Arbitration Rules (2nd ed. 2013).

David Collins, *ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?*, 30 Journal of International Arbitration 333 (2013).

Aaron Cosbey, Howard Mann, Luke Eric Peterson & Konrad von Moltke, Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements (2004), *available at* http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf.

Philippe Couvreur, *Article 16*, *in* The Statute of the International Court of Justice: A Commentary 357 (Andreas Zimmermann et al. eds., 2nd ed. 2012) [Couvreur, *Article 16*].

Philippe Couvreur, *Article 17*, *in* The Statute of the International Court of Justice: A Commentary 372 (Andreas Zimmermann et al. eds., 2nd ed. 2012) [Couvreur, *Article 17*].

James Crawford, *International Protection of Foreign Direct Investments: Between Clinical Isolation and Systemic Integration*, *in* International Investment Law and General International Law: From Clinical Isolation to Systemic Integration? 17 (Rainer Hofmann & Christian J. Tams eds., 2011).

Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration (2012).

Jan H. Dalhuisen, Legal Reasoning and Powers of International Arbitrators (Draft Mar. 03, 2015), http://dx.doi.org/10.2139/ssrn.2393705.

Brooks W. Daly, Evgeniya Goriatcheva, Hugh A. Meighen, A Guide to the PCA Arbitration Rules (2014).

Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed*, 45 Cornell International Law Journal 77 (2012).

Eric De Brabandere, Investment Treaty Arbitration as Public International Law. Procedural Aspects and Implications (2014).

Armand De Mestral, CETA Chapter 8: The Investment Tribunal, Centre for International Governance Innovation (CIGI) Investor-State Arbitration Commentary Series No. 1 (May 2, 2016), https://www.cigionline.org/publications/ceta-chapter-8-investment-tribunal.

Giacinto della Cananea, *Minimum Standards of Procedural Justice in Administrative Adjudication*, *in* International Investment Law and Comparative Public Law 39, 57 (Stephan W. Schill ed., 2010).

Yves Dezalay & Bryant G. Garth, Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order (1996).

Alexandra Diehl, The Core Standard of International Investment Protection (2012).

Magdalene D'Silva, *Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration*, 5 Journal of International Dispute Settlement 605 (2014).

Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 British Yearbook of International Law 151 (2003).

Martin Endicott, *Remedies in Investor-State Arbitration : Restitution, Specific Performance and Declaratory Awards*, *in* New Aspects of International Investment Law 517 (Philippe Kahn & Thomas W. Wälde eds., 2007).

Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 The Yale Law Journal 1490 (2006).

Serena Forlati, The International Court of Justice: An Arbitral Tribunal or a Judicial Body? (2014).

Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 Virginia Journal 977 (2011).

Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 Harvard International Law Journal 435 (2009) [Franck, *Development and Outcomes*].

Susan D. Franck, International Investment Arbitration: Winning, Losing and Why, Columbia FDI Perspectives No. 7 (2009), http://ccsi.columbia.edu/files/2014/01/FDI_7.pdf.

Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 Minnesota Law Review 161 (2007) [Franck, *Integrating Investment Treaty Conflict*].

Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 North Carolina Law Review 1 (2007) [Franck, *Empirically Evaluating Claims*].

Susan D. Franck, *The Role of International Arbitrators*, ILSA Journal of International & Comparative Law 1 (2006) [Franck, *The Role of International Arbitrators*].

Susan D. Franck & Leah D. Harhay, *Bridging the Divide Between Theory and Practice – An Introduction by the Conference Co-Chairs*, 6 World Arbitration and Mediation Review 561 (2012).

Thomas M. Franck, Fairness in International Law and Institutions (1995) [Franck, Fairness].

Thomas M. Franck, The Power of Legitimacy among Nations (1990).

Thomas M. Franck, The Structure of Impartiality. Examining the Riddle of One Law in a Fragmented World (1968) [Franck, Structure].

Jason Fry & Simon Greenberg, *The new ICC Rules on Arbitration: How Have They Fared After the First 18 Months?*, 16 International Arbitration Law Review 171 (2013).

James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30 Arbitration International 189 (2014).

Dmytro Galagan, The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal's Mandate?, Kluwer Arbitration Blog (Feb. 27, 2015), http://kluwerarbitrationblog.com/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/.

Chiara Giorgetti, Caratube v. Kazakhstan: For the First Time Two ICSID Arbitrators Uphold Disqualification of Third Arbitrator, American Society for International Law INSIGHTS (Sept. 29, 2014), http://www.asil.org/insights/volume/18/issue/22/caratube-v-kazakhstan-first-time-two-icsid-arbitrators-uphold [Giorgetti, Caratube v. Kazakhstan].

Chiara Giorgetti, *Challenges of International Investment Arbitrators : How Does it Work, and Does it Work?*, 7 World Arbitration and Mediation Review 303 (2013) [Giorgetti, *Challenges*].

Chiara Giorgetti, *The Challenge and Recusal of Judges of the International Court of Justice*, *in* Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals 3 (Chiara Giorgetti ed., 2015) [Giorgetti, *Judges of the ICJ*].

