

IV Annual Forum for Developing Country Investment Negotiators

Background Papers

New Delhi, 27-29 October 2010

**Arbitrator Independence
and Impartiality:
Examining the dual role
of arbitrator and counsel**

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1.0 Introduction

A common¹ aspect of most international investment agreements (IIAs) is that they permit foreign investors to bring legal claims directly against host States before international arbitral tribunals. Reasons often given for this unique development in IIAs are that, by providing for investor-State dispute resolution through international arbitration, IIAs depoliticize investor-State disputes and help guarantee their just and efficient resolution. Yet to achieve these goals, the dispute settlement process must be legitimate—in both appearance and reality. Absent such legitimacy, investors and States may lose confidence in the system, and the intended efficiency and certainty of the process will decline due to an increase in challenges to arbitrators and awards.

The importance of ensuring legitimacy in the dispute resolution process is, however, by no means an issue unique to the context of investor-State arbitration. Indeed, governments worldwide have significant experience with developing and implementing various institutional safeguards that aim precisely to ensure legitimacy of their judicial systems. And although these safeguards are not identical between or even within countries, they often share common features, key among which are rules and mechanisms aiming to ensure adjudication by independent and impartial officials. These rules and mechanisms include those guaranteeing adjudicators security of tenure, establishing objective mechanisms for assigning judges to particular cases, restricting judges' outside remuneration, ensuring the transparency of proceedings, and providing for review of decisions.² Together, these rules and mechanisms help ensure that disputes are decided on their merits, and protect the legitimacy of the proceedings and their outcomes.

Yet notably, investor-State arbitrations lack these common institutional safeguards protecting the legitimacy of proceedings. First, arbitrators are appointed on a case-by-case basis. This leaves open the possibility that how an arbitrator decides one dispute can have an impact on his or her future employment, a consequence that may influence the arbitrator's decision in the case. Second, arbitrators are selected either by the parties or by "appointing authorities," with each approach raising issues regarding the arbitrator's "independence" from the party or entity that made the appointment (and therefore supplied the employment). Third, arbitrators (independently or through their law firms) can concurrently earn money through other professional activities, including serving as counsel for investors or States in separate (though similar) investor-State arbitrations, and serving on the board of directors of commercial entities with financial or other interests in the parties, issues or outcomes. Fourth, investor-State arbitration proceedings—including challenges to arbitrators for

¹ This paper is an updated version of the background paper for the *IISD Consultation on Priorities and Process for Procedural Reform in Investor-State Arbitration*, held in July 2010 in Barcelona.

² Van Harten, G. (forthcoming 2010). Five justifications for investment treaties: A critical discussion. *Trade Law & Development*, 2(1); see also *Burgh House Principles on the Independence of the International Judiciary*, June 2004.

lack of independence and impartiality, decisions on those challenges, and final awards—generally lack transparency, allowing arbitrators to issue decisions and awards relatively free from outside scrutiny. And finally, because arbitration proceedings and the decisions they produce are often significantly shielded from judicial review, important checks on the propriety of the proceedings are few.

The absence of these safeguards to ensure arbitrator independence and impartiality in investor-State arbitrations is a problem that States and arbitral institutions such as the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID) need to address. Under the status quo, cases and anecdotes reveal that allegations of arbitrator bias arising from diverse fact patterns and relationships pepper the disputes, prolonging proceedings and opening ultimate awards up to strong critique. And, as Jan Paulsson recently stated, “the troubling reality is that the extreme cases remain unknown, because improper behaviour is shrouded in urbane subterfuge and hypocrisy.”³ Calls for significant institutional reform have accordingly been made. Paulsson, for example, has argued that all arbitrators should be chosen jointly or selected by a neutral body and has proposed that, unless and until that is the rule, an alternative solution could be an “institutional requirement that appointments be made from a pre-existing list of qualified arbitrators [...] composed judiciously by a reputable and inclusive international body, with built-in mechanisms of monitoring and renewal.”⁴ Having done much work cataloguing flaws in current investor-State arbitration practices, Gus van Harten has made a broader proposal than Paulsson, advocating the development of a standing international investment court.⁵

