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ARBITRATOR INDEPENDENCE IN ICSID ARBITRATION

*Audley Sheppard**

It is fundamental to due process and confidence in investment treaty arbitration that the arbitrators are independent and impartial. In the 21st century, it is likely that there will be even greater scrutiny of arbitrators' backgrounds, their relationship with the parties, and any prior writings on the issues in dispute, with a concomitant increase in the challenges to arbitrators on grounds of conflict of interest. This contribution to the *Liber Amicorum* of Professor Schreuer addresses the issue of arbitrator independence in investment protection arbitration, with particular reference to International Centre for Settlement of Investment Disputes (ICSID) arbitration.¹

ICSID prescribes that the ICSID arbitrator must 'be relied upon to exercise independent judgment'. I first compare this requirement with the formulation found in other arbitral rules and various national laws. I then consider the decisions in both ICSID and other arbitrations concerning challenges,² based on (i) the relationship between an arbitrator and a party; (ii) the relationship between an arbitrator and a counsel; and (iii) issue and subject matter conflict. I conclude by recommending that the legal test and procedure for determining arbitrator challenges in ICSID proceedings should be changed.

A. ICSID Requirement of 'Independent Judgment' Compared with other Arbitral Rules and National Laws

The ICSID requirements

Article 14(1) of the ICSID Convention requires:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be

* I am grateful to my colleagues, Joachim Delaney, Sachin Trikha, and Sarah George Thengungal, for their assistance in preparing this chapter.

¹ See C. Schreuer, *The ICSID Convention: A Commentary* (2001) 56, 509, and 1105. For other recent articles on this topic see L. Malintoppi, 'Independence, Impartiality and Duty of Disclosure of Arbitrators', in P. Muchlinski, F. Ortino, and C. Schreuer, *The Oxford Handbook of International Investment Law* (2008) 789; C. Harris, 'Arbitrator Bias in Investment and Commercial Arbitration', 5(4) *Transnational Dispute Management* (2008); and C. Mouawad, 'Issue Conflicts in Investment Treaty Arbitration', 5(4) *Transnational Dispute Management* (2008).

² Not all decisions on arbitrator challenges are published and some of the challenges referred to in this chapter have been obtained from various sources such as journal articles, arbitration newsletters, etc. and the information is necessarily limited to the descriptions provided in those sources.

*relied upon to exercise independent judgment.*³ Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

Article 40(2) of the Convention states that: 'Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14'.

Rule 6(2) of the ICSID Arbitration Rules requires an arbitrator to sign a declaration which includes, *inter alia*, a disclosure of his '(a) past and professional, business and other relationships (if any) with the parties and (b) any other circumstance which might cause [the arbitrator's] reliability for independent judgment to be questioned by a party'.⁴ This disclosure requirement is a continuing obligation throughout the arbitration.⁵ The ICSID Arbitration Rules do not contain a list, nor do they provide any guidance, on the situations or relationships that ought to be disclosed under Rule 6(2). The phrase 'any other circumstance' is notably ambiguous and potentially very broad.

Article 57 of the ICSID Convention provides that a party may propose that an arbitrator be disqualified on the basis 'of any fact indicating a *manifest* lack of the qualities required by paragraph (1) of Article 14'.⁶ The need to show a 'manifest lack of the qualities required' is a decidedly higher threshold to satisfy when set against the standards in other arbitral rules and national arbitration laws. As will be shown below, several institutional rules merely require an applicant to show that there are 'justifiable doubts' as to the arbitrator's impartiality and independence. Rule 9(1) requires that a challenge must be brought 'promptly and in any event before the proceeding is closed'.

Article 58 of the ICSID Convention provides that the co-arbitrators, in the first instance, shall decide on the proposal to challenge an arbitrator. This, however, is qualified to the extent that, where a proposal relates to a sole arbitrator, or to a majority of them, or where the co-arbitrators cannot agree, the Chairman of the ICSID Administrative Council will decide on the proposal.⁷

ICSID also imposes certain requirements in relation to the nationality of the arbitrators as an ancillary means of ensuring independence. Article 38 of the ICSID Convention requires, for example, that arbitrators appointed by the Chairman of the Administrative Council 'shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute'. Article 39 also provides that, subject to agreement by the parties, 'the 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' (see also ICSID Arbitration Rule 1(3)).

The early drafts of what became Article 14 did not include the requirement of independent judgment. The Working Paper and the Preliminary Draft to the Convention referred only to 'high moral character and recognized competence in the fields of law, commerce, industry or finance'.⁸ The former phrase was taken from the Statute of the International

³ Emphasis added. The Spanish version of Article 14(1) refers to a person 'who inspires full confidence in his impartiality of judgment', as noted by the ICSID tribunal in the First *Suez* challenge: see below n. 50. However, 'independence' and 'impartiality' are different concepts as recognized by that tribunal.

⁴ Article 13(2) of the Additional Facility Arbitration Rules contains a similar requirement.

⁵ Both limb (b) of the arbitrator's statement and the continuing obligation of disclosure were introduced on 10 April 2006 as part of the amendments to the ICSID Arbitration Rules.

⁶ Emphasis added. ⁷ See also ICSID Arbitration Rule 9.

⁸ A. Broches, *History of the ICSID Convention* (1970), volume 1, 72–4.

Court of Justice. The requirement of ‘independent judgment’ was introduced in the First Draft.⁹ Professor Schreuer states in his brilliant treatise, that the debates ‘show that the delegates were really concerned with the impartiality of members of individual conciliation commissions or arbitral tribunals and not so much with the qualities of Panel members in general’.¹⁰ Professor Schreuer adds that the issue of independence and impartiality, typically, arises in relation to a particular party or dispute and that a person who is perfectly capable of exercising independent judgment in general will still be ineligible if there is a conflict of interests in a particular case.

The ICSID requirement of ‘independent judgment’ may be compared with the formulations found in other arbitral rules and national laws.

UNCITRAL Rules

Article 9 of the UNCITRAL Rules,¹¹ which is often prescribed in investment treaties as one of the arbitral procedures available to an investor, requires a prospective arbitrator to disclose ‘any circumstances likely to give rise to *justifiable doubts* as to his *impartiality and independence*’.¹² Article 9 goes on to provide that ‘an arbitrator, once appointed or chosen, shall disclose, such circumstances to the parties unless they have already been informed by him of these circumstances’.

Further, the UNCITRAL Rules use the twin concepts of ‘impartiality and independence’ as opposed to the phrase ‘independent judgment’¹³ as found in ICSID. The difference is small, but important. The terms ‘independent’ and ‘impartial’ are not synonymous. In broad terms, the former refers to the lack of connection with a particular party whilst the latter refers to a predisposition or favouritism. There also appears to be a subtle difference compared with ICSID with respect to the timing of disclosure. Pursuant to the UNCITRAL formulation, disclosure is required before formal appointment (as well as after formal appointment, if appropriate). The declaration required by Rule 6(2) of the ICSID Arbitration Rules will in practical terms be signed after formal appointment.¹⁴ Consequently, it is more likely that under the UNCITRAL Rules, any concerns with regards to the impartiality or independence of an arbitrator will become apparent earlier.

Article 10(1) of the UNCITRAL Rules provides that ‘any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence’.¹⁵ The process for challenging an arbitrator is set out in Article 11. Any challenge must be brought within 15 days of the appointment of the arbitrator or the discovery of the fact leading to the challenge, while a challenge under ICSID must be

⁹ Ibid 74.

¹⁰ Schreuer, above n. 1, 57.

¹¹ D. Caron, *The UNCITRAL Rules* (2006).

¹² Emphasis added.

¹³ The ICSID Secretariat Discussion Paper entitled ‘Possible Improvements of the Framework for ICSID Arbitration’ (22 October 2004), para 16, however, stated that ‘the requirement of reliability for independent judgment has been interpreted as encompassing impartiality as well as independence from the parties’. See also the Spanish version of Article 14, which refers to ‘impartiality’, as discussed in Section B below n. 50.

¹⁴ The language of ICSID Arbitration Rule 6(2) stipulates that the declaration be signed ‘before or at the first session of the Tribunal’.

¹⁵ Although, pursuant to Article 10(2) of the UNCITRAL Rules, ‘a party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made’.

brought ‘promptly’. The challenge is determined by the relevant appointing authority (as agreed between the parties or as stipulated by the Permanent Court of Arbitration (the PCA) pursuant to Article 12).

SCC Rules

The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules) are sometimes prescribed in investment treaties. Article 14(1) contains an explicit and unequivocal requirement of a type akin to the UNCITRAL formulation (on which the SCC Rules were based), that is, that ‘every arbitrator must be impartial and independent’. Again, the use of the twin terms ‘impartial’ and ‘independent’ is noteworthy.

Article 14(2) of the SCC Rules prescribes a two-stage disclosure requirement similar to that seen in the UNCITRAL Rules. Although the two-stage disclosure requirement contrasts with the disclosure mechanic prescribed in the ICSID Arbitration Rules, the second stage is somewhat similar to the statement required in the signed declaration for ICSID arbitrations (as per Rule 6(2)). In similar vein to the continuing obligation of disclosure under the ICSID Arbitration Rules, Article 14(3) of the SCC Rules provides that: ‘an arbitrator shall immediately inform the parties and the other arbitrators in writing where any circumstances referred to in paragraph (2) arise during the course of the arbitration’.