Chiara Giorgetti, Towards A Revised Threshold for Arbitrators' Challenges Under ICSID?, Kluwer Arbitration Blog (July 3, 2014), http://kluwerarbitrationblog.com/2014/07/03/towards-a-revised-threshold-for-arbitrators-challenges-under-icsid/.

Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 University of Pennsylvania Journal of International Law 431 (2013).

Natalia Giraldo-Carrillo, *The "Repeat Arbitrators" Issue: A Subjective Concept*, International Law, Revista Colombiana de Derecho Internacional 75 (2011).

Jacob Grierson & Annet van Hooft, Arbitrating under the 2012 ICC Rules (2012).

Horacio A. Grigera Naón, *Factors to Consider in Choosing an Efficient Arbitrator*, *in* ICCA Congress Series No. 9: Improving the Efficiency of Arbitration Agreements and Awards. 40 Years of Application of the New York Convention, 286 (Albert Jan van den Berg ed., 1999).

Grant Hanessian, Derek Soller & José Manuel Maza, The ICC Court Decides to Provide Parties With Reasons for Administrative Decisions, Global Arbitration News (Nov. 10, 2015), http://globalarbitrationnews.com/the-icc-court-decides-to-provide-parties-with-reasons-for-administrative-decisions-20151110/ [Hanessian et al., Reasons for Administrative Decisions].

Rainer Hofmann & Christian J. Tams, *International Investment Law: Situating an Exotic Special Regime within the Framework of General International Law*, *in* International Investment Law and General International Law: From Clinical Isolation to Systemic Integration? 9 (Rainer Hofmann & Christian J. Tams eds., 2011).

Rainer Hofmann & Christian J. Tams, *Introduction: The International Convention on the Settlement of Investment Disputes* (*ICSID*) *– Taking Stock after 40 Years*, *in* The International Convention on the Settlement of Investment Disputes (ICSID) (Rainer Hofmann & Christian J. Tams eds., 2007).

G.J. Horvath & R. Berzero, *Arbitrator and Counsel: the Double-Hat Dilemma*, 10 Transnational Dispute Management (2013).

IBA Conflict of Interests Subcommittee, *The IBA Guidelines on Conflicts of Interest in International Arbitration: The First Five Years 2004–2009*, 4 Dispute Resolution Journal 5 (2010).

International Centre for Settlement of Investment Disputes, History of the ICSID Convention, Vol. I (1970).

International Centre for Settlement of Investment Disputes, History of the ICSID Convention, Vol. II-1 (1968) [ICSID, History II-1].

International Centre for Settlement of Investment Disputes, History of the ICSID Convention, Vol. II-2 (1986) [ICSID, History II-2].

International Centre for Settlement of Investment Disputes, Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat (May 12, 2005), *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf.

International Centre for Settlement of Investment Disputes, *The ICSID Caseload -Statistics* (*Issue 2015–2*), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf.

International Centre for Settlement of Investment Disputes, *The ICSID Caseload-Statistics* (*Issue 2016–1*), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf [ICSID, *Caseload-Statistics 2016–1*].

International Institute for Sustainable Development, Belgian Appeals Court rejects Poland's challenge to Arbitrator in Eureko case, Investment Treaty News (Nov. 15, 2007), http://www.iisd.org/pdf/2007/itn_nov15_2007.pdf.

International Institute for Sustainable Development, ICC Nixes Argentina's bid to disqualify Arbitrator in National Grid Case, Investment Treaty News (Jan. 12, 2006), http://www.iisd.org/pdf/2006/itn_jan12_2006.pdf.

International Institute for Sustainable Development, ICSID Tribunals diverge over independence of arbitrator to hear Argentine claims, INVEST-SD: Investment Law and Policy News Bulletin (Mar. 24, 2005), http://www.iisd.org/pdf/2005/investment_investsd_mar24_2005.pdf.

Tom Jones, Cheng survives first of challenges over Freshfields links, Global Arbitration Review (Sept. 3, 2015), http://globalarbitrationreview.com/news/article/34108/cheng-survives-first-challenges-freshfields-links/.

Helena Jung, *SCC Practice: Challenges to Arbitrators. SCC Board decisions 2005–2007*, Stockholm International Arbitration Review 1 (2008) [Jung, *SCC Practice*].

Helena Jung, *The Standard of Independence and Impartiality for Arbitrators in International Arbitration. A Comparative Study Between the Standards of the SCC, the ICC, the LCIA and the AAA* (2008), *available at* http://sccinstitute.com/media/61993/the_standard_of_independence_helena_jung-1.pdf [Jung, *Comparative Study*].

Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, 31 Review of Litigation 267 (2012) [Kapeliuk, *Collegial Games*].

Daphna Kapeliuk, Social Capital and Arbitral Decision Making, EJIL: Talk! Blog of the European Journal of International Law (Sept. 24, 2014), http://www.ejiltalk.org/social-capital-and-arbitral-decision-making/.

Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell Law Review 47 (2010) [Kapeliuk, *Repeat Appointment*].

Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 Arbitration International 357 (2007).

Gabrielle Kaufmann-Kohler, *Foreword*, in Antonio R. Parra, The History of ICSID (2012).

Christopher Kee, *Judicial Approaches to Arbitrator Independence and Impartiality in International Commercial Arbitration*, *in* Investment and Commercial Arbitration – Similarities and Divergences 181 (Christina Knahr et al. eds., 2010).

Meg Kinnear & Frauke Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*, *in* Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals 34 (Chiara Giorgetti ed., 2015).

Pieter Hendrik Kooijmans, *Article 31*, *in* The Statute of the International Court of Justice: A Commentary 530 (Andreas Zimmermann et al. eds., 2nd ed. 2012).

Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens & Nicholas J. Birch, *International Investment Law and Arbitration: 2010 in Review*, *in* Yearbook of International Investment Law and Policy 2010–2011 (Karl P. Sauvant ed., 2012).

David A. Lawson, *Impartiality and Independence of International Arbitrators – Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 ASA Bulletin 22 (2005).

Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 Arbitration International 241 (2005).

Céline Lévesque, The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?, Centre for International Governance Innovation (CIGI), Investor-State Arbitration Series Paper No. 10 (2016), *available at* http://www.css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/resources/docs/CIGI%20-%20The%20European%20Commission%20Proposal%20for%20an%20Investment%20Court%20System.pdf.

Céline Lévesque, CETA's New System for the Resolution of Investment Disputes: What a Difference a Few Months Make, Centre for International Governance Innovation (CIGI) Investor-State Arbitration Commentary Series No. 3 (May 6, 2016), https://www.cigionline.org/publications/cetas-new-system-resolution-investment-disputes-what-difference-few-months-make.

Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, Dispute Resolution Journal 61 (2006).

Niklas Lindström, Challenges to Arbitrators – Decisions by the SCC Board During 2008–2010, *available at* http://www.hannessnellman.com/sites/default/files/media/Challenges_to_Arbitrators__Decisions_by_the_SCC_Board_during_2008_2010.pdf.

Sam Luttrell, Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test (2009).

Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harvard International Law Journal 271 (2003).

Annette Magnusson & Hanna Larsson, *Recent Practice of the Arbitration Institute of the Stockholm Chamber of Commerce. Prima Facie Decisions on Jurisdiction and Challenges of Arbitrators*, 2 Stockholm Arbitration Report 47 (2004).

Howard Mann, *The Emperor's Clothes Come Off: A Comment on Republic of Ghana v. Telekom Malaysia Berhard, and the Problem of Arbitrator Conflict of Interest*, 2 Transnational Dispute Management (2005).

Gabrielle Zoe Marceau, *Rules on Ethics for the New World Trade Organization Dispute Settlement Mechanism: The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, 32 Journal of World Trade 57 (1998).

Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3 Contemporary Asia Arbitration Journal 237 (2010).

Fiona Marshall, Defining New Institutional Options for Investor-State Dispute Settlement (2009), *available at* http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf.

Barrie McKenna, Canada, EU revise trade deal, add investor-state dispute tribunal, The Globe and Mail (Feb. 29, 2016), http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/ottawa-says-legal-review-of-canada-eu-free-trade-deal-completed/article28946075/.

Douglas Earl McLaren, *Party-Appointed vs List-Appointed Arbitrators: A Comparison*, *in* Towards a Science of International Arbitration: Collected Empirical Research 161 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

Sundaresh Menon, *Keynote Address*, *in* ICCA Congress Series No. 17: International Arbitration. The Coming of a New Age? 6 (Albert Jan van den Berg ed., 2013).

Santiago Montt, State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (2009).

Caline Mouawad, *Issue Conflicts in Investment Treaty Arbitration*, 5 TRANSNATIONAL DISPUTE MANAGEMENT (2009).

Alexis Mourre, Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration, Kluwer Arbitration Blog (Oct. 5, 2010), http://kluwerarbitrationblog.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/.

Ramon Mullerat OBE, *Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration*, 4 DISPUTE RESOLUTION INTERNATIONAL 55 (2010).

Felipe Mutis Tellez, ARBITRATORS' INDEPENDENCE AND IMPARTIALITY: A REVIEW OF SCC BOARD DECISIONS ON CHALLENGES TO ARBITRATORS (2010–2012) (2012), *available at* http://www.sccinstitute.com/media/30001/felipe-mutis-tellez_article-on-scc-challenges-on-arbitrators.pdf.

Krista Nadakavukaren Schefer, *Judicial ethics in international economic law: what standards of independence and impartiality apply to arbitrators and panelists?, in* ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW 215 (Joanna Jemielniak, Laura Nielsen, & Henrik Palmer Olsen eds., 2016).

ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009).

Karin Oellers-Frahm, *International Courts and Tribunals, Judges and Arbitrators*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013), online edition, *available at* http://opil.ouplaw.com/home/epil.

