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Independence, Impartiality and Duty of Disclosure in Investment Arbitration

One of the fundamental expectations of any party to a dispute is that the individuals adjudicating the dispute will be independent and impartial. Whether they are judges or party-appointed arbitrators makes little difference in this regard – the expectations of claimant and respondent are the same. It is for this reason that an arbitral award, like the judgment of a national court, may be subject to challenge if the adjudicating body was linked economically to one of the parties to the dispute, or lacked impartiality with respect to a party or the subject matter of the dispute. However, the terms “independence” and “impartiality” remain difficult to define.

In many respects, commentators have come to view investment treaty arbitration differently from international commercial arbitration. Because investment arbitration tends to be more open to the public than commercial arbitration, and due to such proceedings’ potentially far-reaching political and economic implications for the respondent state, the issue of arbitrator independence and impartiality has received a great deal of attention. But the question remains: does investment arbitration impose a different standard of independence and impartiality than commercial arbitration?

The key to an arbitral tribunal being perceived as independent and impartial is each arbitrator’s duty to disclose. In an attempt to provide guidance to arbitrators and counsel with respect to the scope of this duty, the Working Group on Conflicts of Interest in International Arbitration of the International Bar Association published Guidelines on Conflicts of Interest in International Arbitration in 2004. Rooted in the practice of international commercial arbitration, they purport to apply equally to other types of arbitration, “such as investment arbitration (insofar as these may not be considered as commercial arbitrations).”¹ Given the particular environment in which investment

¹ IBA Guidelines, Introduction, at para. 5.

arbitration takes place, it is worth considering whether the IBA Guidelines are in fact sufficiently adapted to the conflicts that can arise in investment arbitration.

In Part 1 of this contribution, we set out some general concepts and discuss the arbitrator's duty to disclose pursuant to the IBA Guidelines, highlighting some potential difficulties in applying this rule to investment arbitration. However, the Guidelines provide an analytical foundation, rather than a full analysis in themselves.² As the great majority of investment disputes today are filed with the International Centre for Settlement of Investment Disputes (ICSID) or under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), and to a lesser extent under the Rules of the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC),³ we further provide a brief comparative overview of these rules with respect to the qualifications of arbitrators, their duty of disclosure, and the decision-making process mandated with respect to the challenge of arbitrators.

In Part 2, we discuss certain specific problem areas related to investment arbitration, including the omnipresence of the state, the possible burden of public interest, and the adjudication of similar legal questions in different cases. For each of these issues, we analyze the standards that have been adopted in applicable rules and applied by arbitral tribunals, in an effort to reconcile the tension between party autonomy and the expectation of arbitrator independence and impartiality.

Finally, in Part 3 we offer some tentative conclusions and prescriptions in relation to the differing needs of users of the commercial arbitration and investment arbitration processes.

1. General Concepts and Applicable Rules

1.1. General Concepts and the Duty to Disclose

Independence and impartiality are two distinct but interrelated qualifications, required of every arbitrator.⁴ As the tribunal explained in *Suez et al. v. Argentina*, "independence relates to the lack of relations with a party that might influence

² IBA Guidelines, Introduction, at para. 7.

³ UNCTAD – IIA Monitor No. 1 (2008), at 1.

⁴ Cf. A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* 201 (2004), noting that there are "parallel tools for assessing the potential for actual or apparent bias. They are rarely used on their own, individually, but are usually joined together as a term of art." See also M. Rubino-Sammartano, *International Arbitration Law and Practice* 330 (2001), stating that "the two notions are different even if on some occasions some overlapping may occur between them."

an arbitrator's decision. Impartiality, on the other hand, concerns the absence of bias or predisposition toward one of the parties."⁵ The European Court of Human Rights (ECHR) has described the two standards in more detail:

The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.⁶

These formulations suggest that independence is a purely objective test, referring to the reasonable impression created by an arbitrator's connections, rather than any actual (subjective) interest in the outcome of the dispute. By contrast, impartiality has both a subjective and an objective component: whether the arbitrator is actually predisposed (the subjective component), or could be seen as potentially predisposed as a result of relationships or personal, cultural or political characteristics (the objective component). Although impartiality is an abstract concept that is difficult to measure,⁷ it has been described as an "absolutely inalienable and predominant standard" in international arbitration.⁸ An arbitrator "who is impartial but not wholly independent may be qualified, while an independent arbitrator who is not

⁵ Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/03/19, and Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina, ICSID Case No. ARB/03/17, and AWG Group Limited v. Argentina, UNCITRAL Arbitration, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal of 12 May 2008, at para. 28. *See also* the decision of the *Cour d'Appel* of Paris of 28 October and 30 November 1999, reproduced by C. Seraglini, *L'instance Arbitrale*, in J. Béguin & M. Menjuq (Eds.), *Droit du Commerce International* 969, at 974 (2005), stating that circumstances which may be invoked to challenge the independence and impartiality of the arbitrator "doivent caractériser, par l'existence des liens matériels ou intellectuels avec l'une des parties en litige, une situation de nature à affecter le jugement de cet arbitre et constituer un risqué certain de prévention à l'égard de l'une des parties à l'arbitrage."

⁶ Findlay v. United Kingdom, ECHR (1997-I), at para. 73.

⁷ Redfern & Hunter, *supra* note 4, cf. Derains & Schwarz, *infra* note 17.

⁸ D. Bishop & L. Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 10 *Arb. Int'l* 395, at 399 (1998); *see in this respect also* G. Keutgen, *Propos sur le statut de l'arbitre*, in *Mélanges offerts à Pierre Van Ommeslaghe* 136 (2000), stating that "l'impartialité est [...] une garantie essentielle que le process arbitral se déroule de manière équitable dans le respect de droits de chacune des parties, et que la sentence soit rendue au vu des arguments avancés par celle-ci," reproduced in D. Matray & A. J. van den Berg, *L'Independence et L'Impartialité de l'Arbitre*, www.transnational-dispute-management.com, Vol 5 Issue 4 (2008).

impartial must be disqualified.”⁹ Naturally, the more dependent an arbitrator is vis-à-vis a party, the less impartial he will be seen (objectively) to be. The difficult issue for arbitral institutions and national courts is determining when objective impartiality is compromised.

The duty to disclose relevant circumstances is central to maintaining the requisite perception of independence and impartiality. Only where an arbitrator has disclosed all potential areas of conflict can the parties make an informed choice whether to object to the arbitrator candidate or to waive any such objections (accepting that the disclosed circumstances do not affect the candidate’s independence or impartiality). Therefore, the duty to disclose not only serves as a basis for an educated analysis of the prospective arbitrator’s qualifications, but also insulates the arbitrator from a subsequent challenge based on the disclosed circumstances.¹⁰

In an attempt to assist arbitral tribunals and institutions in dealing with the increasingly complex questions arising out of arbitrator challenges, the IBA has developed in the Guidelines seven general standards regarding independence, impartiality and disclosure, and has categorized the level of disclosure duties in various circumstances in three Application Lists.

The “Green List” sets forth circumstances which do not normally give rise to a reasonable perception of dependence or partiality, and therefore need not be disclosed. The “Orange List” includes circumstances that may give rise to a reasonable perception of dependence or partiality, and therefore should normally be disclosed to permit the parties to assess whether the arbitrator can serve.¹¹ Finally, the “Red List” is divided into “waivable” and “non-waivable” subsections. “Waivable Red” circumstances are sufficiently grave that they must normally be disclosed *and* expressly accepted by all parties before an arbitrator may accept an appointment. “Non-waivable Red” situations reflect a relationship between the arbitrator and a party that are so close as to prevent the acceptance of an appointment outright, based upon the overriding principle that one may not be a judge in his own cause.

⁹ *Id.*, Bishop & Reed, at 399.

¹⁰ *See, e.g.*, IBA Guidelines, General Standard 4(a) (“If, within 30 days after the receipt of any disclosure by the arbitrator [...] a party does not raise an express objection with regard to that arbitrator [...], the party [...] may not raise any objection to such facts or circumstances at a later stage”). Article 11(2) of the ICC Rules goes in the same direction. ICSID Rule 9(1) requires that a party “shall promptly” raise its objections.

¹¹ O. de Witt Wijnen *et al.*, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 Bus. L. Int’l. 433, at 442 (2004). *See also* IBA Rules of Ethics for International Arbitrators, Article 4.1 (“[f]ailure to make [a required] disclosure creates an appearance of bias”).