Article 15 of the SCC Rules sets out the process for challenging an arbitrator should a party, *inter alia*, have justifiable doubts as to that arbitrator’s impartiality or independence.¹⁶ A party must submit its challenge within ‘15 days from when the circumstances giving rise to the challenge became known to the party’.¹⁷ Unless the other party agrees to the challenge, the SCC board of directors will make the final decision on the challenge.¹⁸

ICC Rules

The International Chamber of Commerce Rules of Arbitration (ICC Rules) are also sometimes prescribed as applicable rules in investment treaties. Article 7 provides that ‘every arbitrator must be and remain independent of the parties involved in the arbitration’. The ICC Rules omit the requirement to be and remain ‘impartial’, because, *inter alia*, of the lack of a satisfactory definition.¹⁹ Nevertheless, an arbitrator may be challenged ‘for lack of independence or otherwise’,²⁰ which could include impartiality. Furthermore, Article 15(2) obliges the arbitral tribunal to ‘act fairly and impartially’.

¹⁶ Article 15(1) SCC Arbitration Rules.

¹⁷ *Ibid*, Article 15(2). A party which does not submit its challenge within the 15-day limit will be deemed to have waived their right to make a challenge.

¹⁸ *Ibid*, Article 15(4).

¹⁹ Stephen Bond points out: ‘it might be noted that the very first ICC Arbitration Rules of 1923 contained no mention of *either* independence or impartiality, nor did they contain provisions for the challenging of an arbitrator’. Nor were the terms present in the 1955 ICC Arbitration Rules. He states that ‘the suggestion was made to include the concept of impartiality in the Rules. This proposal was not accepted for several reasons.’ One of the reasons cited for this was the lack of any satisfactory definition of ‘impartiality’. See S. Bond, ‘The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration’, in ICC, *The Arbitral Process and the Independence of Arbitrators* (1991) 9.

²⁰ Article 11 ICC Arbitration Rules.

Pursuant to Article 7(2), a prospective arbitrator is required to ‘sign a statement of independence and disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties’. The language ‘in the eyes of the parties’ is clearly intended to prevent an arbitrator coming to a purely subjective conclusion with regard to the relevance of a particular fact or circumstance when assessing his/her own independence. The obligation of disclosure also continues for the duration of the arbitral proceedings.²¹ Pursuant to Article 7(4), any challenge is determined by the ICC International Court of Arbitration, at its monthly plenary sessions.

PCA Rules

The Permanent Court of Arbitration (PCA) optional arbitration rules for two parties, of which only one is a State, provide, at Article 6(4), that:

the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

This terminology of ‘independent and impartial arbitrator’ is similar to the UNCITRAL Rules. The requirement ‘to take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties’ is a weaker stipulation than that contained in Articles 38 and 39 of the ICSID Convention. Also similar to the UNCITRAL Rules, Article 12 provides that the challenge is determined by the appointing authority.

Statute of the ICJ

Article 2 of the Statute of the International Court of Justice (the ‘ICJ’) provides that:

the Court shall be composed of a body of *independent judges, elected regardless of their nationality* from among persons of *high moral character* [...].²²

A judge presiding over any given case could therefore be of the same nationality as one of the parties to the dispute. This is a noticeable difference from the requirements in Articles 38 and 39 of the ICSID Convention. Before taking up his duties, each judge must make a solemn declaration in open court that he will exercise his powers impartially and conscientiously pursuant to Article 20 of the ICJ Statute. Article 17(2) of the Statute of the Court requires that:

No member [of the Court] 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.

In the view of Judge Burgenthal in his dissenting opinion in *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case,²³ the examples

²¹ Ibid, Article 7(3). ²² Emphasis added.

²³ *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order, 30 January 2004, *ICJ Reports* (2004).



given in Article 17(2) are not exhaustive in nature:

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.²⁴

A judge of the Court can only be dismissed upon an unanimous decision of the other members of the Court made in a private meeting.²⁵

IBA Guidelines

The International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the ‘IBA Guidelines’) are increasingly seen as representing good practice. General Standard 1 provides that:

Every arbitrator *shall be impartial and independent* of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the award has been rendered or the proceeding has otherwise finally terminated.²⁶

Alongside an arbitrator’s self-assessment of a conflict of interest (General Standard 2(a)), the IBA Guidelines invoke the test of ‘justifiable doubts’, General Standard 2(c) states:

Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

General Standard 2(d) provides examples of where ‘justifiable doubts’ will necessarily exist. In accordance with several institutional rules (as detailed above), an arbitrator is required to make disclosure prior to accepting appointment, or as soon as that arbitrator learns about the relevant fact or circumstance (General Standard 3(a)).

National law

A further point of comparison between ICSID and UNCITRAL or other non-ICSID arbitrations is that non-ICSID arbitrations are subject to the mandatory requirements of the arbitration law of the place of arbitration. The national law of common places of arbitration for investment arbitrations invariably prescribes a requirement of independence and/or impartiality. National law also provides for a challenge process before the national courts: a process which does not apply to ICSID arbitrations.

Swiss law

Article 180(1)(c) of the Swiss Private International Law Act (PILA) provides that a party may challenge an arbitrator when ‘circumstances exist which give rise to justifiable doubts concerning his independence’. Although a challenge on the grounds of impartiality is not express in this section, it is a Swiss constitutional right to have an impartial judge²⁷ and Professor Kaufmann-Kohler has stated that ‘according to the drafters of Article 180(1)(c)

²⁴ Ibid. Dissenting Opinion of Judge Burgenthal, para 9.

²⁵ Article 18 of the ICJ Statute and Article 6 of the Rules of the Court.

²⁶ Emphasis added.

²⁷ Article 30(1) of the Swiss Federal Constitution provides that all legal disputes will be heard by an independent and impartial court. See Malintoppi, above n. 1, 819.



of the PILA, impartiality can be considered to be the corollary of the independence of an arbitrator or, at least, usually results from such independence'.²⁸

English law

The English Arbitration Act 1996 (the Act), at Sections 1(a), 24(1)(a), and 33(1)(a), stipulates that arbitrators must be impartial. The duty of arbitrators to act fairly and impartially was recognized by the Departmental Advisory Committee on Arbitration Law in their Report on the Arbitration Bill, February 1996 (the DAC Report) as 'one of the central proposals' in the Act, which attunes with 'self-evident rules of justice'.²⁹ The Act speaks only of impartiality in the three sections noted above, and not of the concept of independence. The DAC Report explained that 'it seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator is of no significance'³⁰ and that 'the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection (however remote) has been put forward to challenge the "independence" of an arbitrator'.³¹

Lord Hope giving an opinion in the House of Lords in *Porter v Magill*,³² stated that the 'question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.³³ That test, Lord Hope felt, brought English Law 'in harmony with the objective test which the Strasburg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias'³⁴ (see European Convention on Human Rights below).

Dutch law

The Dutch Arbitration Act 1986 (the Dutch Arbitration Act) provides at Article 1033 that 'an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence'. Article 1034 provides that 'a prospective arbitrator [...] who presumes that he could be challenged shall disclose in writing to the person who has approached him the existence of such grounds'.

United States law

The Federal Arbitration Act does not contain any express provisions with regard to challenging arbitrators on the grounds of a lack of impartiality or independence. Although it is open to individual States to fill in the gap, the majority of States have not done so.³⁵ The State of California provides one notable exception. Pursuant to the California Code of Civil Procedure (the Code) (para 1297.124), an arbitrator may be challenged 'only if circumstances exist that gave rise to justifiable doubts as to his or her independence or impartiality'.

There is uncertainty in the United States as to what degree of disclosure should be made. For example, the US Supreme Court in *Commonwealth Coatings Corp v Continental*

²⁸ G. Kaufmann-Kohler and B. Stucki, *International Arbitration in Switzerland* (2004) 42.

²⁹ DAC Report, paras 150 and 152. ³⁰ *Ibid*, para 101.

³¹ *Ibid*, para 102. ³² *Porter v Magill* [2002] 2 AC 357.

³³ *Ibid*, para 103. ³⁴ *Ibid*. ³⁵ Malintoppi, above n. 1, 820.



*Casualty Co*³⁶ required an arbitrator to disclose any dealings which might convey an impression of bias.

European Convention on Human Rights

The European Convention on Human Rights (the ECHR) is also relevant, at least in Europe, to arbitrator independence. Article 6(1) of the ECHR provides: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* established by law'.³⁷

While not directly applicable to private arbitration, national courts have sought to apply a test for arbitrator bias which is consistent with Article 6(1).³⁸

Summary

This short survey shows that the ICSID Convention requires that an arbitrator is capable of exercising independent judgment, whereas the UNCITRAL, SCC, and other procedural rules, national laws and good practice include an express requirement of impartiality. In addition, ICSID requires a 'manifest' lack of the prescribed qualities, which is arguably a higher threshold for a successful challenge than 'justifiable doubts'. In addition, ICSID is the only institution (other than the ICJ) where the other arbitrators decide the challenge.