Marie Öhrström, *Decisions by the SCC Institute Regarding Challenge of Arbitrators*, STOCKHOLM ARBITRATION REPORT 35 (2002).

Organisation for Economic Co-operation and Development, *OECD International Direct Investment Statistics 2014*, *available at* http://dx.doi.org/10.1787/idis-2014-en.

William W. Park, *Arbitration's Discontents: Between the Pernicious and the Precarious*, *in* LES RELATIONS PRIVÉES INTERNATIONALES. MÉLANGES EN L'HONNEUR DU PROFESSEUR BERNARD AUDIT 581 (2014) [Park, *Arbitration's Discontents*].

William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO LAW REVIEW 629 (2009) [Park, *Arbitrator Integrity*].

ANTONIO R. PARRA, THE HISTORY OF ICSID (2012).

JAN PAULSSON, THE IDEA OF ARBITRATION (2013) [PAULSSON, THE IDEA].

Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REVIEW 339 (2010) [Paulsson, *Moral Hazard*].

PCA Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia (Dec. 2, 2015), *available at* http://www.pcacases.com/web/sendAttach/1541.

Luke Eric Peterson, ANALYSIS: Decrying past "contradictory" rulings, Argentina challenges arbitrator, Investment Treaty News (Apr. 1, 2008), http://www.iisd.org/pdf/2008/itn_april1_2008.pdf, 3 [Peterson, Argentina].

Luke Eric Peterson, ICSID Arbitrators Reject Challenge to Third Member of Tribunal in Lemire v. Ukraine Arbitration, Investment Arbitration Reporter (Oct. 1, 2008), http://iareporter.developerspace.co.vu/icsid-arbitrators-reject-challenge-to-third-member-of-tribunal-in-lemire-v-ukraine-arbitration/ [Peterson, Lemire].

Eric A. Posner & Miguel de Figueiredo, Is the International Court of Justice Biased?, University of Chicago Law & Economics, Olin Working Paper No. 234 (2004), *available at* http://ssrn.com/abstract=642581.

Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 California Law Review 1 (2005).

Eric A. Posner & John C. Yoo, A Theory of International Adjudication, UC Berkeley Public Law Research Paper No. 146 (2004), *available at* http://ssrn.com/abstract=507003.

Sergio Puig, *Social Capital in the Arbitration Market*, 25 European Journal of International Law 387 (2014) [Puig, *Social Capital*].

Sergio Puig, Social Capital and the Limits of Network Analysis, EJIL: Talk! Blog of the European Journal of International Law (Sept. 29, 2014), http://www.ejiltalk.org/response-to-comments-on-social-capital-in-the-arbitration-market/.

Sergio Puig, Social Capital in the Arbitration Market, EJIL: Talk! Blog of the European Journal of International Law (Sept. 22, 2014), http://www.ejiltalk.org/12168/.

Lucy Reed, Jan Paulsson & Nigel Blackaby, Guide to ICSID Arbitration (2nd ed. 2011).

Peter Rees QC & Patrick Rohn, *Dissenting Opinions : Can they Fulfil a Beneficial Role?*, 25 Arbitration International 329 (2009).

Andreas Reiner & Christian Aschauer, *Commentary Article 11*, *in* Institutional Arbitration (Rolf A. Schütze ed., 2013) [Reiner and Aschauer, *Art. 11*].

Andreas Reiner & Christian Aschauer, *Commentary Article 14*, *in* Institutional Arbitration (Rolf A. Schütze ed., 2013).

August Reinisch, The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to Permanent Investment Court, Centre for International Governance Innovation (CIGI), Investor-State Arbitration Series Paper No. 10 (2016), *available at* https://www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf [Reinisch, The EU and ISDS].

August Reinisch & Christina Knahr, *Conflict of Interest in International Investment Arbitration*, *in* Conflict of Interest in Global, Public and Corporate Governance 103 (Anne Peters & Lukas Handschin eds., 2012).

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 (Chris de Cooker ed., 2005).

Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 217 (2010).

David W. Rivkin, *The Impact of International Arbitration on the Rule of Law*, 29 ARBITRATION INTERNATIONAL 327 (2013).

CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (2014) [ROGERS ETHICS].

Catherine A. Rogers, International Arbitration in a Time of Global Upheaval, Kluwer Arbitration Blog (Sept. 17, 2014), http://kluwerarbitrationblog.com/blog/2014/09/17/international-arbitration-in-a-time-of-global-upheaval/ [Rogers, Global Upheaval].

Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 233 (2013) [Rogers, *Politics*].

Catherine A. Rogers, *The Ethics of International Arbitrators*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 621 (Lawrence W. Newman & Richard D. Hill eds., 2d ed. 2008) [Rogers, *Arbitrator Ethics*].

Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STANFORD JOURNAL OF INTERNATIONAL LAW 53 (2005).

Alison Ross, Croatia says it will withdraw over Sekolec scandal, Global Arbitration Review (July 27, 2015), http://globalarbitrationreview.com/news/article/34009/croatia-withdraws-sekolec-scandal/.