1.2. The Applicable Rules

Bilateral and multilateral investment treaties normally offer the investor-claimant a choice of procedural options for the submission of disputes to arbitration. Most refer to the ICSID Arbitration Rules, and many also incorporate commercial arbitration rules, particularly the UNCITRAL, SCC, and occasionally ICC Rules. Investment treaties themselves rarely make any mention of the qualifications of arbitrators, except for scattered requirements that the presiding arbitrator be a national of a third-party state. As explained below, there are some subtle differences and broad commonalities between arbitrator qualifications and disclosure obligations in the various arbitration rule systems.

1.2.1. Arbitrator Qualifications

Article 14(1) of the ICSID Convention provides that arbitrators must be “persons of high moral character [...] who may be relied upon to exercise independent judgment.” Neither the English nor the French versions of the ICSID Convention make any explicit mention of any duty of impartiality.¹² As explained further below, the mention only of independence would appear to distinguish the ICSID Rules from other systems. Oddly enough, the Spanish text of Article 14(1) states that an arbitrator must “inspirar plena confianza en su imparcialidad de juicio,” incorporating the equivalent of “impartiality” rather than “independent judgment.” On the basis of this apparent discrepancy, and considering that all three language versions are equally authoritative, the tribunal in *Suez v. Argentina* applied both concepts. It held that imposing dual obligations of impartiality and independence “accords with [the approach] found in many arbitration rules which require arbitrators to be both independent and impartial.”¹³

The UNCITRAL Rules and SCC Rules expressly require arbitrators to be both independent and impartial.¹⁴ By contrast, the ICC Rules expressly require only that arbitrators “be and remain independent of the parties involved in the arbitration.”¹⁵ Separate provisions require that the arbitral tribunal “act

¹² See also ICSID Convention, Article 14(1) (French version) (requiring that arbitrators be “d’une haute considération morale [...] et offrir toute garantie d’indépendance dans l’exercice de leurs fonctions”).

¹³ Suez et al. v. Argentina, *supra* note 5, at para. 27. See also, *Compañía de Aguas del Aconquija S. A. & Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee of 3 October 2001, at para. 14, equating independence and impartiality with the text of Article 14 requiring that an arbitrator must be a person who “may be relied upon to exercise independent judgment.” See further, C. Schreuer, *The ICSID Convention: A Commentary* 57 (2001).

¹⁴ UNCITRAL Arbitration Rules, Article 10(1); SCC Arbitration Rules, Article 14(1).

¹⁵ ICC Arbitration Rules, Article 7(1).

fairly and impartially,”¹⁶ and provide that an arbitrator may be challenged “whether for an alleged lack of independence *or otherwise*.”¹⁷ One former Deputy Secretary General and General Counsel of the ICC has opined that the ICC’s test of independence should be viewed as broad enough to include the concept of impartiality.¹⁸ Indeed, the terms independence and impartiality, although denoting two separate concepts, are often used interchangeably.¹⁹ Thus, the standards employed by the ICSID, UNCITRAL, ICC and SCC Rules, although phrased differently, appear to be roughly similar in scope.

The same discussion of terminology and notions can also be found in national court jurisprudence.²⁰ In *Creighton v. Qatar*, for example, the French Court of Cassation held that arbitrators must satisfy the dual requirement of independence and impartiality, clearly distinguishing the two terms. The court stated:

il appartient au juge de la régularité de la sentence arbitrale d’apprécier l’indépendance et l’impartialité de l’arbitre, en relevant toute circonstance de nature à affecter le jugement de celui-ci et à provoquer dans l’esprit des parties un doute raisonnable sur ces qualités, qui sont de l’essence même de la fonction arbitrale.²¹

1.2.2. Duty of Disclosure

As mentioned above, disclosure is the key to ensuring that justice will be done – and be seen to be done – on an independent and impartial basis. Until 2006, the ICSID Arbitration Rules only required arbitrators to disclose their “past and present professional, business and other relationships (if any) with

¹⁶ ICC Arbitration Rules, Article 15(2).

¹⁷ ICC Arbitration Rules, Article 11(1). *See also* Y. Derains & E. Schwartz, A Guide to the new ICC Rules of Arbitration 109 (1998), stating that “[w]hile the main purpose of Article 7(1) is to secure the appointment of impartial arbitrators, the drafters of the ICC Rules have preferred to express the relevant requirement in terms of independence because independence is a more objective notion. Independence is generally a function of prior or existing relationships that can be catalogued and verified, while impartiality is a state of mind, which may be impossible for anyone but the arbitrator to check or to know when the arbitrator is being appointed. It is therefore easier for the Court to determine, when confirming or appointing an arbitrator, whether that person is independent rather than to assess the extent of his or her impartiality.”

¹⁸ D. Hascher, *ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, 6 ICC Int’l Ct. of Arb. Bull 6, at 6 (1995). Note that Hascher also mentioned the term neutrality alongside with impartiality. Often, the term neutrality is used to encompass both independence and impartiality.

¹⁹ J. Lew *et al.*, *Comparative International Commercial Arbitration* 261 (2003) stated that “[i]n legal systems where either impartiality or independence is the relevant criterion the interpretation adopted incorporates most elements of both concepts.” *See also*, Redfern & Hunter, *supra* note 4, at 201; H.L. Yu & L. Shore, *Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives*, 52 ICLQ 935, at 935 (2003).

²⁰ For a compact overview of national laws and jurisprudence, *see* J.F. Poudret & S. Besson, *Comparative Law of International Arbitration* 346-355 (2007).

²¹ *Etat du Qatar v. Société Creighton Ltd*, Cour de Cassation, 1er Ch. Civile, 16 March 1999.

the parties.”²² Amendments introduced in 2006 to the ICSID Arbitration Rules and Additional Facility Rules expanded and clarified the scope of pre-appointment disclosure by arbitrators to include “any other circumstance that might cause [the arbitrator’s] reliability for independent judgment to be questioned by a party.” The new version of the ICSID Rules also specify that the disclosure obligation is continuing, requiring the prompt disclosure of any relevant disclosures that arise after appointment.²³ The ICSID Secretariat noted that “[e]xpanding the disclosure requirements for arbitrators has become particularly important with the large number of new cases being registered by the Centre and the increased scope for possible conflicts of interest.”²⁴ Like the ICSID Rules, the ICC, UNCITRAL and SCC Arbitration Rules impose a continuing obligation upon each arbitrator to disclose.²⁵

Under ICSID Arbitration Rule 6, an arbitrator must disclose facts or circumstances “if he or she reasonably believes that such fact would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person.”²⁶ The UNCITRAL Rules provide that an arbitrator shall disclose circumstances which may likely give rise to “justifiable doubts” as to his or her independence or impartiality.²⁷ The SCC Rules mirror the UNCITRAL Rules in this regard.²⁸ Presumably, the standards for disclosure are effectively identical under the ICSID, UNCITRAL and SCC Arbitration Rules, despite slightly differing phraseology.

In the application of the ICSID standard, the tribunal in *Vivendi* drew upon the 1987 IBA Rules of Ethics for International Arbitrators (IBA Rules of Ethics), which incorporate the UNCITRAL language calling for the disclosure of all facts and circumstances that may give rise to “justifiable doubts” as to the individual’s independence or impartiality.²⁹ Similarly, an explanatory note accompanying the 2005 ICSID Secretariat’s Discussion Paper noted that the purpose of the proposed changes to the ICSID Arbitration Rules was to “expand the scope of disclosures of arbitrators to include any circumstances likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment.”³⁰

²² ICSID Arbitration Rules (2003), Article 6.

²³ ICSID, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat of 12 May 2005, at 12.

²⁴ *Id.* The prior version of Rule 6 has generally been read implicitly to have imposed a continuing disclosure obligation.

²⁵ D. Caron *et al.*, *The UNCITRAL Arbitration Rules, A Commentary* 201 (2006), stating that “[a]lthough not express, Article 9, in our view, places on the arbitrators a continuing duty to disclose circumstances which arise or become known to them after their appointment.”

²⁶ *Suez et al. v. Argentina*, *supra* note 5, at para. 46.

²⁷ UNCITRAL Arbitration Rules, Article 9.

²⁸ SCC Arbitration Rules, Article 14(2).

²⁹ *Vivendi v. Argentina*, *supra* note 13, at paras. 17-18.

³⁰ ICSID, *supra* note 23, at 12.