It is with these differences between ICSID and non-ICSID arbitrations in mind that I turn to the three general grounds for challenging an arbitrator in investment arbitrations:

- the relationship between an arbitrator and a party;
- the relationship between an arbitrator and a counsel; and
- issue and subject matter conflict.

B. Relationship between an Arbitrator and a Party

The issue of possible bias arising out of an arbitrator's connection with one of the parties has arisen in a number of ICSID cases. It will be seen from the cases considered below that the high threshold required by Article 57 of the ICSID Convention places a heavy burden of proof on the challenging party.

Such a conflict arose in the very first ICSID case, *Holiday Inns SA/Occidental Petroleum v Morocco*.³⁹ The arbitrator appointed by the claimants disclosed that four years after the dispute had been registered, he had become a non-executive director of

³⁶ *Commonwealth Coatings Corp v Continental Casualty Co*, (1968) 393 US 145. In that case, Mr Justice Black stated that arbitrators should 'disclose to the parties any dealings that might indicate an impression of possible bias', 149. Mr Justice White, although concurring, stated that an arbitrator need only disclose a 'substantial interest in a firm which has done more than trivial business', *ibid* 151. The case is discussed in J. Lew, L. Mistelis, and S. Kröll, *Comparative International Commercial Arbitration* (2003) 91.

³⁷ Emphasis added.

³⁸ See eg *Porter v Magill*, above n. 32; see also Lew *et al*, above n. 36, 91–7.

³⁹ *Holiday Inns SA/Occidental Petroleum v Morocco*, ICSID Case No. ARB/72/1, reported in ICSID, *Eleventh Annual Report 1976/1977*, at 34.



Occidental Petroleum. Because the other two co-arbitrators agreed that he should be permitted to resign in accordance with Article 56(3) in view of the change in circumstances, there was no need for Morocco to bring a challenge.

In another of the well-known ICSID cases of the early period, *Amco Asia Corp v Indonesia*,⁴⁰ the claimant-appointed arbitrator, Mr Rubins, was challenged on two grounds: (1) that several years prior to the arbitration he had given tax advice to the individual who controlled the three corporate claimants; and (2) his firm and the claimants' counsel had had a joint office and profit-sharing arrangement for many years. (This second ground is considered in Section C below.) As to the first ground, the claimants contended that, as a party-appointed arbitrator, it was to be expected that the party and/or its lawyers would know the challenged arbitrator and that, in any event, the relationships complained of were trivial.

The challenge was determined by the two remaining arbitrators, Professors Goldman and Foighel. They drew a distinction between independence and impartiality. They held that the ICSID Convention and Arbitral Rules required 'impartiality' of all members of a tribunal. But as regards the requirement of independence, they acknowledged that the appointment process by which an arbitrator may be appointed by a party presumes some acquaintance between a party and the arbitrator. The existence of a relationship between the two, irrespective of the character or extent of that relationship, was not, in and of itself, sufficient to disqualify an arbitrator. Rather, the challenging party must establish that the arbitrator's lack of independence is 'manifest', as required by Article 57 of the ICSID Convention. The mere appearance of partiality was not sufficient; the lack of impartiality must be 'manifest' or 'highly probable', not just 'possible' or 'quasi-certain'. The two arbitrators concluded that Indonesia's challenge failed to meet this high threshold.

In *Zhinvali Development Ltd v Republic of Georgia*,⁴¹ the existence of occasional social contacts between one of the arbitrators and an executive instrumental to the claimant's investment gave rise to a challenge. Stressing the absence of any business or professional relationship, the two remaining arbitrators found that to suggest that a merely occasional personal contact could manifestly affect the judgment of an arbitrator, in the absence of any further facts, was purely speculative. The challenge was rejected.

In *Compana de Aguas del Aconquija & Vivendi Universal v Argentine Republic* (the *Vivendi* case),⁴² Argentina brought a challenge against Mr Yves Fortier CC QC, the President of the ad hoc Committee established by the Chairman of the ICSID Administrative Council to determine Vivendi's request to annul the award. Mr Fortier qualified his Rule 6 declaration by mentioning that his law firm had previously been instructed by a party connected to Vivendi in an unrelated matter. Mr Fortier had not

⁴⁰ *Amco Asia Corp v Indonesia*, ICSID Case No. ARB/81/1. Decision on the Proposal to Disqualify an Arbitrator, 24 June 1982 (unpublished). The description of the challenge is taken from Schreuer, above n. 1, 516; Harris, above n. 1, 4; and W.M. Tupman, 'Challenge and Disqualification of Arbitrators in International Commercial Arbitration', 38 *ICLQ* (1989) 26, 44.

⁴¹ ICSID Case No. ARB/00/1, Decision on Respondent's Proposal to Disqualify Arbitrator, 19 January 2001 (Davis R. Robinson, Seymour J. Rubin) (unpublished) discussed in *Compana de Aguas del Aconquija & Vivendi Universal v The Argentine Republic* ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, para 23 (the '*Vivendi* challenge'). See also Harris, above n. 1, 4.

⁴² *Vivendi* challenge, above n. 41.



been personally involved in the instructions or any ongoing work. The partner involved undertook not to take any further instructions until after the Committee's mandate was complete. The work was neither related to the present case, nor was it general legal or strategic advice, but related to a specific transaction.

In considering the prior ICSID decisions, *Amco Asia* and *Zhinvali*, the two remaining committee members, Professors James Crawford SC and José Carlos Fernández Rozas, acknowledged that the decision in *Amco Asia* had been heavily criticized for setting the threshold at a level that 'would tolerate virtually any prior business or professional relationship'.⁴³ They expressly stated that:

The fact remains that a lawyer-client relationship existed between the claimant and the arbitrator personally during the pendency of the arbitration; this must surely be a sufficient basis for a reasonable concern as to independence, unless the extent and content of the advice can really be regarded as minor and wholly discrete.⁴⁴

After considering Professor Schreuer's ICSID Commentary, as well as other international arbitration authorities,⁴⁵ the remaining two committee members acknowledged that 'manifest' 'imposes a relatively heavy burden of proof on the party making the proposal' and concluded that the test was:⁴⁶

whether a real risk of lack of impartiality based upon those facts (and not upon any mere speculation or inference) could reasonably be apprehended by either party [...] That is to say, the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality.⁴⁷

Applying this test to the present case, the two committee members considered that the fact that the claimant or one of its affiliates was a client was not sufficient, in and of itself, to disqualify Mr Fortier. Given the circumstances of the case, specifically the fact that Mr Fortier's firm had been working on Vivendi's instructions for the entire time in which the arbitration was proceeding, the relationship had been immediately and fully disclosed, the work was nearly completed, it had no connection with the arbitration, and Mr Fortier had not been personally involved in the execution of the work at any stage or in any way, they concluded that Mr Fortier's independence was not impaired by the disclosure of the client relationship and rejected the challenge.⁴⁸

In *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic* (the *Suez* case),⁴⁹ Argentina made two separate

⁴³ Tupman, above n. 40, 51: 'Such a standard has no precedent in the municipal law of any country, and it is quite astonishing that it should have been applied in ICSID, with its unique and delicate balance of the rights of host States and foreign private investors'.

⁴⁴ *Vivendi* challenge, above n. 41, para 22.

⁴⁵ *Ibid*, para 24, where the two remaining committee members referred to P. Fouchard, E. Gaillard, and B. Goldman, *Traité de l'arbitrage commercial international* (1996) and their discussion of two French cases.

⁴⁶ The two remaining committee members had to determine first whether they had jurisdiction to consider the challenge, and if not, who did. Having considered the ICSID Convention, the Arbitral Rules and the *travaux préparatoires*, they inferred that the Arbitral Rules were intended to apply to annulment proceedings and that on this basis, they had jurisdiction to hear the challenge (see *Vivendi* challenge, above n. 41, paras 5–13).

⁴⁷ *Ibid*, para 25.

⁴⁸ *Ibid*.

⁴⁹ The proceedings were joined in (1) *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No. ARB/03/17 (2) *Suez, Sociedad*



challenges against Professor Kaufmann-Kohler as an arbitrator in three arbitrations that had been consolidated. The first challenge related to an issue conflict.⁵⁰ The second challenge arose due to an alleged bias arising out of her appointment as a non-executive director of an investment bank and its relationship with the claimants.⁵¹ (The first challenge is considered below in Section D, but some of the reasoning in the decision is relevant to the second challenge and is referred to here.)