Alison Ross, ICJ president backs out of Croatia-Slovenia dispute, Global Arbitration Review (Aug. 5, 2015), http://globalarbitrationreview.com/news/article/34038/icj-president-backs-croatia-slovenia-dispute/.

Alison Ross, Slovenia replaces Sekolec, Global Arbitration Review (July 28, 2015), http://globalarbitrationreview.com/news/article/34017/slovenia-replaces-sekolec/.

Alison Ross, The tapped conversations: what Sekolec said, Global Arbitration Review (Aug. 19, 2015), http://globalarbitrationreview.com/news/article/34070/what-sekolec-said/ [Ross, Tapped Conversations].

Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality and Duty of Disclosure in Investment Arbitration*, *in* INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 153 (Christina Knahr et al. eds., 2010).

David Samuels, Rees's rules for complex disputes, Global Arbitration Review (July 7, 2011), http://www.globalarbitrationreview.com/news/article/29614/reess-rules-complex-disputes/.

Ank A. Santens, The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?, Kluwer Arbitration Blog (June 28, 2011), http://kluwerarbitrationblog.com/2011/06/28/the-move-away-from-closed-list-arbitrator-appointments-happy-ending-or-a-trend-to-be-reversed/ [Santens, Move Away].

ARMAN SARVARIAN, PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR (2013).

Stephan W. Schill, *Private Enforcement of International Investment Law*, *in* The Backlash Against Investment Arbitration 29 (Michael Waibel et al. eds., 2010).

Patrik Schöldström, *The Arbitrators*, *in* International Arbitration in Sweden: A Practitioner's Guide 115 (Ulf Franke et al. eds., 2013).

Christoph H. Schreuer, *The Dynamic Evolution of the ICSID System*, *in* The International Convention on the Settlement of Investment Disputes (ICSID) 15 (Rainer Hofmann & Christian J. Tams eds., 2007) [Schreuer, *Dynamic Evolution*].

Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, The ICSID Convention – A Commentary (2nd ed. 2009) [Schreuer et al., Commentary].

Thomas Schultz, *Against Consistency in Investment Arbitration*, *in* The Foundations of International Investment Law: Bringing Theory into Practice 297 (2013).

Thomas Schultz, Comments on Sergio Puig's 'Social Capital in the Arbitration Market', EJIL: Talk! Blog of the European Journal of International Law (Sept. 23, 2014), http://www.ejiltalk.org/comments-on-sergio-puigs-social-capital-in-the-arbitration-market/.

Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth*, 28 Arbitration International 161 (2012).

Eric A. Schwartz & Yves Derains, Guide to the ICC Rules of Arbitration (2nd ed. 2005).

Stephen M. Schwebel, *The Overwhelming Merits of Bilateral Investment Treaties*, 32 Suffolk Transnational Law Review 263 (2009).

Stephen M. Schwebel, *National Judges and Judges Ad Hoc of the International Court of Justice*, 48 International & Comparative Law Quarterly 889 (1999) [Schwebel, *National Judges*].

Anja Seibert-Fohr, *International Judicial Ethics*, *in* The Oxford Handbook of International Adjudication 757 (2013).

Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 Loyola of Los Angeles International and Comparative Law Review 473 (2008).

Audley Sheppard, *Arbitrator Independence in ICSID Arbitration*, *in* International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 131 (2009).

Fatima-Zahra Slaoui, *The Rising Issue of "Repeat Arbitrators": A Call for Clarification*, 25 Arbitration International 103 (2009).

Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, Columbia FDI Perspectives No. 33 (2010), http://ccsi.columbia.edu/files/2014/01/FDI_33.pdf [Smit, *Pernicious Institution*].

Hans Smit, *Dissenting Opinions in Arbitration*, 15 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 37 (2004).

Adam M. Smith, *"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEXAS INTERNATIONAL LAW JOURNAL 197 (2005).

Luke A. Sobota, *Repeat Arbitrator Appointments in International Investment Disputes*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 293 (Chiara Giorgetti ed., 2015).

Gregory J. Spak & Ron Kendler, *Selection and Recusal in the WTO Dispute Settlement System*, *in* CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 164 (Chiara Giorgetti ed., 2015).

THOMAS J. STIPANOWICH & ZACHARY P ULRICH, ARBITRATION IN EVOLUTION: CURRENT PRACTICES AND PERSPECTIVES OF EXPERIENCED COMMERCIAL ARBITRATORS, PEPPERDINE UNIVERSITY LEGAL STUDIES RESEARCH PAPER NO. 2014/30 (2014).

Il Ro Suh, *Voting Behavior of National Judges in International Courts*, 63 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 224 (1969).

Stefan Talmon, *Article 43*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1088 (Andreas Zimmermann et al. eds., 2nd ed. 2012).

Douglas Thomson, "An open mind, not a blank mind": Hanotiau survives challenge by Kazakhstan, Global Arbitration Review (Nov. 26, 2015), http://globalarbitrationreview.com/news/article/34376/an-open-mind-not-blank-mind-hanotiau-survives-challenge-kazakhstan/.