While work on those longer-term, comprehensive approaches continues, there must also be parallel work on patches to prevent tainted decisions and to slow the flow of legitimacy bleeding from the current approach to investor-State dispute settlement due to lack of adequate guarantees of arbitrator independence and impartiality. One way to do this is to enforce (and, where necessary, revise and strengthen) the existing patchwork of laws, rules and guidelines relevant to the issue of arbitrator independence and impartiality in investor-State arbitration. This patchwork includes the various sets of procedural rules that may apply in a given investor-State arbitration. Both authors affirm that a necessary component of fairness in investor-State dispute settlement is adjudication by impartial and independent arbitrators, allowing the disputing parties to challenge arbitrators for lack of these qualities. Other components of this patchwork include domestic and international laws regarding enforcement and recognition of arbitral awards, which often allow courts to vacate or to refuse to enforce an arbitral award if sufficient doubts exist regarding the independence or

³ Paulsson, J. (2010, April 29). *Moral hazard in international dispute resolution*. Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, p. 6.

⁴ *Ibid.* p. 11.

⁵ Van Harten, G. (2008). *A case for an international investment court*. Working Paper No. 22/08. Geneva: Society of International Economic Law.

impartiality of the arbitrators who rendered the award. Filling in the holes are various professional rules and guidelines on arbitrator, judicial and attorney conduct, such as the *International Bar Association's Guidelines on Conflicts of Interest in International Arbitration* and the *Burgh House Principles on the Independence of the International Judiciary*.

This paper recognizes the fundamental importance of broader, systematic reforms, but concurrently highlights how the existing framework can and should be used to better resolve problems in the current state of affairs. Even more particularly, this paper focuses on one of the many types of conflicts of interests that can arise in international arbitrations, namely, conflicts arising from arbitrators in investor-State disputes serving as counsel in other investor-State arbitrations. This issue is one that is especially problematic in the unique context of treaty-based investor-State arbitrations (as opposed to general private, commercial arbitration). The difference is due to the fact that the treaties on which investors base their claims against States generally raise the same or similar limited set of legal issues for counsel and parties to argue and the tribunals to decide upon—a very different situation from private commercial arbitration, where contractual disputes can be based on an unlimited number of distinct provisions whose application in one case will have no relevance to the resolution of a dispute in another arbitration.

A growing number of commentators have explained how this dual arbitrator/counsel role threatens independence and impartiality in investor-State arbitration.⁶ For example, one eminent critic of this practice, Judge Thomas Buergenthal, of the International Court of Justice (ICJ) in The Hague, succinctly summarized the problem in a 2006 speech:

I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order to ensure that an arbitrator 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 he or she is handling as counsel. ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments—the Bilateral Investment Treaties, for example—are regularly at issue in different cases before it.

[. . .]

⁶ For example, Van Harten, G. (2007). *Investment treaty arbitration and public law*, Oxford: Oxford University Press; Mouawad, C. (2008, July). Issue conflicts in investment treaty arbitration. *Transnational Dispute Management*, 5(4).

These revolving-door problems—counsel selecting an arbitrator who, the next time around when the arbitrator is counsel, selects the previous counsel as arbitrator—should be avoided. Manus manum lavat, in other words—you scratch my back and I’ll scratch yours, does not advance the rule of law.⁷

Judge Buergenthal identifies two key problems in the current practice of arbitrators acting as counsel. First, there is a temptation for an arbitrator to consciously or unconsciously draft an arbitral decision in a manner that might advance the interests of a client in another case that he or she is arguing, or is shortly to argue, as counsel. Second, within the small international arbitration community, the dual arbitrator/counsel role creates the potential for cross-appointments, for example, Mr. X, as counsel in one case, agrees to appoint Ms. Y as arbitrator, and in return Ms. Y, when acting as counsel, will appoint Mr. X as arbitrator. As Judge Buergenthal notes, such practices do not advance the rule of law.

The scenarios are not hypothetical. Indeed, of the few arbitrator challenges that have become public, several have involved precisely this dual-role issue. In recent years, the following are some of the situations in which conflicts of interests have arisen:

- An arbitrator issued an award in one case and subsequently sought to rely on that same award when acting as counsel in another case;⁸
- A respondent host State sought to rely on a specific decision in support of its defence. The arbitrator evaluating the case (and, naturally, the host State’s defence) was concurrently acting as counsel seeking to annul that same award;⁹
- An arbitrator in a NAFTA arbitration was simultaneously acting as counsel on investment treaty issues to another NAFTA State, who could be interested in the outcome and would be entitled to make submissions to the arbitral tribunal under NAFTA Article 1128;¹⁰
- In several cases, an arbitrator or arbitrator’s law firm was concurrently serving as counsel in a separate investor-State dispute against the respondent host State;¹¹

⁷ Buergenthal, T. (2006, December). The proliferation of disputes, dispute settlement procedures and respect for the rule of law. *Transnational Dispute Management*, 3(5).

⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/07/3), Award 20 August 2007. (referred in-text as “*Vivendi v. Argentina 2007*”)

⁹ *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667; and Challenge 17/2004, Petition No. HA/RK/2004/778, 5 November 2004. (referred to in-text as “*Ghana v. Telecom Malaysia*”)

¹⁰ *Vito G. Gallo v. Canada* (UNCITRAL), Decision of the ICSID Deputy Secretary-General on the challenge to Mr. J. Christopher Thomas, 14 October 2009. (Referred to in-text as “*Gallo v. Canada*”)

¹¹ *S&T Oil Equipment and Machinery Ltd v. Romania*, Investment Arbitration Reporter, 11 May 2009 (Referred to in-text as “*S&T Oil v. Romania*”); *ICS Inspection and Control Services Limited v. Argentine Republic* (UNCITRAL) (Referred to in-text as “*ICS v. Argentina*”), Decision on Challenge to Mr. Stanimir A. Alexandrov, 17 December 2009; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15),

- An arbitrator, who was then acting as counsel in an earlier case where a principal witness in the later case had also been a witness, had acted for clients who accused the witness of dishonesty.¹²

To date, the publicly available outcomes of these challenges have been varied, but indicate that there currently is no clear or consistent regulation of arbitrators' abilities to "change hats." In some cases, challenges to arbitrators who are concurrently serving as counsel in investor-State disputes have failed; in others, the authority reviewing the challenge has allowed the arbitrator to continue in that role, so long as he or she resigns from the concurrent role as counsel; and in other similar disputes, challenges have succeeded. In certain cases, different fact patterns can help explain the different outcomes; yet more commonly, the different outcomes are not so easily justified.

One possible explanation for the diverging decisions is that it is due to the particular standard on arbitrator independence and impartiality provided in the applicable arbitration rule or law. It is at least arguable that some cases might have been decided differently had a different set of arbitral rules applied. An examination below shows that there are indeed differences in the texts of the various arbitration rules most commonly applied in investor-State disputes. For example, while the ICSID Convention requires that an arbitrator be capable of "independent judgment," the arbitration rules developed by the United Nations Commission on International Trade Law (UNCITRAL) explicitly also include an "impartiality" requirement. As this note explains, however, notwithstanding the different language used in the arbitration rules, the standards that have emerged for judging arbitrator challenges are today rather uniform. The textual variations are not the source of the problem.

Another possible explanation may be the fact that decisions on challenges are not commonly publicized or, if they are made public, are often issued without any accompanying reasons. This removes the decisions from outside scrutiny, and prevents the development of a well-reasoned body of jurisprudence on arbitrator independence and impartiality that can give guidance to other tribunals or authorities deciding challenges and promote consistency in the law.

The decisions that have been made public provide yet another explanation. They support the conclusion above that the rules are not the source of the inconsistency and suggest that, instead, it is the inconsistent manner in which the rules are applied that is preventing the development of a clear and consistent approach to the dual role issue. A fundamental element that seems to explain the decisions is whether and to what extent the authority reviewing the challenge recognizes the unique

Decision on Proposal for Disqualification of an Arbitrator, 6 November 2009 (referred to in-text as "*CEMEX v. Venezuela*").

¹² *ASM Shipping Ltd v. TTMI Ltd* [2005] All ER (D) 271 (Nov). Note: this was not an investor-State arbitration.

aspects of treaty-based investor-State dispute settlement that make it different from general commercial arbitration. A related element that is also reflected in the decisions and seemingly influential is whether and to what extent the authority reviewing the challenge seeks guidance from what is currently common practice (as opposed to what *should be*).

The question then becomes how to ensure adequate analysis of these conflict-of-interest issues so that a clear and consistent solution emerges. This paper suggests some strategies. One is to improve the arbitration rules through formal amendment or interpretation. Another is to better elaborate and increase reliance on relevant professional guidelines such as the International Bar Association's (*IBA Guidelines on Conflicts of Interest* ("*IBA Guidelines*") and the *Burgh House Principles on the Independence of the International Judiciary* ("*Burgh House Principles*"). And a final approach considered in this paper is for States to address the issue by including express provisions on it in their IIAs or issuing relevant interpretative statements. Each of these is complementary; one neither displaces nor generally removes the need for the others. It is hoped that these efforts can produce an approach to the dual role issue that is better reasoned and that will not vary based on who is actually responsible for deciding the challenges.