In the first challenge, the remaining arbitrators translated the Spanish version of Article 14(1) of the ICSID Rules as referring to a person ‘who inspires full confidence in his impartiality of judgment’ (rather than ‘independent judgment’, which is the phrase used in the English version). They described the differences between the two concepts as follows:

Generally speaking independence relates to the lack of relations with a party that might influence an arbitrator’s decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.⁵²

The remaining arbitrators emphasized that ‘independence and impartiality are states of mind’ and that ‘such state of mind can only be inferred from conduct’: ‘It is for this reason that Article 57 requires a showing by a challenging party of *any fact* indicating a manifest lack of impartiality or independence’.⁵³

Argentina’s second challenge was based on its discovery that Professor Kaufmann-Kohler was appointed as a non-executive director to the board of UBS some two years after her appointment to the tribunal. Argentina alleged that this relationship adversely affected her ability to be impartial and independent due to three key factors: (1) UBS was a shareholder in two of the claimants, Suez (2.1 per cent) and Vivendi (2.38 per cent); (2) UBS undertook research on and made recommendations in relation to investments in the water sector and had developed financial products which it sold to investors permitting them to invest in that sector; and (3) a portion of Professor Kaufmann-Kohler’s remuneration was in UBS shares. Argentina also complained of Professor Kaufmann-Kohler’s failure to disclose her position with UBS as required by both the ICSID and UNCITRAL Arbitration Rules. The challenge proceedings concerned Professor Kaufmann-Kohler’s position in three separate tribunals: two constituted under the ICSID Convention and one constituted under the UNCITRAL Rules. The two remaining arbitrators considered the UNCITRAL case, *AWG Group Limited v The Argentine Republic* (the *AWG* case) separately because of the different test under the UNCITRAL Rules and because UBS was not a shareholder of AWG. Article 10(1) of the UNCITRAL Rules permits a challenge ‘if circumstances exist that give rise to *justifiable doubts* as to the arbitrator’s impartiality or independence’.⁵⁴ The two remaining arbitrators emphasized that this was an objective, not a subjective, standard that must be satisfied by the challenging party. The question to be answered was: ‘Would a reasonable, informed person viewing the facts be led to

General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic, ICSID Case No. ARB/03/19 and (3) *AWG Group v The Argentine Republic* (UNCITRAL).

⁵⁰ Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007 (the ‘First *Suez* challenge’).

⁵¹ Decision on the Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008 (the ‘Second *Suez* challenge’).

⁵² First *Suez* challenge, above n. 50, para 29.

⁵³ *Ibid*, para 30.

⁵⁴ Emphasis added.



conclude that there is a justifiable doubt as to the challenged arbitrator's independence and impartiality?'⁵⁵

The remaining arbitrators stressed that the connection between the arbitrator and the party must be 'significant and direct, such as an economic relationship causing an arbitrator to be dependent in some way on a party'.⁵⁶ Given the tenuous connection between AWG and UBS, that is, that AWG operates in the water sector and UBS conducts research and develops financial products related to the water sector, the remaining arbitrators concluded that 'the existence of such purported connection is not enough to establish a "circumstance" giving rise to *justifiable doubts* as to an arbitrator's independence and impartiality'.⁵⁷

The remaining arbitrators acknowledged that Professor Kaufmann-Kohler was under a continuing obligation of disclosure, but that she was only required to disclose facts that might give rise to justifiable doubts as to her impartiality, none of which existed in the AWG case. Thus, Professor Kaufmann-Kohler was not required to disclose her UBS appointment in the AWG case.⁵⁸

The approach to be taken in the two ICSID cases, however, was different given the terms of Articles 14 and 57 of the ICSID Convention. Taking into account the English and the Spanish versions of Article 14, the two remaining arbitrators confirmed that they must look at the two related but distinct concepts of independence and impartiality of judgment. They acknowledged that the relevant test sets a high threshold:

It is important to emphasise that the language of Article 57 places a *heavy burden of proof* on the Respondent to establish facts that make it *obvious and highly probable, not just possible*, that Professor Kaufmann-Kohler is a person who may not be relied upon to exercise independent and impartial judgement.⁵⁹

The remaining arbitrators considered four criteria for evaluating the alleged connection between Professor Kaufmann-Kohler and the claimants:⁶⁰

Proximity: How closely connected is the challenged arbitrator to one of the parties by reason of the alleged connection? The closer the connection between an arbitrator and a party, the more likely that the relationship may influence an arbitrator's independence of judgment and impartiality;

Intensity: How intense and frequent are the interactions between the challenged arbitrator and one of the parties as a result of the alleged connection? The more frequent and intense the interaction by virtue of the relationship between an arbitrator and a party the more probable that such relationship will affect the arbitrator's independence and impartiality;

Dependence: To what extent is the challenged arbitrator dependent on one of the parties for benefits as a result of the connection? The more the arbitrator is dependent on a relationship for benefits or advantages the more likely that the relationship may influence the arbitrator's independence and impartiality; and

Materiality: To what extent are any benefits accruing to the challenged arbitrator as a result of the alleged connection significant and therefore likely to influence in some way the arbitrator's judgment? Obviously significant benefits derived from a relationship will be more

⁵⁵ Second *Suez* challenge, above n. 51, para 22.

⁵⁷ *Ibid*, para 24.

⁶⁰ *Ibid*, para 35.

⁵⁸ *Ibid*, paras 25–6.

⁵⁶ *Ibid*, para 24.

⁵⁹ *Ibid*, para 29 (emphasis added).



likely to influence an arbitrator's judgment and impartiality than negligible or insignificant benefits.

Applying these criteria to the present case, the remaining arbitrators concluded that the connection was not sufficient: any connection between Professor Kaufmann-Kohler and Suez or Vivendi was 'remote and certainly not direct'; there was 'no interaction at all between Professor Kaufmann-Kohler and Suez or Vivendi by virtue of her UBS directorship'; Professor Kaufmann-Kohler derived 'no benefits or advantages from and [was] in no way dependent on [Suez or Vivendi] as a result of the alleged connection'; and the UBS shareholdings in Suez and Vivendi were 'not material to UBS's financial performance, profitability or share price and in no way affect the compensation that Professor Kaufmann-Kohler earns as a director of UBS'.⁶¹ The challenge was therefore dismissed.

The two remaining arbitrators also considered whether or not the fact that Professor Kaufmann-Kohler failed to disclose her UBS directorship in and of itself indicated a manifest lack of independence and impartiality. They confirmed that Rule 6 requires an arbitrator to 'disclose a fact only 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'. They also confirmed that an arbitrator was not required to disclose a fact of which they were unaware unless they should have been aware of its existence. In the present case, Professor Kaufmann-Kohler had provided a list of the cases in which she was involved to UBS for the purposes of conflict searches and relied upon the information provided by UBS. (This had led to her resignation as an America's Cup arbitrator, because UBS informed her that it sponsored one of the contenders.) Such enquiry was sufficient, Professor Kaufmann-Kohler was not required to make any further enquiries, and even if she was so required, the remaining arbitrators held that 'her failure to do so was in our opinion the result of an honest exercise of judgment and was not part of a pattern of circumstances raising doubts about impartiality'. Thus, no violation of Rule 6 was found.⁶²

Argentina sought to raise Professor Kaufmann-Kohler's directorship with UBS to challenge her appointment to the tribunal in *EDF v Argentina*. Professors William W. Park and Jesus Remon, the two remaining members of the tribunal, rejected the challenge. They also confirmed that the failure to disclose did not indicate a manifest lack of independence: 'Whatever 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'.⁶³

More recently, a challenge to Mr Jan Paulsson by the Ukraine in *Lemire v Ukraine*⁶⁴ was rejected by Professor Juan Fernandez-Armesto and Mr Jurgen Voss, the other two members of the tribunal. The Ukraine brought the challenge on the basis of a disclosure by Mr Paulsson that his law firm, Freshfields Bruckhaus Deringer, had taken instructions to represent the Ukraine in an unrelated investment arbitration. Mr Paulsson had been

⁶¹ Ibid, para 40. ⁶² Ibid, paras 46–8.

⁶³ ICSID Case No. ARB/06/18. See L. Peterson, 'Remaining Members of Tribunal in EDR v Argentina Case Reject Challenge to Prof. Gabrielle Kaufmann-Kohler', *Investment Arbitration Reporter* (7 August 2008), <<http://www.iareporter.com/Archive/IAR-08-07-08.pdf>>.

⁶⁴ ICSID Case No. ARB/03/23. See L. Peterson, 'ICSID Arbitrators Reject Challenge to Third Member of Tribunal in Lemire v Ukraine Arbitration', *Investment Arbitration Reporter* (1 October 2008), <<http://www.iareporter.com/Archive/IAR-10-01-08.pdf>>.



appointed by Lemire. He informed the parties that he was not personally involved in the other matter in any capacity. Whilst there are reports that the parties sought to agree that Mr Paulsson would not step down if certain conditions were fulfilled, no agreement was reached. Messrs Fernandez-Armesto and Voss concluded that no ‘manifest lack of the qualities required’ had been demonstrated.

It is interesting to speculate whether any of these cases would have been decided differently if (i) the test had been justifiable doubts rather than manifest lack of independent judgment, and/or (ii) the challenge had been decided by a third party rather than the co-arbitrators.

C. Relationship between an Arbitrator and a Counsel

A second ground of challenge has been the alleged relationship between an arbitrator and a counsel. Invariably, these have been unsuccessful.