Douglas Thomson, Is ICSID a "Monarchy"?, Global Arbitration Review (Jan. 4, 2016), http://globalarbitrationreview.com/news/article/34415/is-icsid-monarchy/ [Thomson, Monarchy].

Douglas Thomson, New faces on troubled Balkan border panel, Global Arbitration Review (Sept. 25, 2015), http://globalarbitrationreview.com/news/article/34178/new-faces-troubled-balkan-border-panel/.

Leon Trakman, *The Impartiality and Independence of Arbitrators Reconsidered*, 10 INTERNATIONAL ARBITRATION LAW REVIEW 124 (2007).

W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 26 (1989).

United Nations Conference on Trade and Development, *IIA Issues Note: Recent Trends in IIAs and ISDS*, No. 1 (Feb. 2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

United Nations Conference on Trade and Development, *Report on Recent Developments in Investor-State Dispute Settlement* (*ISDS*), April 2014, http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf [UNCTAD, *ISDS Report*].

United Nations Conference on Trade and Development, *World Investment Report Overview 2015: Reforming International Investment Governance*, UNCTAD/WIR/2015(Overview) (June 25, 2015).

United Nations Conference on Trade and Development, *World Investment Report 2015*, UNCTAD/WIR/2015 (June 25, 2015) [UNCTAD, *WIR 2015*].

U.N. Secretary-General, *Conditions of service and compensation for officials other than Secretariat officials, Members of the International Court of Justice: Rep. of the Secretary-General*, U.N. Doc. A/C.5/50/18 (Nov. 2, 1995).

Albert Jan van den Berg, *Charles Brower's problem with 100 per cent – dissenting opinions by party-appointed arbitrators in investment arbitration*, 31 Arbitration International 381 (2015).

Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 821 (2010) [van den Berg, *Dissenting Opinions*].

Peter Van den Bossche & Werner Zdouc, The Law and Policy of the World Trade Organization (3rd ed. 2013).

Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 Osgoode Hall Law Journal 211 (2012) [Van Harten, *Arbitrator Behaviour*].

Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, *in* International Investment Law and Comparative Public Law 627 (Stephan W. Schill ed., 2010) [Van Harten, *Procedural Fairness*].

Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, *in* The Backlash Against Investment Arbitration 433 (Michael Waibel et al. eds., 2010) [Van Harten, *Perceived Bias*].

Gus Van Harten, Investment Treaty Arbitration and Public Law (2007) [Van Harten, Investment Treaty Arbitration].

Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 European Journal of International Law (2006).

Francisco Orrego Vicuña, *Softening Necessity*, *in* Looking to the Future. Essays on International Law in Honor of W. Michael Reisman 741 (Mahnoush H. Arsanjani et al. eds., 2010).

Erik Voeten, *International Judicial Independence*, *in* Interdisciplinary Perspectives on International Law and International Relations. The State of the Art 421 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

Erik Voeten, *The Politics of International Judicial Appointments*, 9 Chicago Journal of International Law 387 (2009).

Erik Voeten, The Impartiality of International Judges: Evidence from the European Court of Human Rights, 102 American Political Science Review 417 (2008).

Sir Arthur Watts, *New Practice Directions of the International Court of Justice*, 1 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 247 (2002).

Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, in ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, 2007 SPECIAL SUPPLEMENT, INDEPENDENCE OF ARBITRATORS 7 (2008).

Stephan Wilske & Michael Stock, *Rule 3.3.7 of the IBA Guidelines on Conflicts of Interest in International Arbitration – The Enlargement of the Usual Shortlist?*, 23 ASA BULLETIN 45 (2005).

Richard Woolley, Is arbitrator impartiality a myth?, Global Arbitration Review (June 9, 2015), http://globalarbitrationreview.com/news/article/33866/.

Jan Wouters & Nicolas Hachez, *The Institutionalization of Investment Arbitration and Sustainable Development*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 615 (Marie-Claire Cordonier Segger, Markus W. Gehring, & Andrew Newcombe eds., 2011).

Legal Sources

Claims Settlement 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.
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, 1869 U.N.T.S. 401.
ECT	The Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 381 (1995).
ECHR	European Convention on Human Rights, Nov. 4, 1950, ETS 5 (entered into force Sept. 3, 1953), as amended by Protocols Nos. 11 and 14, CETS 194 (entered into force June 1, 2010).
GATT 1947	General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
1899 The Hague Convention	1899 Convention for the Pacific Settlement of International Disputes, Jul. 29, 1899.
1907 The Hague Convention	1907 Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907.
the Hague Conventions	the 1899 The Hague Convention and the 1907 The Hague Convention.
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration, Council of the International Bar Association, May 22, 2004.
ICC Arbitration Rules	Rules of Arbitration of the International Chamber of Commerce (entered into force Jan. 1, 2012).
ICC Arbitration Rules (1998)	Rules of Arbitration of the International Chamber of Commerce (entered into force Jan. 1, 1998).
ICJ Rules	Rules of International Court of Justice (1978), Apr. 14, 1978, I.C.J. Acts & Docs. 91.
ICJ-Statute	Statute of the International Court of Justice, June 26, 1945, I.C.J. Acts & Docs. 59.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 (entered into force Oct. 14, 1966).

ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (entered into force Apr. 10, 2006).
LCIA Arbitration Rules	Arbitration Rules of the London Chamber of International Commerce, Oct. 1, 2014.
NAFTA	North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).
PCA Arbitration Rules 2012	Permanent Court of Arbitration Arbitration Rules 2012.
PCA Optional Rules	PCA Optional Rules for Arbitrating Disputes Between two Parties of which only one is a State, Jul. 6, 1993.
Practice Direction VII	Practice Direction VII, Feb. 7, 2002, I.C.J. Acts & Docs. 165.
Practice Direction VIII	Practice Direction VIII, Feb. 7, 2002, I.C.J. Acts & Docs. 165.
Rules of Conduct	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, Working Procedures, Annex 2, Dec. 11, 1996, WT/DSB/RC/1.
SCC Arbitration Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (entered into force Jan. 1, 2010).
UNCITRAL Arbitration Rules (1976)	Arbitration Rules of the United Nations Commission on International Trade Law, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).
UNCITRAL Arbitration Rules (2010)	UNCITRAL Arbitration Rules as revised in 2010, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Dec. 6, 2010).
UNCITRAL Arbitration Rules (2013)	United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules, G.A. Res. 68/109, U.N. Doc. A/RES/68/109 (Dec. 16, 2013).
UNCITRAL Arbitration Rules	any or all versions of the UNCITRAL Arbitration Rules (1976, 2010, or 2013).
WTO Agreement	Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.
Working Procedures	Working Procedures for Appellate Review, Aug. 16, 2010, WT/AB/WP/6.

ICSID Cases

Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5

Recommendation on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg, PCA Case No. IR 2011/1 (Dec. 19, 2011).

Rejection of Request for Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg (Dec. 21, 2011) (*Abaclat I*).

Decision on the Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014) (*Abaclat II*).

Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9.

AES Summit Generation v. Republic of Hungary, ICSID Case No. ARB/07/22.

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) (*Alpha Projektholding*).

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1

Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982) (*Amco Asia*).

Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11.

Azurix Corp. v. Argentine Republic (*Azurix*), ICSID Case No. ARB/01/12.

Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20

Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal (Nov. 12, 2013) (*Blue Bank*).

Brandes Investment Partners LP v. The Bolivarian Republic of Venezuela (*Brandes*), ICSID Case No. ARB/08/3.

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) (*Burlington*).

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 Bruno Boesch (Mar. 20, 2014) (*Caratube*).

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 (Nov. 6, 2009) (*Cemex*).

CIT Group Inc. v. Argentine Republic (*CIT*), ICSID Case No. ARB/04/9.

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8

Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic (Sept. 25, 2007) (*CMS*).

Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic (*Transgabonais*), ICSID Case No. ARB/04/5.

Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3

Decision on Challenge to the President of the Committee (Sept. 24, 2001) (*Vivendi*).

Decision on the Argentine Republic's Request for Annulment of the Award rendered on Aug. 20, 2007, Separate Opinion of Professor Jan Hendrik Dalhuisen (Aug. 10, 2010).

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 (*ConocoPhillips*)

Decision on the Proposal for the Disqualification of L. Yves Fortier, Q.C. (Feb. 27, 2012) (*ConocoPhillips I*).

Decision on the Proposal to Disqualify a Majority of the Tribunal (May 5, 2014) (*ConocoPhillips II*).

Decision on the Proposal to Disqualify a Majority of the Tribunal (July 1, 2015) (*ConocoPhillips III*).

Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (Dec. 15, 2015) (*ConocoPhillips IV*).

Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (Mar. 15, 2016) (*Conoco Phillips V*).

Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. (July 26, 2016) (*ConocoPhillips VI*).

Consortium R.F.C.C. v. Kingdom of Morocco (*RFCC*), ICSID Case No. ARB/00/6.

Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (*Duke Energy International*), ICSID Case No. ARB/03/28.

EDF International S.A., SAUR International S.A., Léon Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23

Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (June 25, 2008) (*EDF*).

Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19

Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal (Feb. 25, 2008) (*Electrabel*).

Eni Dación B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/4.

Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3

Decision on Annulment (July 30, 2010) (*Enron*).

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (*Occidental Petroleum*), ICSID Case No. ARB/06/11.

OPIC Karimum Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14

Decision on the Proposal to Disqualify Professor Philippe Sands (May 5, 2011) (*OPIC*).

Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8.

Participaciones Inversiones Portuarias SARL v. Gabonese Republic, ICSID Case No. ARB/08/17

Decision on Proposal for Disqualification of an Arbitrator (Nov. 12, 2009) (*PIP*).

Perenco Ecuador Limited v. The Republic of Ecuador & Empresa Estatal Pertoleos Del Ecuador, ICSID Case No. ARB/08/6

Decision of the Secretary-General of the Permanent Court of Arbitration on a Challenge an Arbitrator, PCA Case No. IR-2009/1 (Dec. 8, 2009) (*Perenco*).

Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic, ICSID Case No. ARB/12/38

Decision on the Proposal for the Disqualification of a Majority of the Tribunal (Dec. 13, 2013) (*Repsol*).

Robert Azinian and others v. United Mexican States, ICSID Case No. ARB(AF)/97/2.

Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5

Decision on the Proposal for the Disqualification of Francisco Orrego Vicuña (June 14, 2013) (*Rusoro*).

S & T Oil Equipment and Machinery Ltd. v. Romania, ICSID Case No. ARB/07/13.

Saba Fakes v. Turkey (*Saba Fakes*), ICSID Case No. ARB/07/20.

Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13

Decision on Claimant's Proposal to Disqualify an Arbitrator (Feb. 27, 2013) (*Saint-Gobain*).

Sempra Energy International v. Argentine Republic (*Sempra*), ICSID Case No. ARB/02/16.

SGS Société Générale 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) (*SGS*).

Siemens A.G. v. Argentine Republic (*Siemens*), ICSID Case No. ARB/02/8.

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

Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007) (*Suez I*).

Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008) (*Suez II*).

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 (Oct. 22, 2007) (*Suez I*).

Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008) (*Suez II*).

Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited (*Tanzania Electric*), ICSID Case No. ARB/98/8.

Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5

Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Dec. 23, 2010) (*Tidewater*).

Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/01

Decision on the Proposal to Disqualify Teresa Cheng (Aug. 26, 2015) (*Total*).

Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/9

Decision on the Proposal for the Disqualification of two Members of the Arbitral Tribunal (May 20, 2011) (*Universal Compression*).

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26

Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (Aug. 12, 2010) (*Urbaser*).

Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela (*Vannessa Ventures*), ICSID Case No. ARB(AF)/04/6.

Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/00/1

Decision on a Proposal to Disqualify an Arbitrator (Jan. 19, 2001) (*Zhinvali*).

UNCITRAL Cases

AWG Group v. Argentine Republic

Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007) (*Suez I*).

Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May 12, 2008) (*Suez II*).

BG Group plc v. The Republic of Argentina (*BG Group*)

United States District Court for the District of Columbia, Case No. 08–0485 (RBW), Petition to Vacate or Modify Arbitration Award (Mar. 21, 2008), *available at* http://ita.law.uvic.ca/documents/BGvArgentina.pdf.

Canfor Corporation v United States (*Canfor*)

Select documents available at http://www.state.gov/s/l/c7424.htm (last accessed on Dec. 30, 2016).

CC/Devas v. Republic of India (*CC/Devas*)

PCA Case No. 2013–09, 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), *avalable at* http://www.italaw.com/sites/default/files/case-documents/italaw3161.pdf.pdf.

EnCana Corporation v. Republic of Ecuador (*EnCana*)

LCIA Secretariat, LCIA Case No. UN3481, Partial Award on Jurisdiction (Feb. 27, 2004), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0283_0.pdf.

Eureko B.V. v. Republic of Poland (*Eureko*)

Court of First Instance of Brussels, R.G. 2006/1542/A, Judgement [sic] on the Request for Recusal of Judge Schwebel (Dec. 22, 2006), *English translation available at* http://www.italaw.com/documents/Eureko-arbitratorchallenge.pdf.

GAMI Investments, Inc. v. The Government of the United Mexican States

Select documents available at http://www.state.gov/s/l/c7119.htm (last accessed on Dec. 30, 2016).

Grand River Enterprises Six Nations Ltd et al v. United States of America (*Grand River*)

ICSID Secretary-General, Decision on the Challenge to Arbitrator James Anaya (Nov. 28, 2007), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0382_0.pdf.

ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (*ICS*)

PCA Case No. 2010–9, Decision on Challenge to Arbitrator (Dec. 17, 2009), *available at* http://italaw.com/sites/default/files/case-documents/ita0415.pdf.

National Grid plc v. The Republic of Argentina (*National Grid*)

Division of the LCIA Court, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L. Kessler (Dec. 3, 2007), *available at* http://www.iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf (*National Grid II*)

Telekom Malaysia Berhad v. Republic of Ghana (*Telekom Malaysia*)

District Court of The Hague, Petition No. HA/RK 2004.667, Decision on the Challenge of Prof. E. Gaillard (Oct. 18, 2004) (*Telekom Malaysia I*), *English translation available at* http://www.italaw.com/cases/1091.

District Court of The Hague, Petition No. HA/RK 2004.788, Decision on the Challenge of Prof. E. Gaillard (Nov. 5, 2004) (*Telekom Malaysia II*), *English translation available at* http://www.italaw.com/cases/1200.

Vito G. Gallo v. Government of Canada (*Vito Gallo*)

ICSID Deputy Secretary-General, Decision on the Challenge to Mr. J. Christopher Thomas, Q.C. (Oct. 14, 2009), *available at* http://italaw.com/documents/Gallo-Canada-Thomas_Challenge-Decision.pdf.

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