Structurally, this paper proceeds by first examining the texts of the rules commonly used in investor-State arbitrations, the relevant decisions that have interpreted and applied those rules, and the standards that have emerged. Based on that analysis, this paper concludes that the standards for arbitrator independence and impartiality under each set of rules are effectively the same. Second, the paper examines some of the decisions evaluating the dual role issue. It notes important factual elements behind the challenges, examines the reasons offered for the decisions, and highlights problematic implications of the diverging outcomes. Third, the paper turns to examining the *IBA Guidelines* and *Burgh House Principles*. It describes the guidance these texts provide, and explains how they currently do and can further apply in the specific context of the dual role issue. Fourth, the paper discusses how analogous processes of adjudication have addressed similar issues. Finally, the paper discusses the options for implementing improved and consistent responses to the problems created by arbitrators in investor-State disputes serving as counsel in those same matters.

2.0 Arbitration Rules on Arbitrator Independence and Impartiality

One feature of arbitration that distinguishes it from traditional judicial resolution of disputes is that the parties generally have latitude to choose the procedural rules that will govern the resolution of their dispute. They may decide to craft their own set of rules, but frequently elect to use one of the several sets of rules that have been drafted to govern arbitrations. These rules include rules developed by arbitral facilities, such as the arbitration rules developed by the World Bank's ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or the International Chamber of Commerce's (ICC) arbitration facility. They also include ad hoc arbitration rules, including the rules developed by UNCITRAL.

Parties may elect in contractual arbitration clauses to use a particular set of rules in the event of a dispute. States that include in their investment treaties or in their national laws general offers to arbitrate disputes with foreign investors also either specify the rules that will govern the disputes, or offer investors the option to choose the applicable set of rules when initiating their claims.

This paper focuses on four sets of rules relevant for investor-State arbitration: ICSID, UNCITRAL, ICC and SCC. These rules share many common features relevant to arbitrator ethics. More specifically, each contains provisions:

- on arbitrators' qualifications, including explicit requirements that arbitrators be independent or impartial;
- requiring arbitrators to make certain disclosures regarding their independence or impartiality;
- governing the arbitrators' conduct of the arbitration;
- addressing standards and procedures for parties to challenge arbitrators based on a real or apparent lack of independence or impartiality;
- requiring parties to raise their objections to the arbitrators' qualifications or conduct in a timely manner; and
- declaring that decisions and awards issued by tribunals or other institutional bodies are final and binding.

This section of the paper examines those rules most relevant to the issue of arbitrator independence and impartiality in investor-State arbitration. While none of the rules specify which situations might give rise to a loss of independence and none of the rules make any reference to the dual role issue,

they are nevertheless of singular importance for this potential conflict, because they form the key basis on which challenges are decided.¹³

2.1 The UNCITRAL Arbitration Rules¹⁴

Article 9 of the 1976 UNCITRAL Arbitration Rules states:

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to *justifiable doubts as to his impartiality or independence*. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances. (Emphasis added.)

Article 11 of the 2010 UNCITRAL Arbitration Rules similarly states:

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

If an appointing authority is making the appointment, “the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.”¹⁵

In respect of a challenge to an arbitrator appointed under the UNCITRAL Arbitration Rules: “Any arbitrator may be challenged if circumstances exist that give rise to *justifiable doubts as to the arbitrator’s impartiality or independence*”¹⁶ (emphasis added).

¹³ It should also be remembered that the arbitration rules are part of a wider framework. There are a number of additional rules and guidelines that could be relevant in a given case, including domestic law at the seat of the arbitration or where enforcement of an award is sought, international treaties governing recognition and enforcement of arbitral awards, such as the New York Convention, the ICSID Convention, and professional guidelines and codes of conduct.

¹⁴ The UNCITRAL Arbitration Rules were originally adopted in 1976 and were revised for the first time 2010. Because it is unclear which set of rules will apply to a particular dispute, this paper includes relevant language from both versions. If referring to both versions equally, this paper will refer generally to the “UNCITRAL Arbitration Rules;” otherwise, it will reference the specific version.

¹⁵ Art. 6, UNCITRAL Arbitration Rules.

¹⁶ Art. 10(1), 1976 UNCITRAL Arbitration Rules; Art. 12(1), 2010 UNCITRAL Arbitration Rules: “A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.” Art. 10(3), UNCITRAL Arbitration Rules; Art. 12(2) 2010 UNCITRAL Arbitration Rules.