As noted above, in *Amco Asia Corp v Indonesia*,⁶⁵ the claimant-appointed arbitrator, Mr Rubins, was challenged on the grounds, *inter alia*, that his firm and the claimants’ counsel had had a joint office and profit-sharing arrangement for many years. Although this arrangement had ended shortly before the commencement of the arbitration, the two firms continued to occupy the same premises and they shared administrative services during the first stages of the ICSID proceedings. The claimants contended that the relationship was trivial. The two remaining arbitrators, Professors Goldman and Foighel, stressed that the challenging party must prove facts demonstrating that the arbitrator’s lack of independence is ‘manifest’ and concluded that Indonesia’s challenge failed to meet that threshold.

In *SGS Société Générale de Surveillance SA v Pakistan*,⁶⁶ SGS challenged Pakistan’s appointed arbitrator, Mr J. Christopher Thomas, due to the alleged relationship that he had with Mr Jan Paulsson, Pakistan’s counsel in that case. Mr Thomas had either represented or at least advised Mexico in a number of arbitrations, including *GAMI v United Mexican States* and *Robert Azinian v United Mexican States*. Mr Paulsson was the president of the tribunal in both of those arbitrations. The tribunal in the *Azinian* case had found in favour of Mexico and dismissed the investor’s claim. SGS claimed that there was ‘a clear relationship of dependence between Mr Thomas and Mr Paulsson’.⁶⁷

The two remaining arbitrators, Mr Florentino P. Feliciano and Mr André Faurès, set out the applicable test:

The party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made. The first requisite that facts must be established by the party proposing the qualification, is in effect a prescription that mere speculation or inference cannot be a substitute for such facts. The second requisite of course essentially consists of an inference, but that inference must

⁶⁵ *Amco Asia Corp v Indonesia*, ICSID Case No. ARB/81/1. Decision on the Proposal to Disqualify an Arbitrator, 24 June 1982 (unpublished). Description of the challenge is taken from Tupman, above n. 40, 44.

⁶⁶ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimants’ Proposal to Disqualify Arbitrator, 19 December 2002, 8 *ICSID Reports* 398, 402 (the ‘SGS challenge’).

⁶⁷ *Ibid*, 405.



rest upon, or be anchored to, the facts established. An arbitrator cannot, under Article 57 of the Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences.⁶⁸

The two remaining arbitrators emphasized that the inference must itself be ‘reasonable’ and that there must be a ‘clear and reasonable relationship between the constituent facts and the constituent inference they generate’. Recognizing the importance of international arbitration practice, they stipulated that the inference ‘should accord with the common experience of the pertinent community of arbitrators and lawyers’,⁶⁹ although they did not explicitly acknowledge that international practice applies a lower threshold.

Applying the relevant test, the two remaining arbitrators found that the alleged inference to be drawn from the relationship between Mr Thomas and Mr Paulsson was ‘simply a supposition, a speculation merely’. In reaching this conclusion, the two remaining arbitrators took into account the nature and size of the international arbitration community as well as the overlapping roles that an arbitration lawyer might adopt as an arbitrator in one case and counsel in another. They commented:⁷⁰

It is commonplace knowledge that in the universe of international commercial arbitration, the community of active arbitrators and the community of active litigators are both small and that, not infrequently, the two communities may overlap, sequentially if not simultaneously. It is widely accepted that such an overlap is not, by itself, sufficient ground for disqualifying an arbitrator. Something more must be shown if a challenge is to succeed. In the instant case, that ‘something more’ has not been shown by the Claimant.

It was the interchanging role of arbitrators and counsel that caused Argentina to commence challenge proceedings in two ICSID cases and one UNCITRAL case. Argentina challenged the appointment of Dr Andres Rigo Sureda as chairman in two separate ICSID proceedings, *Azurix Corp v Argentine Republic* and *Siemens v Argentine Republic*.⁷¹ Dr Rigo Sureda had joined the law firm of Fulbright & Jaworski as a senior advisor in April 2001. Subsequently, Fulbright & Jaworski became involved as counsel for Duke Energy in a case against Peru, in which it appointed Mr Guido Tawil as its party-appointed arbitrator. Mr Tawil had been acting for Azurix and Siemens in the two cases against Argentina, in which Dr Rigo Sureda was chairman. Thus, Mr Tawil was an advocate in two cases before Dr Rigo Sureda at the same time as Fulbright & Jaworski was pleading a case before Mr Tawil. Argentina challenged Dr Rigo Sureda’s independence and impartiality in the *Azurix* and *Siemens* cases. Dr Rigo Sureda resigned from his position at Fulbright & Jaworski in February 2004 whilst the challenges were being considered.

In the *Azurix* case, the challenge was not brought until after the conclusion of the hearing on the merits. The two remaining arbitrators rejected the challenge. The decision has not been published.⁷²

⁶⁸ Ibid, 402. ⁶⁹ Ibid (emphasis added). ⁷⁰ Ibid, 404.

⁷¹ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12; *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/8; from ‘ICSID Tribunals Diverge over Independence of Arbitrator to Hear Argentine Claims’, *Investment Law and Policy News Bulletin* (25 March 2005), <<http://www.icsid.org/investment>>.

⁷² *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, at 9 which states that a decision dated 25 February 2005 dismissing the challenge to Dr Rigo Sureda was issued to the parties on 11 March 2005.

The challenge in the *Siemens* case was also rejected. Although the decision in the *Siemens* case has also not been published, some of the reasoning adopted has been discussed in public newsletters.⁷³ Those discussions indicate that the two remaining arbitrators did not agree: 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.⁷⁴ The challenge was referred to the chairman of the ICSID Administrative Council, who in turn referred it to the PCA because Dr Rigo Sureda had previously been employed by the World Bank and therefore the chairman himself might be said to have a conflict of interest. The PCA rejected the challenge without giving any reasons.⁷⁵

In a third challenge brought by Argentina against Dr Rigo Sureda, in *National Grid Plc v Argentina*,⁷⁶ an UNCITRAL case in which Dr Rigo Sureda had been appointed chairman, Argentina relied on the same grounds, that is, the alleged relationship with Mr Tawil. The Appointing Authority was the PCA, which in turn appointed the ICC International Court of Arbitration to determine the challenge. The ICC Court rejected the challenge, without giving reasons. Argentina has applied to the Argentine courts to have the ICC Court decision annulled, and those proceedings are still ongoing. The Argentine courts ordered the arbitration to be suspended whilst it dealt with the application, but the tribunal has nevertheless continued the proceedings. The Argentine court has not yet issued a decision on the challenge.

Subsequently, following a hearing on the merits, Argentina raised a challenge against one of the other arbitrators, Mr Judd Kessler, who had been appointed to the tribunal to replace Mr Whitney Debevoise (who had resigned in order to accept an appointment from the US government). Whilst the challenge did not relate to the relationship between the arbitrator and counsel, but to a statement made by the arbitrator, it is worth considering here. Argentina alleged that certain comments made by Mr Kessler during the hearing on the merits in July 2007 raised concerns as to his impartiality and independence. The parties agreed to refer the challenge to the LCIA, reportedly because of the LCIA's policy of providing reasons for challenge decisions, the lack of reasons being of particular concern to Argentina in the challenge of Dr Rigo Sureda in the earlier *Siemens* and *National Grid* cases. The LCIA appointed a Division of the Court consisting of Dr Klaus Sachs, Dr Hassan Ali Radhi, and Mr Paul B. Hannon⁷⁷ to hear the challenge. Their decision is publicly available.⁷⁸ The Division applied an objective

⁷³ Cited in L. Peterson, 'ICSID Rejects Challenge to Lead Arbitrator in Siemens Case; Argentina Rips Decision', *Invest-SD: Investment Law and Policy Weekly News Bulletin* (27 April 2005), <<http://www.icsid.org/investment>>.

⁷⁴ *Ibid.*

⁷⁵ *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, at 10–11.

⁷⁶ *National Grid Plc v Argentine Republic*, from L. Peterson, 'ICC Nixes Argentina's bid to disqualify Arbitrator in National Grid Case', *Investment Treaty News* (12 January 2006), <<http://www.investmenttreatynews.com>>.

⁷⁷ Mr Paul B. Hannon was appointed following Argentina's objections to the appointment of Mr Yves Fortier CC QC. See Decision on the Challenge to Mr Judd L. Kessler, para 22 (the 'Kessler Decision') <http://www.iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf>.