Apparently distinct from the objective test found in the ICSID, UNCITRAL and SCC Arbitration Rules is the standard codified in the ICC Arbitration Rules, which link the disclosure duty to the perception of the *parties to the dispute*.³¹ Although it has been suggested that circumstances need only be disclosed if they would *reasonably* call into question the arbitrator's independence,³² some scholars opine that the ICC disclosure standard may be more stringent than that enunciated in the ICSID, UNCITRAL and SCC Rules.³³ A *subjective* standard also appears in the IBA Guidelines. As the IBA Working Group explained:

A purely objective test for disclosure exists in the majority of the jurisdictions analyzed and in the UNCITRAL Model Law. Nevertheless, the Working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view. Because of the strongly held views of many arbitration institutions (as reflected in their rules and as stated to the Working Group) that the disclosure test should reflect the perspectives of the parties, the Working Group in principle accepted, after much debate, a subjective approach for disclosure ...³⁴

The IBA Guidelines nevertheless recognize in the Green List a range of circumstances which need not be disclosed, regardless of the particular parties' views or desires.³⁵

A cornerstone of the arbitrator's duty of disclosure is the duty to investigate, which is expressly recognized in General Standard 7(c) of the IBA Guidelines, according to which "an arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest." They further provide that a failure to disclose is not excused by lack of knowledge "if the arbitrator makes no reasonable attempt to investigate." Thus, closely linked to this duty is the already mentioned Article 4.1 of the IBA Rules of Ethics. Accordingly, failure to make a "reasonable attempt to investigate" may in itself create an appearance of bias, as would a failure to disclose.

The ICSID Convention and Rules do not establish any specific obligation to investigate; nor do the ICC, UNCITRAL and SCC Arbitration Rules. However, it has been suggested that a general duty of disclosure requires reasonable inquiries as to whether potential conflicts of interest exist, and that an arbitrator may not rely on the state of his knowledge at the time of the nomination.³⁶

³¹ ICC Arbitration Rules, Article 7(2) (disclosure required when facts or circumstances may call into question the arbitrator's independence "in the eyes of the parties").

³² Derains & Schwartz, *supra* note 17, at 119.

³³ Yu & Shore, *supra* note 19, at 938.

³⁴ IBA Guidelines, explanatory note to 'General Standard' No. 3.

³⁵ *Id.*

³⁶ Lew *et al.*, *supra* note 19, at 268.

1.2.3. Challenging an Arbitrator and Deciding the Challenge

As explained above, the leading international arbitration rules are broadly similar. Despite slight textual differences, tribunals have not tended to give them markedly different effect. 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.³⁷

However, the various rules used in investment treaty arbitration, provide for different procedures to be followed to adjudicate a challenge to an arbitrator on grounds of partiality or lack of independence.

Institutional commercial arbitration rules, such as the ICC and SCC Rules provide that the institution will assess the merits of any challenge. Invariably, both the ICC and SCC refrain from giving any reasons for their decisions in this regard.³⁸ This is despite the fact that interlocking corporate relationships and larger international law firms have increased the potential for conflicts of interest,³⁹ and parties have relatively little guidance as to how the principles of independence and impartiality will be applied in practice. In part in an effort to improve predictability, the London Court of International Arbitration (LCIA) recently decided to publish certain challenge decisions.⁴⁰

In arbitration proceedings governed by the UNCITRAL Rules, the appointing authority frequently rules on the challenge, frequently (but not uniformly) without giving reasons. The appointing authority will normally follow its own standard procedure with respect to challenges, such that the ICC will not provide its reasoning in respect of a challenge when acting as appointing authority, while the LCIA will issue a reasoned decision.

Whether or not such decisions may be reversed by national courts depends upon the applicable national arbitration law at the place of arbitration. In France, for example, courts regularly reject petitions to review decisions of the

³⁷ Challenge Decision of 11 January 1995, 22 Y.B. Comm. Arb. 227 (1997), at paras. 24, 30-31 (deciding challenge under UNCITRAL Rules); *National Grid PLC v. Argentina*, LCIA Case No. UN7949, Decision on the Challenge of Judd Kessler, at para. 80 (deciding challenge under UNCITRAL Rules); *EDF International S.A., SAUR International S.A. and León Participaciones S.A. v. Argentina*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler of 25 June 2008, at para. 74 (deciding challenge under ICSID Rules).

³⁸ However, the SCC has periodically, in the Stockholm Arbitration Report and its successor, the Stockholm International Arbitration Review, published a significant proportion of the arbitrator challenge decisions it has rendered, with a brief description of the circumstances of each challenge and the outcome of the petition.

³⁹ IBA Guidelines, at para. 1.

⁴⁰ For more details, see G. Nicholas & C. Partasides, *LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish*, 23 Arb. Int'l. 1 (2007). Note that unlike the SCC and ICC, the LCIA regularly gives reasoned decisions, although LCIA Rule 29(1) does not require that such decisions be explained.

ICC Court of Arbitration.⁴¹ The same applies to Switzerland⁴² and Belgium,⁴³ where the courts will not directly review decisions of the appointing authority. By contrast, at least one Dutch court has agreed to review a decision of the Permanent Court of Arbitration in The Hague, which dismissed a petition to disqualify an arbitrator.⁴⁴

The ICSID Rules establish a rather unique procedure for the adjudication of challenges to arbitrators.⁴⁵ Such a petition normally falls to the two arbitrators who have not been challenged. Despite the absence of any guidance in this regard in the ICSID Rules or Convention, decisions adjudicating arbitrator challenges have been extensively reasoned.⁴⁶ The inclination to issue a full-fledged decision may arise out of the practical inability of the two adjudicating arbitrators to mask their personal responsibility for the result. By contrast, the individuals within an arbitral institution who decide arbitrator challenges (for example, members of the ICC Court or members of the SCC Arbitration Institute) remain to a large extent anonymous.

If more than one arbitrator has been challenged, or if the tribunal is composed of a sole arbitrator, the Chairman of the ICSID Administrative Council – who is also the President of the World Bank – has the authority to decide whether to accept the challenge.⁴⁷ In practice, this system can lead to the unusual outcome that the decision-maker will be unacquainted with the applicable legal concepts and arbitration practices in the area of conflicts of interest. This situation occurred in at least two cases.

In *Generation Ukraine v. Ukraine*,⁴⁸ arbitrator Jürgen Voss, the Deputy General Counsel of the World Bank's Multilateral Investment Guarantee Agency, was challenged. The two other arbitrators, Jan Paulsson and Eugen Salpius, disagreed as to whether Mr. Voss should be disqualified. Considering himself compromised by the close relationship between MIGA and the

⁴¹ P. Fouchard *et al.* (Eds.), Fouchard Gaillard Goldman on International Commercial Arbitration 461–462, 502 (1999).

⁴² W. Peter & T. Legler, *Art. 179*, in H. Honsell *et al.* (Eds.), *Basler Kommentar Internationales Privatrecht* 1565 (2007); Poudret & Besson, *supra* note 20, at 336.

⁴³ Poudret & Besson, *supra* note 20, at 336.

⁴⁴ *The Republic of Ghana v. Telekom Malaysia Berhad*, Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision of the District Court of The Hague of 18 October 2004; Challenge No. 17/2004, Petition No. HA/RK 2004.788, Decision of the District Court of The Hague of 5 November 2004, *see infra*.

⁴⁵ ICSID Arbitration Rule 9.

⁴⁶ ICSID Arbitration Rule 9(4) only requires the other members of the tribunal to promptly consider and vote on the proposal.

⁴⁷ ICSID Arbitration Rule 9. The Administrative Council is the governing body of ICSID. It is comprised of one representative of each of the ICSID Contracting States. The Administrative Council convenes annually in conjunction with the joint World Bank/International Monetary Fund annual meetings. All representatives have equal voting powers. The President of the World Bank is *ex officio* Chairman of the ICSID Administrative Council but has no vote.

⁴⁸ *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003.