Under the UNCITRAL Rules, an appointing authority chosen by the parties or the Permanent Court of Arbitration (PCA) will decide on the challenge.¹⁷ Several publicly available challenge decisions help shed light on how appointing authorities have interpreted and applied the “justifiable doubts” standard. In a relatively recent decision in a NAFTA dispute, *Gallo v. Canada* (2009),¹⁸ for example, the ICSID Deputy Secretary-General, acting as the appointing authority in the case, stated that “under the UNCITRAL Arbitration Rules doubts are justifiable [...] if they give rise to an apprehension of bias that is, to the *objective observer, reasonable*” (emphasis added).¹⁹ That decision and others also indicate that non-binding authorities such as the *IBA Guidelines* (which are discussed further below) that describe and proscribe certain problematic relationships can provide guidance to determine whether doubts are objectively reasonable.²⁰

Appointing authorities have sustained challenges while noting that they themselves do not doubt the challenged arbitrator’s independence or impartiality.²¹ Whether these objective third-party evaluators harbour doubts is not the test. Rather, it is whether they recognize that circumstances can create a reasonable *perception* of a lack of impartiality or independence.²² Appointing authorities applying the UNCITRAL Rules have noted that disqualification may be warranted for “prudential” concerns in order to help ensure the arbitration’s perceived legitimacy.²³

2.2 The ICSID Convention and its Arbitration Rules

The ICSID Convention provides for the establishment of a list (called a “Panel”) of suitably qualified persons from which disputing parties may (but are not required to) select from in choosing an arbitrator to appoint in their dispute.²⁴

Article 14(1) of the ICSID Convention requires that persons designated to serve on the Panels shall be:

persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise *independent judgment*.²⁵ (Emphasis added.)

¹⁷ Art. 12, 1976 UNCITRAL Arbitration Rules; Art. 13, 2010 UNCITRAL Arbitration Rules.

¹⁸ *Gallo v. Canada* (2009).

¹⁹ *Ibid.*, citing Challenge Decision of 11 January 1995, XXII *Yearbook Commercial Arbitration* 227, 234 (1997).

²⁰ *ICS v. Argentina* (2009), para. 2; *Gallo v. Canada* (2009), para. 33.

²¹ *ICS v. Argentina* (2009), para. 5; *see also Gallo v. Canada* (2009), para. 33: rejecting the challenge but directing the arbitrator to decide whether to continue in his role as arbitrator or counsel.

²² *Gallo v. Canada* (2009), paras. 32–33.

²³ *ICS v. Argentina* (2009), para. 5.

²⁴ Arts. 3, 12–13, ICSID Convention.

²⁵ Art. 14(1), ICSID Convention.

Arbitrators appointed from outside the Panel of Arbitrators must possess the prescribed qualities of arbitrators on the Panel.²⁶

Under Article 57 of the ICSID Convention, a party may propose to a Tribunal the disqualification of any of its members on account of “any fact indicating a *manifest* lack of the qualities required by paragraph (1) of Article 14”²⁷ (emphasis added). Article 58 of the ICSID Convention states that an arbitrator *must* be disqualified if the proposal is well-founded.

Article 6(2) of the ICSID Arbitration Rules require that, before or at the first session of the Tribunal, each arbitrator shall sign a declaration stating:²⁸

To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____.

The declaration must also, inter alia, state:²⁹

I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

[...]

Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) *any other circumstance that might cause my reliability for independent judgment to be questioned by a party*. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding. (Emphasis added.)

According to the recent annulment decision in *Vivendi v. Argentina* (2010), an arbitrator’s lack of knowledge about a potential conflict does not excuse the arbitrator from his or her duties of disclosure. Rather, arbitrators have affirmative duties to investigate the existence of problematic

²⁶ Art. 40, ICSID Convention.

²⁷ Art. 57, ICSID Convention.

²⁸ Rule 6(2), ICSID Arbitration Rules.