⁷⁸ *Ibid.* See also the tribunal's award dated 3 November 2008.

test to determine whether Mr Kessler's comments gave rise to 'justifiable doubts as to his impartiality' in accordance with Article 10(1) of the UNCITRAL Rules. The Division acknowledged that Mr Kessler's comments might give the wrong impression when taken in isolation, but when placed in the context of the full exchange during the hearing, they found that 'any appearance of bias which may have been created by the challenged sentence was eliminated'.⁷⁹

The facts in *Eureko v Poland*,⁸⁰ an UNCITRAL case, revealed a stronger relationship between the arbitrator and counsel than the ICSID cases considered above, but the challenge was also rejected, applying the UNCITRAL threshold. Poland challenged Judge Schwebel acting as arbitrator, because of his close working relationship with the law firm, Sidley Austin Brown & Wood ('Sidley Austin'), which was acting against Poland in an unrelated investment arbitration for Cargill Corporation. Judge Schwebel had worked with Sidley Austin as co-counsel in other investment arbitrations (the *Vivendi* case and a case against Turkey), but not in the Cargill arbitration. The challenge was brought before the Belgium courts. The Belgian Court of First Instance rejected the challenge on the ground that there was no evidence to link Judge Schwebel with the representation of Cargill by Sidley Austin.⁸¹ The fact that his office was in the same building did not constitute sufficient evidence. Poland appealed the court's decision and claimed that an additional ground for challenge arose out of Judge Schwebel's work with Sidley Austin as co-counsel in the *Vivendi* case, particularly the fact that they had relied in their written briefs in *Vivendi* on the earlier partial award co-authored by Judge Schwebel in the *Eureko* case. Poland contended that the reliance on the *Eureko* award indicated 'a clear conflict of interest sufficient to raise justifiable doubts as to Judge Schwebel's impartiality in the arbitration'.⁸² The Belgian Court of Appeals also rejected the challenge, concluding that working with Sidley Austin on other arbitrations would not compromise Judge Schwebel's impartiality as an arbitrator in the *Eureko* case. However, the court refused to consider the new argument raised by Poland in relation to the *Vivendi* submissions for procedural reasons, because this had not been raised before the lower court.⁸³

The administrative relationship between English barristers in the same chambers has become a controversial issue in the context of conflicts of interest.⁸⁴ It is not uncommon that a barrister will appear as counsel before an arbitrator who is a member of the same chambers. This issue arose in a recent ICSID arbitration, *Hrvatska Elektroprivreda, dd*

⁷⁹ Ibid, para 96. ⁸⁰ Mouawad, above n. 1, 5.

⁸¹ *In re: Republic of Poland v Eureko*, RG 2006/1542/A, 22 December 2006, excerpts published at <<http://ita.law.uvic.ca/documents/Eureko-arbitratorchallenge.pdf>>.

⁸² Separately, the government of Argentina objected to the reliance by *Vivendi* on the *Eureko* award, on the basis that it was co-drafted by one of its counsel (Judge Schwebel) in the same period when the *Vivendi v Argentina* arbitration was ongoing. Although the *Vivendi* tribunal deferred the decision on the weight to be given to the *Eureko* award to a later stage of the proceedings, there is no explicit reference to it in the final award of 20 August 2007. It can be concluded that the *Vivendi* tribunal appears to have rejected Argentina's position.

⁸³ L. Peterson, 'Belgian Appeals Court Rejects Poland's challenge to Arbitrator in *Eureko* Case', *Investment Treaty News* (15 November 2007), <http://www.iisd.org/pdf/2007/itn_nov15_2007.pdf>.

⁸⁴ See *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd's Law Rep. 45; contrast *obiter* remarks in *Smith v Kvaerner Cementation Foundations Ltd* [2007] 1 WLR 370 (CA).

(*HEP*) v *Republic of Slovenia*.⁸⁵ The tribunal consisted of Mr Charles N. Brower (claimant's nominee), Mr Jan Paulsson (respondent's nominee), and Mr David A.R. Williams QC, a 'door tenant' of Essex Court Chambers as the president. On the eve of the hearings on the merits, Slovenia informed the tribunal that Mr David Mildon QC, a barrister at Essex Court Chambers, would be appearing on its behalf. HEP did not challenge the appointment of Mr Williams as president of the tribunal, but objected to Slovenia being represented by Mr Mildon. HEP recognized that this practice was not unusual,⁸⁶ but noted that:

the community of participants in ICSID arbitrations is much broader than the English bar, and what 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.⁸⁷

The parties had agreed that Mr Williams should not be forced to resign. The issues to be addressed by the tribunal (including Mr Williams) were whether the tribunal had the power to order that Slovenia refrain from using Mr Mildon and if so, should it make that order. The tribunal accepted 'that as a general rule parties may seek such representation as they see fit—and that this is a fundamental principle'. Nevertheless, they emphasized that there may be overriding exceptions, such as the 'immutability of properly constituted tribunals' arising out of Article 56(1) of the ICSID Convention. While the tribunal acknowledged that the 'ICSID Convention and Arbitration Rules do not, however, explicitly give the power to tribunals to exclude counsel', it found that 'as a judicial formation governed by public international law, the Tribunal has an inherent power to take measures to preserve the integrity of its proceedings'. The tribunal concluded:

To be concrete: although the Respondent in this case was free to select its legal team as it saw fit prior to the constitution of the Tribunal, it was not entitled to subsequently amend the composition of its legal team in such a fashion as to imperil the Tribunal's status or legitimacy.⁸⁸

Having taken into account the specific circumstances of this case, the tribunal decided that Mr Mildon's involvement in the case would be 'inappropriate and improper'. The tribunal was, however, keen to emphasize that their decision should not set a precedent, debaring the presence of counsel and arbitrators from the same chambers in every case, but that each case will depend on the particular circumstances. Nonetheless, this decision will have an important impact upon the arbitration community, at least in the context of investment arbitrations.

⁸⁵ *Hrvatska Elektroprivreda, dd (HEP) v Republic of Slovenia*, ICSID Case No. ARB/05/24, Tribunal's Ruling dated 6 May 2008 ('*HEP v Slovenia* ruling').

⁸⁶ eg in *Bayindir v Pakistan*, members of Essex Court Chambers were involved both as a member of the tribunal (Sir Franklin Berman) and counsel for both sides (Mr Gavan Griffith QC for the claimants and Messrs V.V. Veeder QC, Christopher Greenwood QC, and Samuel Wordsworth for the respondents); see the Decision on Jurisdiction dated 14 November 2005.

⁸⁷ *HEP v Slovenia* ruling, para 10. See also L. Peterson, 'ICSID Tribunal Rules that a Barrister may not Appear as Counsel for State in Arbitration where another Member of Chambers Sits on Tribunal', *Investment Arbitration Reporter* (25 November 2008), <<http://www.iareporter.com/Archive/IAR-11-25-08.pdf>>.

⁸⁸ *HEP v Slovenia* ruling, para 26.

In *Vannessa Ventures v Bolivarian Republic of Venezuela*, Mr V.V. Veeder QC chose to resign as president of the tribunal when counsel acting for Vannessa Ventures appeared at the jurisdictional hearing, who had a connection with Mr Veeder: they were co-counsel in another unrelated arbitration that was still pending.⁸⁹

D. Issue and Subject Matter Conflict

The last decade has seen a significant growth in investment arbitration case law, publications by leading lawyers commenting on that case law and on the principles of investment protection generally. In addition, some eminent arbitrators have been appointed to a number of tribunals in cases where the facts and/or legal argument are similar to cases where they have already rendered awards. This has led to challenges to arbitrators based on 'issue conflict'⁹⁰ and 'subject matter conflict'. The risk of such conflict is exacerbated by the relatively small pool from which arbitrators are chosen, the several roles of advocate, expert, and arbitrator played by some practitioners, and the fact that the legal principles are very similar across most bilateral and multilateral investment treaties.

Challenges concerning issue conflict have arisen in UNCITRAL and ICSID proceedings. As demonstrated in the analysis below, it appears that the decision-making bodies considering challenges under the UNCITRAL rules have been more inclined to uphold a challenge than those in ICSID proceedings.

In *Canfor Corporation v United States*,⁹¹ Canfor initiated proceedings under NAFTA pursuant to the UNCITRAL Rules on the basis that determinations made by the Department of Commerce and the United States International Trade Commission resulted in a Canfor subsidiary being required to pay increased duties on softwood lumber products imported to the United States in contravention of US obligations under Chapter 11 of NAFTA. Canfor's party-appointed arbitrator, Mr Conrad Harper, disclosed in December 2002 that he had made a speech on the specific subject matter in dispute in May 2001. In that speech he commented that: '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.'⁹²

The United States alleged that the content of the speech reflected the fact that the arbitrator had a pre-existing bias in relation to the subject matter of the arbitration and in consequence, that he was unable to act with impartiality. They challenged his appointment and, with reference to Article 12(1)(b) of the UNCITRAL Arbitration Rules, requested that the Secretary-General of ICSID, the appointing authority for NAFTA arbitrations, determine the challenge. The central issue to be determined was whether the content of the speech specifically addressed the matters in dispute in the arbitration or whether they were simply general statements relating to the subject matter in dispute.⁹³ The ICSID Secretary-General advised the arbitrator that he would

⁸⁹ Peterson, above n. 87. ⁹⁰ Mouawad, above n. 1, 2; and Harris, above n. 1, 9.

⁹¹ *Canfor Corporation v United States*, <<http://www.state.gov/s/l/c7424.htm>>.

⁹² Quoted in B. Legum, 'Investor-State Arbitrator Disqualified for Pre-appointment Statements on Challenged Measures', 21(2) *Arbitration International* (2005) 241.

⁹³ Legum, above n. 92, 244.



find in favour of the United States and uphold the challenge unless the arbitrator resigned. Because the arbitrator resigned from his position, ICSID did not publish its decision.⁹⁴

There is no explicit requirement in the UNCITRAL Rules which stipulates that, before a challenge is determined, the challenged arbitrator should be given the opportunity of resigning or removing himself from the situation that has given rise to potential conflict. The flexibility and diplomacy shown by the ICSID Secretary-General in the *Canfor* case is welcome.