World Bank,⁴⁹ the Chairman of the ICSID Administrative Council declined to decide the challenge directly, instead seeking a recommendation from the Secretary General of the Permanent Court of Arbitration (PCA). Such a procedure was not envisaged in the ICSID Rules or Convention. Based on the recommendation he received, the President of the World Bank rejected the challenge to Mr. Voss.⁵⁰

In *Siemens v. Argentina*,⁵¹ the challenge was to the presiding arbitrator, Professor Andrés Rigo Sureda. Once again, the two remaining arbitrators, Judge Charles N. Brower and Professor Domingo Bello Janeiro, were divided. Because Professor Rigo Sureda had been an officer of the World Bank, the Chairman of the ICSID Administrative Council sought the recommendation of the Secretary General of the PCA, and subsequently dismissed Argentina's petition without reasoning.⁵²

The ICSID's unique system for adjudicating arbitrator challenges raises interesting questions. Are a challenged arbitrator's colleagues on the tribunal likely to remove him in light of the personal and professional connections between them? It would seem that an arbitral institution (like the ICC or the SCC Board) would have more interest than co-arbitrators in carefully scrutinizing alleged conflicts of interest, given the systemic and reputational risks that such conflicts implicate. Further, is the Chairman of the ICSID Administrative Council (normally the President of the World Bank) in the best position to undertake such an adjudication, in the circumstances envisaged by the ICSID Rules? The increasing legal complexity of such challenges as well as the additional layer of potential conflicts raised in the *Generation Ukraine* and *Siemens* cases suggest that he is not.

1.2.4. The Status of the IBA Guidelines

Arbitral tribunals (including, to a certain extent, investment treaty tribunals⁵³) and national courts have often considered the IBA Guidelines to be a useful tool in deciding subtle questions of proper arbitrator disclosure and arbitrator qualifications and duties. The Swiss Federal Supreme Court recently held:

In order to verify the independence of the arbitrators, the Parties may also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration approved on May 22, 2004. Such guidelines admittedly have no statutory value; yet they are a precious instrument, capable of contributing to harmonization and unification of the standards applied in the field of international arbitration

⁴⁹ The Multilateral Investment Guarantee Agency is a branch of the World Bank.

⁵⁰ *Generation Ukraine v. Ukraine*, *supra* note 48, at para. 4.18.

⁵¹ *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award of 6 February 2007.

⁵² *Id.*, at paras. 36, 38.

⁵³ *E.g.*, the tribunal in *EDF v. Argentina*, *supra* note 37, at para. 69.

to dispose of conflict of interests and such an instrument should not fail to influence the practice of arbitral institutions and tribunals.⁵⁴

Nevertheless, the IBA Guidelines may in certain respects be inherently ill-suited to the investment arbitration context.

Section 4.1.1 of the Green List, for example, provides that the arbitrator need not disclose a previously published legal opinion concerning an issue which arises in the arbitration. Indeed, such legal opinions may be of limited relevance in commercial arbitration, which normally concerns the application of domestic legal norms as specified in the parties' contract. By contrast, arbitrators in investment arbitration frequently deal with repeating issues of international law, and are often asked to determine rules as a matter of first impression. On this basis, predisposition with respect to a particular question of law, even if expressed in general terms, could give rise to justifiable doubts as to the author's receptiveness to certain arguments, *i.e.*, as to whether he will exercise "independent judgment." Under one view, arbitral awards in investment disputes contribute to an evolving body of international law, which may become *jurisprudence constante*, despite the traditional approach that each arbitration is a self-contained event *sui generis*.⁵⁵ While tribunals are not formally bound by the decisions of other tribunals,⁵⁶ it is equally true that arbitrators tend to seek consistency, and often adopt decisions consonant with "important precedents by Tribunals."⁵⁷

⁵⁴ DTF 4A.506/2007, cons. 3.2.2.2, Judgement of the Swiss Federal Supreme Court of March 20, 2008, citations omitted; translation by www.praetor.ch.

⁵⁵ Cf. H. Mann, *The Emperor's Clothes Come Off: A Comment on Republic of Ghana v. Telekom Malaysia Berhad, and the Problem of Arbitrator Conflict of Interest*, www.transnational-dispute-management.com.

⁵⁶ Art. 53(1) of the ICSID Convention is generally regarded as excluding the doctrine of binding precedence; *but see* the cases noted in note 57, *infra*. Article 59 of the Statute of the International Court of Justice (ICJ) provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Similarly, the Appellate Body of the World Trade Organization (WTO) held that "reports of the panels are not binding, except with respect to resolving the particular dispute between the parties to that dispute" (*Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body of 4 October 1996, at 14), but that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute" (*id.*). This holding has recently been explicitly confirmed by the Appellate Body (*United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, Report of the Appellate Body of 30 April 2008, at para. 158).

⁵⁷ See *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006, at para. 82. See also *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/705/07, Decision on Jurisdiction of 21 March 2007, at para. 67 ("The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to

While the Orange List is non-exhaustive,⁵⁸ it may not capture some of the specific conflicts issues raised in investment arbitration. Focusing primarily on the parties to the dispute, the Orange List disregards a key stakeholder in the investment arbitration process: the host state's populace. Otherwise stated, who is the "reasonable observer" against whose views the arbitrator's apparent independence is to be measured?⁵⁹ Unlike international commercial arbitration, investment arbitration frequently takes place in a highly politicized environment.⁶⁰

The Red List presents its own distinctive problems with respect to the appointment of arbitrators from respondent countries. Given the interconnected nature of government structures, the Red List may prohibit the appointment of a large proportion of the qualified arbitrators within the host state's jurisdiction. For example, legal academics in many countries are effectively civil servants, as they are employed by institutions of higher learning owned and controlled entirely by the state.

1.2.5. Rules of the World Trade Organization (WTO)

Apart from the roughly 2,500 bilateral treaties in force dealing with foreign direct investment, rules influencing cross-border investment can also be found under the WTO framework.⁶¹ While BITs refer disputes primarily to institutional or ad hoc arbitration, the WTO has established its own distinct dispute resolution mechanism. Like arbitral tribunals, WTO panels rule on

adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law"). The tribunal in *Noble Energy Inc. et al. v. Ecuador et al.*, ICSID Case No. ARB/05/12 used exactly the same phrasing at para. 50. Both tribunals were chaired by Gabrielle Kaufmann-Kohler. See also McLachlan *et al.*, *International Investment Arbitration 72* (2007).

⁵⁸ IBA Guidelines, Part II at para. 3.

⁵⁹ See *EDF v. Argentina*, *supra* note 37, at para. 74.

⁶⁰ See in that respect also the discussion of the *Metalclad* award by C. Tollefson, *Metalclad v. United Mexican States revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process*, 11 *Minn. J. Global Trade* 183, at 204 (2002), stating that Chapter Eleven claims have a strong public character, and that the issues to be decided have broad implications for public policy affecting the ability of governments to promote sustainable development and to take measures that protect public health and the environment. See also N. Blackaby, *Public Interest and Investment Treaty Arbitration*, www.transnational-dispute-management.com.

⁶¹ In particular in the General Agreement on Trade in Services (GATS), the Agreement on Trade Related Investment Measures (TRIMs), the Agreement in Trade Related Intellectual Property Rights (TRIPs), the Agreement on Government Procurement (GPA) and the Agreement on Subsidies and Countervailing Measures (SCM).

the respondent state's observance of international treaty obligations. A brief review of the applicable rules and standards provided in the WTO framework may therefore provide useful guidance.

The Dispute Settlement Understanding (DSU),⁶² which includes the general rules on the WTO dispute resolution process, provides that panel members should be selected with a view to ensuring the independence of the members,⁶³ and that nationals of WTO Member States who are parties to the dispute as well as nationals of third parties having a substantial interest in the dispute shall not serve on the panel, unless the parties to the dispute agree otherwise.⁶⁴

The DSU Rules of Conduct employ a standard for disclosure similar to that found in the UNCITRAL Rules. Prospective panel members, as well as members of the Appellate Body, must be impartial and independent,⁶⁵ and shall:

[...] disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality; [...].⁶⁶

Disclosure need not extend to the identification of matters only marginally relevant to the issues considered in the proceedings.⁶⁷ This is arguably an objective standard similar to those set forth in the ICSID and UNCITRAL Rules. Indeed, with respect to the applicable standard under the ICSID framework, the deciding co-arbitrators in *Suez et al. v. Argentina* held that information must be disclosed only if the arbitrator "reasonably believes" that the information "would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person."⁶⁸

The DSU Rules of Conduct contain a non-exhaustive list of information which should be disclosed by potential panel members. Not surprisingly, these examples of information subject to disclosure closely mirror the Orange and Red Lists of the IBA Guidelines:

- (a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
- (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings,

⁶² Annex 2 of the Agreement Establishing the World Trade Organization.