²⁹ Rule 6(2), ICSID Arbitration Rules.

relationships throughout the proceedings, and to disclose potential conflicts they discover to the parties.³⁰

Language used in the ICSID Convention and Arbitration Rules regarding arbitrator qualifications and challenges differs in two notable ways from language in other rules, such as the ICSID Arbitration Rules. First, Articles 14 and 40 of the ICSID Convention specifically require arbitrators to be relied upon to “exercise *independent judgment*” (emphasis added);³¹ and Article 57 allows arbitrators to be challenged for lack of that quality. Yet nothing in the ICSID Convention or the ICSID Arbitration Rules specifically authorizes arbitrators to be challenged for lack of *impartiality*. Nevertheless, ICSID decisions on arbitrator challenges have reasoned that independence and impartiality are two key qualifications of arbitrators, and that a manifest lack of either will be grounds for an Article 57 challenge.³²

Second, Article 57 of the ICSID Convention permits disqualification to be proposed based on “any fact indicating a manifest lack” of arbitrator qualifications, while other rules, including the UNCITRAL Arbitration Rules, permit challenges for “justifiable doubts” as to the arbitrator’s impartiality and independence.³³ The ICSID “manifest lack” test, like the UNCITRAL “justifiable doubts” test, is said to be based on an objective standard, rather than a “subjective, self-judging standard” viewed from the eyes of the challenging party.³⁴ Yet the ICSID standard has also been described by commentators as being a more difficult standard to meet than the UNCITRAL “justifiable doubts” test.³⁵ And indeed, although the language of Article 57 states that disqualification may be proposed based on “*any fact indicating a manifest lack*” of independence and impartiality, applications of that standard in challenge decisions tend to focus on the words that would raise the bar for successful challenges, that is to say, “*manifest lack*,” while paying little attention to the words

³⁰ *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Application for Annulment, 10 August 2010, paras. 204–205, 222. (“*Vivendi v. Argentina 2010*”)

³¹ Art. 14(1), ICSID Convention.

³² See, for example, *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Challenge to the President of the Committee, 24 September 2001, para. 14; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, para. 28; *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 March 2010, para. 35.

³³ See, for example, Rule 10, 1976 UNCITRAL Arbitration Rule.

³⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Challenge to the President of the Committee, 24 September 2001, para. 25.

³⁵ See, for example, Schreuer (2001), *The ICSID Convention: A commentary*, Cambridge: Cambridge University Press, p. 1200, para. 16; Sheppard, A. (2009) Arbitrator independence in ICSID arbitration. C. Binder, U. Kriebaum, A. Reinisch & S. Wittich (Eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford: Oxford University Press, p. 132.

that might lower it, that is to say, “*any fact indicating*.” Consequently, the standard for arbitrator challenges in the ICSID context appears to be a high threshold to satisfy in practice.³⁶

Those deciding challenges in more than one case, for instance, have opined that the ICSID Convention “places a heavy burden of proof [...] 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 judgment.”³⁷ Decisions have similarly stated that a “manifest lack” of impartiality or independence requires more than mere speculation or inference of partiality.³⁸ Relationships giving rise to the challenge must be more than trivial and *de minimis*.³⁹ “The circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality.”⁴⁰

Some other language in ICSID challenge decisions, however, suggests that the ICSID “manifest lack” standard may more closely track the UNCITRAL “justifiable doubts” standard⁴¹ and, like the UNCITRAL standard, derive its meaning to some extent from guidance offered by the *IBA Guidelines* and other similar sources.⁴² In *Vivendi v. Argentina* (2001), for example, the arbitrators reviewing a challenge to the president of the annulment committee noted that an early application of the “manifest lack” standard in *Amco Asia Corp. v. Indonesia* (1982) had been subsequently strongly criticized for being too lax on the issue of arbitrator conflicts of interests. The *Vivendi v. Argentina* (2001) challenge decision then appeared to adopt an approach entailing greater scrutiny of arbitrator independence and impartiality by equating a “manifest lack” of independence or impartiality under the ICSID Convention with the “appearance of bias” under the IBA Code of Ethics.⁴³ The *Vivendi v.*

³⁶ See also, *Participaciones Inversiones Portuarias SARL v. Gabonese Republic* (ICSID Case No. ARB/08/17), Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009.

³⁷ *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A* (ICSID Case No. ARB/03/17), Second Decision on Disqualification, 12 May 2008, para. 29 (emphasis added); *Amco Asia Corp. v. Indonesia* (ICSID Case ARB/81/1), Decision on the Proposal to Disqualify an Arbitrator, 24 June 1982.

³⁸ See, for example, Sheppard, A. (2009) Arbitrator independence in ICSID arbitration. C. Binder, U. Kriebaum, A. Reinisch & S. Wittich (Eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford: Oxford University Press, p.137 (discussing cases).

³⁹ *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Challenge Decision Regarding Professor Gabrielle Kaufman, 12 August 2003, paras. 132–33 (referred to in-text as *EDF v. Argentina*).