In *Grand River Enterprises v United States of America*,⁹⁵ another NAFTA case heard by an UNCITRAL tribunal, the United States challenged the position of Professor James Anaya as arbitrator under Article 10 of the UNCITRAL Rules on the basis that he had an ongoing role in two separate proceedings aimed at evaluating whether the United States was complying with international human rights norms before the Inter-American Commission on Human Rights and the United Nations Committee on the Elimination of Racial Discrimination (CERD). The United States was concerned that his simultaneous involvement in proceedings which evaluated their international commitments raised 'justifiable doubts as to [his] impartiality and independence'.⁹⁶ As with the *Canfor* case, the challenge was determined by the ICSID Secretary-General as the appointing authority under NAFTA. The ICSID Deputy Secretary-General felt that these concerns were well founded on account of the 'basic similarity' of the proceedings, because both involved the evaluation of the United States' international commitments, and consequently concluded that Professor Anaya's role in the human rights proceedings was incompatible with his role as arbitrator in the present case.

As in the *Canfor* case, the ICSID Deputy Secretary-General invited Professor Anaya to inform him as to whether he wished to continue in his roles in the non-NAFTA proceedings. Professor Anaya informed ICSID that he had ceased his involvement in both of the human rights proceedings, although he continued to assist students with their work with CERD, the body before which he had been advocating in the second human rights proceedings. A distinction was drawn by the Deputy Secretary-General between supervising students and representing parties in international fora. Applying the objective standard, it was concluded that assistance to the students was not sufficient to give rise to justifiable doubts as to his impartiality and independence. Consequently, the United States challenge was rejected.

In *The Republic of Ghana v Telekom Malaysia Berhad*,⁹⁷ another UNCITRAL case, Telekom Malaysia Berhad (TMB) acquired a 30 per cent stake and management control of Ghana Telecommunications Company Limited. A dispute subsequently arose and TMB initiated arbitration proceedings for purported breaches by Ghana of the bilateral investment treaty with Malaysia. The proceedings were administered by the PCA and the Secretary-General of the PCA was the appointing authority. The seat of

⁹⁴ Ibid, 243.

⁹⁵ *Grand River Enterprises Six Nations Ltd et al v United States of America*, Challenge before the Secretary-General of ICSID, 28 November 2007.

⁹⁶ Article 10(1) UNCITRAL Rules.

⁹⁷ *Republic of Ghana v Telekom Malaysia Berhad*, HA/RK2004.667, 18 October 2004.



the arbitration was The Hague.⁹⁸ Ghana challenged Professor Gaillard⁹⁹ on the basis that his role as counsel in the *RFCC/Morocco* case was incompatible with his role in the present case. Ghana's challenge was rejected by both the arbitral tribunal and the Secretary-General of the PCA. Ghana thereafter filed a challenge with the District Court of The Hague.

Ghana's central allegation was that Professor Gaillard's role in the *RFCC/Morocco* case rendered him incapable of acting as an impartial arbitrator in the present proceedings on account of the similarity of the two cases (although such similarity was contested by TMB). Referring to the IBA Guidelines, Ghana argued that Professor Gaillard, 'who in his capacity of counsel opposes a specific notion or approach, cannot be unbiased in his judgement of that same notion or approach in a case in which he acts as an arbitrator'.¹⁰⁰ For his part, Professor Gaillard wrote a letter stating 'experience shows that each case is different and that, in BIT arbitrations, the arbitrators' primary task is to apply the relevant rules of law, first and foremost the treaty and the basis of which the arbitration is initiated—here the bilateral treaty between Malaysia and Ghana'. The Dutch Court of The Hague, applying Dutch law, held:

the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Moroccan award. This attitude is incompatible with the attitude Professor Gaillard has to adopt as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case.¹⁰¹

Similar to the approach of the ICSID Secretary-General in the *Canfor* case, the Dutch court invited Professor Gaillard to resign as counsel in the *RFCC/Morocco* case, or the court would uphold the challenge.¹⁰²

Professor Gaillard did subsequently resign from his position as attorney. Ghana, in consequence, challenged the conditional nature of the decision made by the Dutch court. The Dutch court rejected that argument and refused to grant an unconditional order to disqualify the arbitrator. The court stated that:

After all, it is generally known that in (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 than if he had not defended such a point of view before.¹⁰³

⁹⁸ Decision of the District Court of The Hague, 18 October 2004, unofficial English translation, 2 ('The First Hague Decision').

⁹⁹ TMB appointed Professor Gaillard following a challenge by Ghana to its first appointee, Mr Blackaby. Similarly, Dr Asante was replaced by Mr Layton following a challenge by TMB.

¹⁰⁰ The First Hague Decision, above n. 98, 3.

¹⁰¹ Ibid, 6. The ICSID Secretariat is sensitive to this type of conflict, particularly in respect of members of ad hoc annulment committees, and generally appoints jurists who do not often appear as advocates to such committees.

¹⁰² Ibid, 7.

¹⁰³ Decision of the District Court of The Hague, 5 November 2004, para 11 of the unofficial English translation.

Poland attempted to challenge Judge Schwebel in *Eureko v Poland*¹⁰⁴ on similar grounds, that is, the fact that in the *Vivendi* case, Judge Schwebel with co-counsel Sidley Austin had relied in their written briefs on the partial award co-authored by Judge Schwebel in the *Eureko* case. This aspect of the challenge was rejected on procedural grounds, it being too late to raise a new argument that had not been raised before and considered by the Court of First Instance.

Interestingly, Argentina contended in the *Vivendi* case that the tribunal should not consider the *Eureko* partial award precisely because it had been co-drafted by Judge Schwebel at the same time that he was acting as co-counsel in the *Vivendi* case. No suggestion was made that Judge Schwebel had acted improperly, yet it was the potential consequences that could result from those circumstances that were of concern to Argentina. Even though the tribunal deferred its decision on this point, there do not seem to be any explicit references to the *Eureko* partial award in the tribunal's final award.¹⁰⁵

In *BG Group v Argentina*,¹⁰⁶ an ICC case, Argentina challenged Professor Albert Jan van den Berg on the basis that he had signed, as a member of the tribunal, two arbitral awards involving Argentina, *LG&E v Argentina* and *Enron v Argentina*, which had reached apparently conflicting conclusions on the state of necessity doctrine. The challenge was referred to the ICC International Court of Arbitration as the appointing authority. The ICC Court rejected the challenge, but no reasons were provided. Argentina has now sought to challenge the award rendered in favour of BG in the US District Court of the District of Columbia on the ground that it doubted Professor van den Berg's impartiality and that the ICC Court had acted beyond its powers in rejecting the challenge. Those challenge proceedings are still pending.¹⁰⁷ Argentina's challenge was based not on the fact that Professor van den Berg had previously reached an unfavourable decision against them, but, rather, on his apparent inconsistent decision-making in the two earlier proceedings.¹⁰⁸

Issue conflict and subject matter conflict have also arisen in a number of ICSID cases.

In the first challenge in the *Suez* case,¹⁰⁹ Argentina proposed to disqualify Professor Kaufmann-Kohler because of her participation as a member of another ICSID tribunal in the *Vivendi* case. In August 2007, that tribunal rendered an award of US\$105 million against Argentina. Argentina claimed that the findings of fact and the appraisal of the evidence by the tribunal in the *Vivendi* case was so flawed that Professor Kaufmann-Kohler 'could not have acted independently and impartially in arriving at such a decision'.¹¹⁰ For this reason, according to Argentina, Professor Kaufmann-Kohler's participation in that decision 'reveals a prima facie lack of impartiality of the above mentioned arbitrator, made evident through the most prominent inconsistencies of the award that result in the total

¹⁰⁴ Mouawad, above n. 1, 5.

¹⁰⁵ *Compana de Aguas del Aconquija & Vivendi Universal v The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007. See also Mouawad, above n. 1, 6.

¹⁰⁶ *Republic of Argentina v BG Group plc*, Case No. 08-0485 (RBW) (DDC).

¹⁰⁷ The Petition to Vacate or Modify Arbitration Award, para 73.

¹⁰⁸ *Ibid*, para 75.

¹⁰⁹ First *Suez* challenge, above n. 50.

¹¹⁰ *Ibid*, para 34.

lack of reliability'.¹¹¹ Accordingly, this was not strictly issue conflict or subject matter conflict, but an allegation of bias.