⁶³ DSU Article 8(2).

⁶⁴ DSU Article 8(3), DSU Article 10(2). The equivalent in the IBA Guidelines is the 'Waivable Red-List'.

⁶⁵ Rules of Conduct, WT/DSB/RC/1, 11 December 1996, Article II.

⁶⁶ *Id.*, Article III; the same duty of disclosure is stated again in Article VI.

⁶⁷ *Id.*, Article VI.

⁶⁸ *Suez et al. v. Argentina*, *supra* note 5, at para. 46. Note in this regard the same approach of the tribunal in the EDF decision, *supra* note 37, at paras. 97 *et seq.*

- and their implications, where these involve issues similar to those addressed in the dispute in question);
- (c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
- (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);
- (e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).⁶⁹

In addition, the individuals covered by the Rules of Conduct are subject to an ongoing duty of disclosure.⁷⁰ Like most arbitration rules, DSU challenges must be made at the earliest possible time.⁷¹ A failure to disclose, however, is not sufficient grounds to disqualify a panel member, unless the evidence shows that a material violation of the obligations of independence and impartiality has also occurred.⁷² This is arguably a less stringent standard than that set forth in Article 4.1 of the IBA Rules of Ethics.

To date very few challenges have been lodged against DSU panel or Appellate Body members, perhaps because the appointment of the panel members is less party-driven than in international arbitration. Panel members are proposed to the parties by the WTO Secretariat,⁷³ based on “an indicative list of governmental and non-governmental individuals,”⁷⁴ and parties may not oppose to the appointment save for “compelling reasons.”⁷⁵ Where parties have opposed particular nominations, candidates normally withdrew on a voluntary basis.⁷⁶

⁶⁹ *Id.*, Annex 2, Illustrative List of Information to be Disclosed.

⁷⁰ *Id.*, Annex 3, Disclosure Form.

⁷¹ *Id.*, Article VIII(1); Article 11(2) ICC Arbitration Rules, which provide that a challenge must be made within 30 days to be admissible, Rule 9(1) of the ICSID Arbitration Rules states that a challenge must be made ‘promptly’, and the UNCITRAL Arbitration rules provide for a time limit of 15 days. *Also*, the IBA Guidelines ‘General Standard 4(a)’ states: “If, within 30 days after the receipt of any disclosure by the arbitrator [...] a party does not raise an express objection with regard to that arbitrator [...], the party [...] may not raise any objection to such facts or circumstances at a later stage.”

⁷² Rules of Conduct, *supra* note 65, Article VIII(2).

⁷³ DSU, Article 8(6).

⁷⁴ DSU, Article 8(4).

⁷⁵ DSU, Article 8(6).

⁷⁶ J. Waincymer, WTO Litigation 268 (2002).

2. Three Problem Areas Characteristic to Investment Arbitration

2.1. Three Problem Areas

In Part 2 we discuss three problem areas in relation to arbitrator conflicts in arbitration proceedings involving state parties.

First, a number of jurisdictions are characterized by intense and pervasive state involvement, often as a result of Communist or post-colonial heritage. In such instances, as mentioned above, the pool of qualified arbitrators of the respondent state's nationality who are not "conflicted out" may be very limited. To maintain the equality of the parties, should the standards of independence and impartiality be modified?

Second, investment arbitration frequently implicates particular public interest issues. On the one hand, governments seek to attract and retain foreign direct investment by concluding investment protection agreements, while on the other hand, they are preoccupied with preserving the ability to regulate for the greater good of their people. Where treaty obligations clash with the right of the sovereign to regulate, the importance of an *appearance* of independence and impartiality increases. If these qualities are seen by the respondent state's public to be compromised, it may become politically impossible for the State to observe awards and to maintain investment treaties in force. This raises the question whether investment arbitration requires a different standard of independence and impartiality than is applied to commercial disputes.

Third, investment arbitration raises questions of 'issue conflict' that are almost unheard-of in commercial disputes.⁷⁷ While issue conflicts come in many forms, only two specific aspects will be discussed here.⁷⁸ First, lawyers often serve as counsel and arbitrator concurrently in different (but unrelated) cases. This normally innocuous situation has raised complaints where the individual serves as counsel and arbitrator in disputes involving similar issues of law.⁷⁹ A second aspect concerns the impartiality of an arbitrator who has already decided an issue of law as arbitrator in a prior case.

⁷⁷ B. Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 Arb. Int'l 241, 242 (2005).

⁷⁸ Not discussed here is the *Canfor* case, in which it was decided that pre-arbitration statements by an arbitrator in relation to the challenged measures may result in disqualification. *Canfor Corporation v. The United States of America*, UNCITRAL Arbitration (pursuant to NAFTA). This case has been thoroughly discussed by Barton Legum, *supra* note 77. Also outside the scope of this contribution is *Grand River Enterprises Six Nations, Ltd., v. United States*, UNCITRAL (NAFTA), Decisions on the Challenge to the Arbitrator of 28 November 2007 and 23 October 2007.

⁷⁹ T. Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, www.transnational-dispute-management.com (suggesting that lawyers

2.2. Problem Area No.1: The Omnipresence of the State

As stated above, the strictures of the IBA Guidelines' Red List present distinctive problems with respect to the appointment of arbitrators in investment arbitration.

As discussed above the Red List includes two sub-lists of situations, "waivable" and "non-waivable." Waivable conflicts are "serious but not as severe,"⁸⁰ and therefore will not necessarily prevent the appointment of an arbitrator, so long as there is full disclosure and all of the parties expressly consent to the appointment.⁸¹ Non-waivable circumstances must always lead to disqualification, based upon the overriding principle that no person may be the judge of his own cause.⁸²

It has been said that a party has the right to nominate an arbitrator whose views are compatible with its national and economic circumstances.⁸³ This is particularly salient in investment arbitration, where actions or omissions of states are at issue. Investment treaty panels have been criticized for being "manned by commercial arbitrators whose concern for the values of the international community is weaker than their concern for contractual sanctity [...] and their loyalty to the values of multinational business."⁸⁴ A respondent state's primary goal when nominating an arbitrator is to select an individual who will understand its positions and concerns, and ensure that they are represented in the tribunal's deliberations. The arbitrators most compatible with the respondent state's "national and economic circumstances" may well be individuals of the State's nationality, including legal academics expert in the its legal traditions.

In many jurisdictions, governmental authorities exercise a dominant influence on economic and social life, particularly in education. In such countries, leading institutions of higher learning are more often than not part of the government structure, owned and controlled by ministries or other government agencies.⁸⁵ Arbitrators selected based upon academic reputation may on this basis be disqualified as lacking independence. After all, their salaries may well be paid by subdivisions of the government party itself.

should choose whether they will serve as advocate or arbitrator, to ensure that as arbitrator they "will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case [they are] handling as counsel").

⁸⁰ IBA Guidelines, Part II, at para. 2.

⁸¹ IBA Guidelines, Part II, at para. 2.

⁸² IBA Guidelines, Part II, at para. 2.

⁸³ Bishop & Reed, *supra* note 8, at 404.

⁸⁴ M. Sornarajah, *The Clash of Globalisations and the International Law on Foreign Investment*, The Simon Reisman Lecture on International Trade Policy, 12 September 2002, Ottawa, at 17.

⁸⁵ Russia's most prominent faculty for the study of international law, for example, part of the Moscow State Institute of International Relations, is a subdivision of the Ministry of Foreign Affairs of the Russian Federation.

This situation clearly limits the pool of qualified arbitrators available to the respondent State, and potentially contradicts the principle of equality of the parties in international arbitration, since the claimant is unlikely to be subject to similar strictures.