⁴⁰ *Compañía de Aguas del Aconquija & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Challenge to the President of the Committee, 3 October 2001, para. 25. (“*Vivendi 2001*”)

⁴¹ See, for example, *EDF v. Argentina* (2003), para. 64: “The relevant quality that has been put into question relates to independence. We must consider whether Professor Kaufmann-Kohler ‘may be relied upon to exercise independent judgment.’ If *reasonable doubts* exist on this matter, she should cease to serve in these proceedings” (emphasis added).

⁴² See, for example, *Hrvatska Elektroprivreda, d.d v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Tribunal’s Ruling Regarding the Participation of David Milton QC in Further Stages of the Proceedings of 6 May 2008.

⁴³ *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Challenge to the President of the Annulment Committee, 3 October 2001, paras. 20, 22: “[A] question arises with respect to the term ‘manifest lack of the qualities required’ in Article 57 of the Convention. This might be thought to set a lower standard for disqualification than the standard laid down, for example, in Rule 3.2 of the IBA Code of Ethics,

Argentina (2001) challenge decision further stated that “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” (emphasis added).⁴⁴ Similarly, in *EDF v. Argentina* (2003), the two arbitrators deciding on the challenge against the third tribunal member stated that they must consider whether the challenged arbitrator “‘may be relied upon to exercise independent judgment.’ If *reasonable doubts exist* on this matter, she should cease to serve in these proceedings” (emphasis added).⁴⁵

Notably, arbitrators in ICSID cases responsible for evaluating challenges of their fellow arbitrators have also looked to guidance from general practice in the world of international commercial arbitration. In *SGS v. Pakistan* (2002), for example, the two members of the tribunal who rejected Pakistan’s challenge of the third arbitrator did so on the reasoning that the complained-of relationship was a “widely accepted” consequence of the fact that the “community of active arbitrators and the community of active litigators” were “small” and “not infrequently” overlapping.⁴⁶ In reaching their decision, the arbitrators apparently did not consider it important to distinguish between what was accepted and acceptable practice in general international commercial arbitration, on the one hand, and what might be adequate and acceptable practice in the specific context of treaty-based investor State dispute settlement on the other.⁴⁷

2.3 The SCC Arbitration Rules

Under the SCC Arbitration Rules, “every arbitrator must be impartial and independent.”⁴⁸ Before being appointed as arbitrator, a person shall disclose any circumstances that may give rise to justifiable doubts as to his/her impartiality or independence. If the person is appointed as arbitrator,

which refers to an ‘appearance of bias.’ The term ‘manifest’ might imply that there could be circumstances which, though they might appear to a reasonable observer to create an appearance of lack of independence or bias, do not do so manifestly. In such a case, the arbitrator might be heard to say that, while he might be biased, he was not manifestly biased and that he would therefore continue to sit. As will appear, in light of the object and purpose of Article 57 we do not think this would be a correct interpretation.” (para. 20).

⁴⁴ *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (2001), para. 25; see also *Alpha Projekt Holding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 March 2010. In this decision on the respondent’s challenge to one member of the arbitral tribunal, the two remaining members of the tribunal in this case stated the following: “To the extent that the ICSID Convention or the Arbitration Rules may be silent or ambiguous on a given point, the Two Other Members find guidance in the preparatory papers, other decisions made under the ICSID Convention and decisions made pursuant to other international arbitral rules.” (para. 33).

⁴⁵ *EDF v. Argentina* (2003), para. 64.

⁴⁶ *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, para. 404 (referred to in-text as “*SGS v. Pakistan*”).

⁴⁷ When evaluating Ghana’s challenge to an arbitrator in *Ghana v. Telekom Malaysia Berhad* based on the arbitrator’s role as counsel in another case raising similar issues, the District Court of the Hague similarly cited commonly accepted practice in international commercial arbitration as a reason for refusing to disqualify the arbitrator. *Republic of Ghana v. Telekom Malaysia Berhad*, HA/RK2004.667, Decision of the District Court of The Hague, 5 November 2004.