Although the proceedings involved the consolidation of two ICSID and one UNCITRAL arbitration, the remaining arbitrators focused on the standards required by the ICSID Convention and Arbitral Rules when determining the substance of the challenge.¹¹² Emphasizing that 'Article 57 requires a showing by a challenging party of *any fact* indicating a manifest lack of impartiality or independence',¹¹³ the arbitrators noted that unlike other challenges, this challenge was not based on the existence of a professional or business relationship but was based on *the fact* that Professor Kaufmann-Kohler participated in and signed the award in the *Vivendi* case. The question was whether that 'fact' indicated a 'manifest lack' of independence or impartiality. Recognizing the heavy burden of proof placed on Argentina,¹¹⁴ the two arbitrators found that participation in the award was not 'in and of itself obvious evidence' that Professor Kaufmann-Kohler lacked independence or impartiality. The arbitrators questioned: 'does the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case mean that such judge cannot decide the law and the facts impartially in another case?' and found that:

A finding of an arbitrator's or a judge's lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.¹¹⁵

Referring to previous ICSID decisions (*Amco Asia*, *SGS v Pakistan*, and *Vivendi*), the arbitrators emphasized that they were required to use an 'objective standard based on a reasonable evaluation of the evidence of a third party' rather than a 'subjective standard based on the belief of the complaining party'.¹¹⁶ The tribunal stated:¹¹⁷

Indeed, the application of a subjective, self-judging standard instead of an objective [one] would enable any party in arbitration who becomes discontented with the process for any reason to end it at any time at its sole discretion simply by claiming that an arbitrator is not independent or impartial, a result that would undermine and indeed destroy the system of investor-State arbitration that was so carefully established by the states that have agreed to the Convention.

Argentina could not point to any objective evidence, but based its proposal on a belief of impartiality. In dismissing the challenge, the remaining arbitrators emphasized the

¹¹¹ Ibid, para 13.

¹¹² The two remaining arbitrators considered the timing of the challenge under the ICSID Convention and Arbitration Rules and the UNCITRAL Rules, concluding that Argentina's proposal was not within the time limits under either the UNCITRAL Rules (which require a challenge to be made within 15 days of the circumstances becoming known, Article 11) or the ICSID Arbitration Rules (which require a proposal to be made 'promptly', Rule 9(1)) as Argentina had made its proposal 52 days after it became aware of the award in the *Aguas del Aconquija* case. See the First *Suez* challenge, above n. 50, 18–26.

¹¹³ Ibid, para 30.

¹¹⁴ Referring to Professor Scheuer's Commentary in the First *Suez* challenge, above n. 50, para 34.

¹¹⁵ First *Suez* challenge, above n. 50, para 36.

¹¹⁶ Ibid, para 39.

¹¹⁷ Ibid, para 41. Note that there appears to be a formatting error in the Award which wrongly gives the impression that this quote comes from the *Vivendi* decision.

material differences between the *Suez* and the *Vivendi* cases, that is, the fact that the two cases involved different factual circumstances—the claim in the *Suez* case related to measures and actions taken by the Argentine government during the financial crisis of 2001 while the *Vivendi* case arose out of the privatization of water and sewage systems some five years prior to the 2001 crisis—the cases involved different BITs with different States; and the different factual circumstances required different applications of the ‘general international legal principles’ and a different ‘determination of damages’.¹¹⁸

More recently, in *Electrabel SA v Republic of Hungary*,¹¹⁹ the claimant sought to challenge the appointment by the respondent of Professor Brigitte Stern on the basis that she had also been appointed as an arbitrator by Hungary in another Energy Charter Treaty claim, *AES Summit Generation v Republic of Hungary*.¹²⁰ Electrabel’s complaint was that: both arbitrations arose out of similar factual circumstances relating to the generation of electricity in Hungary and out of similar long-term Power Purchase Agreements; both arbitrations concerned the same governmental decree which had the effect of reducing tariffs significantly; both arbitrations related to the Energy Charter Treaty; both arbitrations were registered on the same day consequent to which the proceedings would likely run more or less in parallel; and Professor Stern would very likely be privy to evidence and arguments in the *AES* arbitration which would not have been seen by counsel to the claimant or the other two arbitrators in the *Electrabel* arbitration. The two remaining arbitrators, Professor Kaufmann-Kohler and Mr V.V. Veeder QC (chairman), rejected the challenge.¹²¹ (The decision is public, but not the reasoning.)

Similar circumstances arose in *EnCana v Ecuador*, an UNCITRAL case. In that case, the respondent had appointed the same legal advisors and the same arbitrator in *Occidental Petroleum v Ecuador*. Although there was no challenge to the arbitrator under Article 10(1) of the UNCITRAL Rules, the tribunal acknowledged that this situation could lead to a procedural inequality as that arbitrator might receive more information than the other members of the tribunal by virtue of the arbitrator being appointed in the two cases. As the arbitrator could not be expected to maintain a ‘Chinese wall’ in his own mind, the tribunal adopted a practical solution by ordering Ecuador to make the award in the *Occidental* case available to the claimant in the later case and the arbitrator had to disclose any facts that were relevant to the issues in the *EnCana* case.¹²²

In another ICSID case, *Saba Fakes v Turkey*,¹²³ the claimant challenged the appointment of Professor Laurent Levy by Turkey. The claimant alleged that, as a result of Turkey appointing Professor Levy in a separate unrelated arbitration brought by a Polish investor under the Energy Charter Treaty arising out of similar circumstances, that is, the seizure by the State of assets of the Uzan family, he would not be able to

¹¹⁸ First *Suez* challenge, above n. 50, para 37.

¹¹⁹ *Electrabel SA v Republic of Hungary*, ICSID Case No. ARB/07/19. The author is counsel for Electrabel SA in the arbitration.

¹²⁰ *AES Summit Generation v Republic of Hungary*, ICSID Case No. ARB/07/22.

¹²¹ Decision of 25 February 2008, as reported at <<http://www.encharter.org/index.php?id=213&L=0#Electrabel>>.

¹²² *EnCana*, Partial Award on Jurisdiction, 27 February 2004, para 44. See also, Harris, above n. 1, 12.

¹²³ *Saba Fakes v Turkey*, ICSID Case No. ARB/07/20.

exercise the ‘independent judgment’ required by the ICSID Rules. Professors Gaillard and Hans van Houtte, the co-arbitrators, rejected the challenge. Their written decision is as yet unpublished.

E. Conclusion

Professor Schreuer’s recognition in his treatise of the heavy burden on a challenging party has been a consistent theme throughout challenges in ICSID arbitrations.¹²⁴ The requirement to establish a ‘manifest lack’ of independence as required by Article 57 of the ICSID Convention is arguably higher than the ‘justifiable doubts’ test applied in UNCITRAL and other rules as well as national arbitration laws, the court in Strasbourg, and the IBA Guidelines. As the two arbitrators in the Second *Suez* challenge noted: ‘It is important to emphasise that the language of Article 57 places a heavy burden of proof on the Respondent to establish facts that make it obvious and highly probable, not just possible, that [the challenged arbitrator] is a person who may not be relied upon to exercise independent and impartial judgement’. In this author’s opinion, there is no basis for the test for disqualification of ICSID arbitrators to be any more burdensome than the test for challenging an arbitrator in an UNCITRAL or other non-ICSID investment treaty arbitration or, indeed, in any commercial arbitration.

Recognizing this inconsistency, the ICSID Secretariat suggested that the disclosure requirements in Rule 6(2) be changed to reflect the ‘justifiable doubts’ test:¹²⁵

The relevant ICSID provisions, ICSID Arbitration Rule 6(2) and Article 13(2) of the Additional Facility Rules, could be amended similarly to require the arbitrator to disclose, not only any past or present relationships with the parties, but more generally any circumstances likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgement. This might be particularly helpful in addressing perceptions of issue conflicts among arbitrators.¹²⁶

The amendments made in 2006 to the ICSID Arbitration Rules did not reflect this proposal. Most notable is the omission of the words ‘likely to give rise to justifiable doubts’ in the current version of Rule 6. Rather, as referred to above, arbitrators are required to disclose ‘any other circumstance that might cause [their] reliability for independent judgement to be questioned by a party’. This is unfortunate. Consistency with the vast majority of arbitral rules, national laws, and good practice would have been welcome.

Another notable or unusual feature of ICSID is that challenges are decided by the other two arbitrators (unless they disagree). It is inevitable that a challenging party will have further doubts as to whether the remaining arbitrators will have a conflict of interest themselves when determining a challenge, in that they may have been or might expect one day to be challenged themselves, and may have a (subliminal) desire to set the test at a high level.

¹²⁴ Schreuer, above n. 1, 1200.

¹²⁵ ICSID Secretariat Discussion Paper, ‘Possible Improvements of the Framework for ICSID Arbitration’ (22 October 2004), para 17.

¹²⁶ *Ibid.*



Further, the lack of a fixed time period in which to make a proposal for disqualification is anomalous.

Most surprising is the absence of an express requirement of impartiality in the English version of the ICSID Convention. Accordingly, I recommend that the ICSID rules and procedures be changed such that:

- arbitrators and members of ad hoc committees must be expressly ‘independent and impartial’;
- the test for disqualification should be amended to omit ‘manifest’ lack of independence and be replaced with ‘justifiable doubts as to independence and impartiality’;
- challenges should be decided by an independent ad hoc challenge committee;
- a challenge committee should consider a doubt to be justifiable if a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was not independent or not impartial; and
- the time for challenging an arbitrator should be a fixed period, of 30 days, from the date of the arbitrator’s Rule 6(2) declaration or from the date at which the challenging party knew or ought to have known of the fact or circumstance on which the challenge is based.

Through these simple but important changes, ICSID and its arbitrators would be more likely to retain the confidence of the arbitral community and the parties, both investors and States.