This consideration raises the question whether arbitrators nominated by States should in some circumstances be less subject to challenge on the basis of financial relationships. While the leading arbitration rules do not deal expressly with the issue, their provisions suggest varying approaches. ICSID excises the problem entirely, providing that the arbitrators normally may not be nationals of either party.⁸⁶ Other arbitration rules allow the appointment of arbitrators of any nationality. The practice of the ICC has been to show tolerance where a state party appoints an arbitrator with close ties to the state.⁸⁷

Berschader v. Russian Federation presents an interesting case study in relation to this first problem area.⁸⁸ The dispute arose from the construction of the new Supreme Court building in Moscow by a Belgian company. Shortly before completion of the work, the Russian administration annulled the contract and expelled the company from the project site. Thereafter, the company's Belgian shareholders commenced SCC arbitration pursuant to the Belgium-Russian Federation BIT. The claimants named Professor Todd Weiler of Canada as arbitrator. The Russian Federation nominated Russian national Sergei Lebedev, a prominent professor of international law at the Moscow State Institute of International Relations.⁸⁹ In addition to his teaching duties, Professor Lebedev had served as adviser to the Russian government, had been the Soviet and then Russian delegate to UNCITRAL for decades, and held the civil service title of Counsellor First Class.⁹⁰ Particularly in light of the fact that Professor Lebedev's home institution was an integral part of Russia's Foreign Ministry, these circumstances arguably fell within the scope of the IBA Red List. The Red List potentially bars appointment where the

⁸⁶ ICSID Arbitration Rule 3(1)(a)(i). If the parties appoint each individual arbitrator by agreement, the parties may deviate from the strict nationality requirements. *See* Schreuer, *supra* note 13, at 506-507 (2001). Also the WTO opted for a strict approach, *see* DSU Article 8(3), DSU Article 10(2).

⁸⁷ W. Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 ICLQ 26, at 43 (1989); Craig *et al.*, *International Chamber of Commerce Arbitration* 211-212 (2000); Derains & Schwartz, *supra* note 17, at 129-130.

⁸⁸ *Berschader v. Russian Federation*, SCC Case No. 080/2004. Freshfields Bruckhaus Deringer was counsel for claimants in this arbitration.

⁸⁹ Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation.

⁹⁰ Professor Lebedev held the rank of a Counsellor First Class, a title which could only be conferred upon functionaries of the Russian Government. Federal Law No. 119-FZ of 5 July 1995, *On the Foundation of Government Service of the Russian Federation*, Article 7(3). Professor Lebedev has also been a member of the Russian President's Council for Judicial Reforms since 1996.

candidate regularly advises the appointing party,⁹¹ or where the candidate derives a significant portion of his income from the appointing party.⁹² The claimants challenged Professor Lebedev's appointment on these and other grounds, alleging reasonable doubts as to him being independent. The SCC Board rejected this challenge (without reasoning, in accordance with SCC practice), although it had disqualified arbitrators in commercial cases appeared to present less serious conflicts of interest.⁹³

The SCC's decision in *Berschader* may seem at first contrary to its stated goal of promoting a "homogenous international standard" in the area of disclosure and conflicts, using the IBA Guidelines "as a tool when judging conflicts of interest in international arbitration."⁹⁴ It seems rather clear that Professor Lebedev would have been disqualified, had he exhibited equally close relations with a commercial party. This apparent discrepancy may suggest some recognition by the SCC Board of the need to permit state parties access to an adequate pool of arbitrators with both amenable nationality and legal expertise.

At the same time, the SCC's decision is difficult to reconcile with the Guidelines, giving rise to significant transparency concerns. To the extent that arbitral institutions prefer to accord increased deference to the arbitrator choices of states as opposed to commercial parties, separate guidelines of some sort should be drawn up. Otherwise, neither states parties nor their private opponents in arbitration can know what to expect in terms of the freedom to select arbitrators despite a certain lack of independence.

2.3. Problem Area No.2: The Burden of Public Interest

If the first problem area suggests a possible need to relax the requirements of independence in investor-state disputes, the presence of public interest concerns in such disputes may militate towards a *stricter* view of arbitrator independence and impartiality. Unlike commercial arbitration, which normally

⁹¹ *Id.*, Section 2.3.1, or 2.3.7.

⁹² IBA Guidelines, 'Red List' Section 1.4.

⁹³ See M. Johansson, *Decisions by the Arbitration Institute of the Stockholm Chamber of Commerce Regarding Challenge of Arbitrators*, 1999:2 Stockholm Arb. Rep. 175. Cases described include X (Hong Kong) v. Y (Russia), SCC Case Ref. No. 13 (disqualifying an arbitrator whose his law firm had previously advised the respondent's controlling shareholder on unrelated matters); X (USA) v. Y (Russia), SCC Case Ref. No. 14 (arbitrator disqualified because five years prior to his appointment he belonged to a law firm representing the respondent); SCC Case No. 60/2001 (arbitrator disqualified where his law firm partner represented the claimant's parent company in an unrelated court dispute). After *Berschader*, the SCC sustained other similar challenges, e.g. Case No. 053/2005 (arbitral chair disqualified where his law firm had provided services to the Claimant).

⁹⁴ H. Jung, *SCC Practice: Challenges to Arbitrators, SCC Board Decisions 2005–2007*, 2008:1 Stockholm Int'l Arb. Rev. 2.

remains confidential, many treaty cases are conducted in full public view, with the population of the host state as a key stakeholder in the proceedings. It is undeniable that the taxpayers' money is directly at stake when an award is rendered against the state. But just as importantly, treaty claims are often predicated on a challenge to regulatory and legislative measures that have been implemented by legislatures or other elected officials – ostensibly at least – at the public's behest. In this regard, one might expect that the state's constituents have a legitimate interest in an impeccably independent and impartial tribunal, and that the public at large may view conflicts issues differently than the international arbitration community.

An illustration of this problem can be found in two recent challenges to Professor Gabrielle Kaufmann-Kohler raised by the respondent in two separate investment treaty proceedings against Argentina. The respondent called into question Professor Kaufmann-Kohler's qualifications when it learned that she served on the board of directors of the Swiss bank UBS.

The conflicts problem in *Suez et al. v. Argentina* arose from UBS's portfolio investments in shares of claimant companies (2.38% of Vivendi and 2.1% of Suez). Argentina pointed out that Professor Kaufmann-Kohler received part of her compensation for her work on the board in UBS stock, and argued on this basis that she effectively held shares in the claimants. As a shareholder, Professor Kaufmann-Kohler arguably stood to benefit financially from an award against Argentina.

The tribunal was operating under both the UNCITRAL and the ICSID rules, due to differing terms of the applicable treaties.⁹⁵ The two co-arbitrators who adjudicated the challenge appear to have considered the ICSID standard for conflicts of interest to be more permissive than that applicable under the UNCITRAL Rules. The arbitrators concluded that the UNCITRAL Rules mandate disqualification where a "reasonable and informed person" would have justifiable doubts as to the challenged arbitrator's independence and impartiality. By contrast, the arbitrators considered that, under the ICSID framework, the challenging party must establish facts that "make it obvious and highly probable, not just possible," that the arbitrator's independent and impartial judgment would be unreliable. This seems contrary to the 2001 decision in *Vivendi*, which emphasized the similarity between the UNCITRAL and ICSID standards:

⁹⁵ The cases of *Suez, Sociedad General de Aguas de Barcelona S. A.*, and *Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, and *Suez, Sociedad General de Aguas de Barcelona S.A.*, and *InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17 were subject to ICSID Arbitration, while the case of *AWG Group Limited* had to proceed under the UNCITRAL Arbitration Rules; see on this issue the Decision on Jurisdiction of 3 August 2006 in *Suez, Sociedad General de Aguas de Barcelona S.A.*, and *Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, and *AWG Group Limited v. Argentina*, UNCITRAL Arbitration, at paras. 1-9, in particular para. 2.

If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld.⁹⁶

The *Suez et al.* arbitrators then elaborated a four-part test to determine whether the connections between Professor Kaufmann-Kohler and the claimants should result in her removal from the tribunal. These four elements were identified as proximity, intensity, dependence, and materiality.⁹⁷ On the facts, the two arbitrators found these elements only weakly established in the case at hand, and rejected Argentina's challenge to Professor Kaufmann-Kohler.

The two deciding arbitrators in *EDF v. Argentina* faced slightly different facts and adopted a different legal approach. While UBS did not actually own stock in any of the claimants, it did recommend that its clients invest in the parent company of one of them. UBS also held debt securities issued by the same parent company. Again, on this basis, Argentina argued that Professor Kaufmann-Kohler's compensation would be affected by the success or failure of EDF in the arbitration.

The deciding arbitrators articulated a rather simple approach to assessing these facts, invoking a decision of the English Court of Appeal in *ATT v. Saudi Cable Co.* According to this test, an insignificant interest in the outcome of the case cannot serve as the basis for disqualification. The arbitrators qualified the interest of UBS in EDF as *de minimis*, and on this basis concluded that the possibility of influence upon Professor Kaufmann-Kohler's independent judgment was equally negligible. They stated:

73. While the prospect of such subconscious influence can never be completely excluded, the possibility remains remote, tenuous and speculative. [...].

74. A reasonable observer cannot find that Professor Kaufmann-Kohler's independence would, by virtue of her position at UBS, fluctuate in function of her contemplation of a victory for one side or the other. No reasonable observer would find such a scenario credible.⁹⁸

The deciding arbitrators in both the *Suez et al.* and *EDF* cases reasoned that in an increasingly interdependent and complex world, connections between prominent practitioners and companies are ubiquitous.⁹⁹ This position has some merit: after all, the pool of available qualified arbitrators (particularly in the investment treaty field) is limited, and "arbitrators cannot sever all their ties with the business world."¹⁰⁰ On the other hand, the question might be

⁹⁶ *Vivendi v. Argentina*, *supra* note 13, at para. 25.

⁹⁷ *Suez et al. v. Argentina*, *supra* note 5, at para. 35.

⁹⁸ *EDF v. Argentina*, *supra* note 37, at para. 74.

⁹⁹ *Suez et al. v. Argentina*, *supra* note 5, at paras. 32-33; *see also* *EDF v. Argentina*, *supra* note 37, at para. 121. *See generally* J. J. Marshall *et al.*, *Six Degrees of Separation: Arbitrator Independence in International Arbitration*, www.transnational-dispute-management.com.

¹⁰⁰ *Commonwealth Corp. v. Casualty Co.*, 393 U.S. 145 (1968). According to the decision

posed whether arbitrators serving on an investment treaty tribunal, deciding issues of significant public import, are subject to more scrutiny than those dealing with purely commercial disputes between private corporations.

In the end, were the *EDF* and *Suez et al.* arbitrators sufficiently rigorous in their assessment of the challenges presented, in light of the particular dispute environment? The ECHR in *Findlay* held that appearances may be of particular importance in maintaining confidence in the independence and impartiality of the court. Subjective (in addition to *objective*) considerations may have similar importance with respect to investment arbitration. In *AT&T v. Saudi Cable*, Lord Justice May, while concurring with the rejection of the plaintiff's challenge based on an arbitrator's seat on a board of directors, stated that:

[i]t did seem to me that there was a reasonably persuasive general case that his non-executive directorship "might be of such a nature as to call into question [the arbitrator's] independence in the eyes of [one] of the parties." If AT&T had known of this directorship at the outset, an objection by them to his acting as arbitrator would, in my view, probably have been regarded as reasonable and would have been sustained.

The facts and circumstances of the *Suez et al.* and *EDF* cases made them borderline instances. From a layman's point of view, a board member of a company that owns or recommends to purchase a share in a party has been asked to decide a multi-million dollar claim against a sovereign government in relation to measures affecting the public interest. Is the public's (perhaps unsophisticated) perception about the arbitrator's independence relevant? In particular, what is "*de minimis*" to an international arbitrator may not seem insignificant to an average citizen of the host State, whose tax money is at stake. How public perception could be taken into account without unreasonably restricting the pool of qualified arbitrators is a more difficult issue. In this regard, Judge Buergenthal has opined that:

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.¹⁰¹

In any event, the *Berschader* case and the challenges of Professor Kaufmann-Kohler in *EDF* and *Suez et al.* present an interesting comparison to inspire further discussion. On the one hand, the SCC appears to have rejected a manifest conflict of interest, perhaps to preserve the respondent State's freedom

in *Suez*, "[a]rbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another."

¹⁰¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Proceedings, Order of 30 January 2004, Dissenting Opinion of Judge Buergenthal, at para. 10.

of choice. On the other hand, a more subtle connection between the arbitrator and the claimant was rejected in circumstances that might have raised serious concerns among the populace of the State in question.

2.4. Problem Area No.3: Issue Conflicts

2.4.1. The Multifarious Role of Lawyers in Arbitration

A typical situation in which issue conflicts may arise is when arbitrators serve both as counsel and arbitrator, whether concurrently or consecutively. Perhaps the best known case in this regard is *Telekom Malaysia Berhad v. Ghana*.¹⁰² Ghana challenged Professor Emmanuel Gaillard, who had been appointed as arbitrator by the claimant, on grounds that he was simultaneously serving as counsel for the petitioner in the annulment proceedings of *RFCC v. Morocco*, an award upon which Ghana relied in the *Telekom Malaysia* case.¹⁰³

In *RFCC*, the claimant petitioner argued that Morocco's breach of contract had constituted a breach of the BIT between Italy and Morocco. The arbitral tribunal rejected RFCC's position, on grounds that the State's behaviour did not constitute an act of *puissance publique*.¹⁰⁴ RFCC sought to annul the award under the ICSID Convention as an incorrect application of the law and therefore an excess of power. In *Telekom Malaysia*, Ghana constructed an argument similar to Morocco's successful defence in *RFCC* – the very argument that Professor Gaillard was challenging in the annulment proceedings on the claimant's behalf. Ghana invited Professor Gaillard to resign, arguing that he could not be considered impartial in light of his interest in the resolution of the legal issue in question. Professor Gaillard declined. Ghana then sought a decision to disqualify Professor Gaillard from the Secretary General of the

¹⁰² *Telekom Malaysia Berhad v. Ghana*, UNCITRAL Arbitration, Permanent Court of Arbitration at The Hague. It is notable that Ghana was represented in the challenge proceeding before The Hague District Court by Otto de Witt Wijnen, Chair of the IBA Working Group that formulated the IBA Guidelines on Conflicts of Interest in International Arbitration.

¹⁰³ *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award of 22 December 2003. Ghana's counsel did not challenge the appointment of the tribunal chairman, Albert Jan van den Berg, although he had disclosed that his partner, Bernard Hanotiau, was serving as arbitrator on the *RFCC v. Morocco* annulment panel.

¹⁰⁴ The relevant interpretation of the arbitral tribunal on treaty claims and contract claims can be found in para. 65 of the *RFCC* award: "Pour qu'il y ait droit à compensation il faut que la personne de l'exproprié prouve qu'il a été l'objet de mesures prises par l'Etat agissant non comme cocontractant mais comme autorité publique. Les décisions relatives aux cas d'expropriation indirecte mentionnent toutes l'« interférence » de l'Etat d'accueil dans l'exercice normal, par l'investisseur, de ses droits économiques. Or un Etat cocontractant n' « interfère » pas, mais « exécute » un contrat. S'il peut mal exécuter ledit contrat cela ne sera pas sanctionné par les dispositions du traité relatives à l'expropriation ou à la nationalisation à moins qu'il ne soit prouvé que l'Etat ou son émanation soit sorti(e) de son rôle de simple cocontractant(e) pour prendre le rôle bien spécifique de Puissance Publique."

PCA, the appointing authority which regarded the challenge without providing an explanation for its decision. Subsequently, Ghana took the challenge to the District Court of The Hague.

Telekom Malaysia argued that the circumstance of Professor Gaillard's concurrent service in unrelated cases as counsel and arbitrator fell within the ambit of section 4.1.1 of the IBA Guideline's "Green List." Ghana countered that an informed objective observer could not conclude that Professor Gaillard, "who in his capacity as counsel opposes a specific notion or approach, [can] be unbiased in his judgment of that same notion or approach in a case in which he acts as arbitrator."¹⁰⁵ Professor Gaillard himself testified in the Dutch court proceedings, stating:

The fact that I have been asked to act as a counsel for an unrelated party in an unrelated matter does not [...] affect [...] impartiality and independence in any way. [E]ach case is different and [...] in BIT arbitrations, the arbitrators' primary task is to apply the relevant rules of law, first and foremost the treaty on the basis of which the arbitration is initiated [...] to the facts [...]. I consider myself as completely impartial and independent to do so [...].¹⁰⁶

The judge reviewed the challenge based on the Dutch Code of Civil Procedure, which provides for an objective assessment as to whether justified doubts exist with respect to an arbitrator's independence and impartiality. He ultimately concluded that:

Even if this arbitrator were able sufficiently to distance himself in chambers from his role as attorney in the annulment proceedings ... account should in any event be taken of the appearance of his not being able to observe the said distance. Since he has to play these two parts, it is in any case impossible for him to avoid the appearance of not being able to keep these two parts strictly separated. For this reason there will be justified doubts about his impartiality if Professor Gaillard does not resign as attorney in the RFCC/Moroccan case.¹⁰⁷

Faced with this conclusion, Professor Gaillard resigned as counsel to RFCC in the pending annulment proceeding, and maintained his seat on the *Telekom Malaysia* tribunal.

Subsequently, Ghana raised a second challenge against Professor Gaillard, arguing that he was already tainted by the conflict that the Dutch court had anticipated. The second Dutch judge took the view that no general inference could be drawn that an arbitrator, having defended a particular point of view as lawyers in another case, would later be "less open-minded [than] if he had

¹⁰⁵ The Republic of Ghana v. Telekom Malaysia Berhad (English translation), Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision of the District Court of The Hague of 18 October 2004, at 3 (English translation available at www.transnational-dispute-management.com).

¹⁰⁶ *Id.*, at 5.

¹⁰⁷ *Id.*, at 6.

not defended such a point of view before.”¹⁰⁸ As a result, the judge ruled that there was “no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration.”

2.4.2. Deciding on similar legal issues repeatedly

While the dual role of lawyers as counsel and arbitrator in *concurrent* investment arbitration proceedings appears to raise serious conflict issues, it is a more difficult question whether an arbitrator having once decided an issue of law in a prior case can nevertheless be impartial when the same issue is raised in a later case. This particular problem is unique to investment arbitration (as opposed to commercial arbitration), given the recurring nature of questions of investment protection law and treaty interpretation.

This problem area has been placed in particular relief by the multitude of investment treaty claims submitted against Argentina, most in relation to a single set of government measures implemented in response to the country’s economic crisis of 2000-2001. One of Argentina’s defenses in both the *CMS* and *LG&E* cases was that its actions were justified by a “state of necessity” under customary international law, and pursuant to an emergency clause in the US-Argentina BIT. In both disputes, Argentina appointed as arbitrator Judge Francisco Rezek, a Brazilian jurist who served as a judge of the International Court of Justice. The two cases arose from nearly identical circumstances.

In *CMS*, Argentina’s state of necessity defense was rejected. The tribunal reasoned that neither the requirements set forth in customary international law nor those of the emergency clause of the US-Argentina BIT were satisfied by the factual circumstances.¹⁰⁹

However, the tribunal in *LG&E* came to exactly the opposite conclusion:

231. Extremely severe crises [...] reached their apex and converged in December 2001, threatening total collapse of the Government and the Argentine State [...] [and] triggered the protections afforded under Article XI of the Treaty [...].

238. The Tribunal rejects the notion that Article XI is only applicable in circumstances amounting to military action and war. [...] When a State’s economic foundation is under siege, the severity of the problem can equal that of any military invasion. [...].

240. The Tribunal has determined that Argentina’s enactment of the Emergency Law was a necessary and legitimate measure on the part of the Argentine Government. [...]

¹⁰⁸ The Republic of Ghana v. Telekom Malaysia Berhad (English translation), Challenge No. 17/2004, Petition No. HA/RK 2004.788, Decision of the District Court of The Hague of 5 November 2004, at para. 11 (English translation available at www.transnational-dispute-management.com).

¹⁰⁹ *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, at paras. 315-331 (on customary international law) and 353-378 (on the emergency clause of the US-Argentina BIT).

246. In international law, a state of necessity is marked by certain characteristics that must be present. [...] [T]he State must be dealing with interests that are essential or particularly important. [...]

257. The essential interests of the Argentine State were threatened in December 2001.¹¹⁰

Thus, Judge Rezek rejected Argentina's "state of necessity" defense in *CMS* and later accepted it in *LG&E*. Similarly, Professor Albert Jan van den Berg, who was the claimant-nominated arbitrator in *LG&E*, later signed the *Enron* award, which followed the *CMS* tribunal in dismissing Argentina's "state of necessity" defense.¹¹¹ Again in *BG Group v. Argentina*, Professor van den Berg served on the arbitral tribunal, which rejected the same defense on both treaty and general international law principles.¹¹²

At first blush, the positions of Judge Rezek and Professor van den Berg would suggest some possible "issue conflict." After all, once an arbitrator has rendered an award on a particular question of law, how can he maintain consistency and the appearance of integrity without maintaining the same position in subsequent airings of the same issue? Given the outcome of these cases, however, the conflict appears to fade.¹¹³ The arbitrator's primary duty – besides always remaining impartial and independent – is to decide the case before him based upon the facts and arguments presented by the parties. This is perhaps precisely what led both Rezek and van den Berg to accede to awards that seem directly to conflict with their prior decisions.

It has been suggested that issue conflict problems may arise when arbitrators publish commentary on an issue of law. The IBA Guidelines characterize this as "green," not giving rise to any actionable conflict. Nevertheless, it could be argued that an objective observer would have justifiable doubts as to the receptiveness of the arbitrator to certain arguments, after having taken a contrary position in a prominent journal. It is for this reason that the Resolution on Judicial Ethics of the ECHR requires judges to refrain from

¹¹⁰ *LG&E Energy Corp, LG&E Capital Corp and LG&E International, Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 26 September 2006.

¹¹¹ *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award of 22 May 2007.

¹¹² *BG Group Plc. v. Argentina*, UNCITRAL Arbitration, Final Award of 24 December 2007. The public international law "necessity" defense was ultimately rejected due to the fact that the Argentina-UK BIT implicitly excluded reliance on such a defense (at para. 409).

¹¹³ Even though not yet frequently tested, Rule 41(5) of the ICSID Arbitration Rules could be a potential source for issue conflicts, as both a decision on a Rule 41(5) objection and any subsequent award on jurisdiction and/or merits is handed down by the same tribunal. Thus, in cases where there the tribunal is divided on the Rule 41(5) objection, the question may arise whether the arbitrator who considered a particular claim to be manifestly without legal merit under Rule 41(5) is biased with respect to a later objection on jurisdiction or that the particular claim which was already subject to a Rule 41(5) decision lacks legal merit. While in the cases discussed above the issue conflict indeed appears to fade, it might perhaps be more pronounced in such cases.

making public statements or remarks that may give rise to reasonable doubt as to their impartiality.¹¹⁴ In the context of the ICJ, Judge Buergenthal, in his Dissenting Opinion on the Israel Wall, stated:

A court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that [...] he may be deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the court. That is what is meant by the dictum that the fair and proper administration of justice requires that justice not only be done, but that it also be seen to be done.¹¹⁵

Naturally, an international arbitration tribunal composed of private individuals with separate careers as educators or practitioners cannot be expected to separate themselves from the foment of professional discussion as might be expected of a judge in a standing body such as the ECHR or the ICJ. Moreover, international investment law, an area still in its formative phase, undoubtedly benefits from the clarification and development of key issues by the very individuals who decide them. Nevertheless, the public interest aspect of investment treaty arbitration has led many to question whether particular guidelines of some sort should be developed to assist arbitrators and parties in understanding the potential for conflict that may arise from such publications.

3. Conclusions

The existing legal framework for arbitrator challenges is well-equipped with respect to commercial arbitration, which tends to be both confidential and apolitical. The shortcomings of present rules become apparent in the context of the public and political nature of many investment treaty disputes, with entire populations arguably constituting key stakeholders in the proceedings. As a result, the IBA Guidelines may be somewhat limited outside the sphere of “classic” commercial conflicts.

Investment treaty arbitration creates an inherent tension, between the omnipresent state and the burden of potential public interest. While the need to offer the respondent State freedom of choice in arbitrator selection suggests a need to relax the standard of independence in some instances, public scrutiny and the taxpayer funds at stake could militate for a stricter standard in other cases. But allowing the respondent state greater leeway while limiting the autonomy of the private claimant would seem to result in an impermissibly unequal treatment of the parties.

One solution that has been proposed is a permanent investment “court,” similar to the International Court of Justice or the WTO Appellate Body. The practical barriers to the establishment of such an institution, however, are

¹¹⁴ European Court of Human Rights, Resolution on Judicial Ethics, Rule VI.

¹¹⁵ Buergenthal, *supra* note 101, at para. 12.

manifold, leaving this possibility a mere fantasy of the distant future. For now, the IBA Guidelines aptly sum up the difficulty, in commercial as well as treaty disputes:

The growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine. Reluctant parties have more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator.¹¹⁶

The problem areas described in this contribution do not lead to any obvious solutions. What is clear is that further serious discussion is required, which perhaps will lead to the elaboration of separate rules on arbitrator independence and impartiality, that are more closely adapted to the particular circumstances of treaty disputes.

¹¹⁶ IBA Guidelines, Introduction, at para. 1.