⁴⁸ Article 14(1), SCC Arbitration Rules.

he/she shall submit to the Secretariat a signed statement of impartiality and independence “disclosing any circumstances which may give rise to justifiable doubts as to that person’s impartiality or independence.”⁴⁹ The Secretariat shall send a copy of the statement of impartiality and independence to the parties and the other arbitrators.⁵⁰

In an arbitration under the SCC Arbitration Rules, a party may challenge any arbitrator if “circumstances exist which give rise to *justifiable doubts as to the arbitrator’s impartiality or independence* or if he/she does not possess qualifications agreed by the parties” (emphasis added)⁵¹ This test is substantively identical to the test set forth in the UNCITRAL Arbitration Rules. Under the SCC Arbitration Rules, the SCC Board of Directors decides challenges to arbitrators.⁵²

As general rule, the SCC Board of Directors does not provide reasons for its decisions. Consequently, it is difficult to know how the board interprets and applies SCC Rules in arbitrator challenges.⁵³ The Arbitration Institute of the SCC, however, has published a report summarizing six challenge decisions issued (out of 22 challenges pursued) between 2005 and 2007.⁵⁴ The introductory material to that report states that “as the SCC promotes a homogenous international standard it uses the International Bar Association’s guidelines [...] as a tool when judging conflicts of interest in international arbitration.”⁵⁵ After providing the case summaries, which reflect the SCC Board’s approach of referring to the *IBA Guidelines*, the report concludes with the following assessment of arbitrator challenges before the SCC:

The number of challenges, in relation to the caseload, has been decreasing. A part of the reason for fewer challenges in the latest years appear to be that there were fewer challenges made which were aimed at obstructing the proceedings [...].

It can further be noted that when it comes to the most common ground for a challenge, namely that the arbitrator or the arbitrator’s law firm have had previous contact with one of the parties, the decisions by the SCC reflect a rather strict view, strongly influenced by the standards in the *IBA Guidelines*. If an arbitrator or the arbitrator’s law firm had previous contact with one of the parties within the past three years and the arbitrator is challenged, the SCC tends to sustain the challenge and dismiss the arbitrator, even if no actual bias has been shown.⁵⁶

⁴⁹ Art. 14(2), SCC Arbitration Rules.

⁵⁰ Art. 14(2), SCC Arbitration Rules.

⁵¹ Art. 15(1), SCC Arbitration Rules.

⁵² Art. 15(4), SCC Arbitration Rules.

⁵³ Jung, H. (2008). SCC Practice: Challenges to arbitrators: SCC Board decisions 2005–2007, *Stockholm International Arbitration Review*, p. 4.

⁵⁴ *Ibid.*, pp. 1, 4.

⁵⁵ *Ibid.*, pp. 2.

⁵⁶ *Ibid.*, pp. 17–18.

Based on the SCC Board’s principle of promoting homogeneity in the law, and given the similarity in language between the UNCITRAL and SCC Rules, the SCC Board may also look to publicly available decisions under UNCITRAL for guidance when deciding on challenges. The report, however, does not expressly reflect such practice.

2.4 The ICC Arbitration Rules

The ICC Arbitration Rules require that “every arbitrator must be and remain *independent* of the parties involved in the arbitration” (emphasis added).⁵⁷

Before appointment or confirmation, a prospective arbitrator shall sign a statement of independence and disclose in writing to the ICC 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*” (emphasis added).⁵⁸ The ICC Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.⁵⁹ An arbitrator shall immediately disclose in writing to the ICC Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration.⁶⁰

According to Article 11(1), a disputing party may challenge an arbitrator for a “*lack of independence or otherwise*” (emphasis added).⁶¹ In contrast to UNCITRAL Rules and SCC Rules, but similar to the ICSID Rules, ICC Rules do not specifically state that a lack of impartiality is a permissible ground for challenging an arbitrator. However, a lack of impartiality may support a challenge for lack of *independence or otherwise*.

Pursuant to the ICC Rules, the ICC Court decides the merits of challenges to arbitrators, but does not provide reasons for its decisions on those challenges.⁶²

Although the ICC’s rules on disclosure are *subjective*, requiring arbitrators to disclose information that may cause their independence to be called into question in the eyes of the parties, the ICC, like the authorities responsible for applying the ICSID, UNCITRAL and SCC Rules, applies an *objective* test when determining when evaluating challenges to arbitrators.⁶³

⁵⁷ Art. 7(1), ICC Arbitration Rules.

⁵⁸ Art. 7(2), ICC Arbitration Rules.

⁵⁹ Art. 7(2), ICC Arbitration Rules.

⁶⁰ Art. 7(3), ICC Arbitration Rules.

⁶¹ Art. 11(1), ICC Arbitration Rules.

⁶² Art. 7, ICC Arbitration Rules.

⁶³ Jung, H. (2008). *The standard of independence and impartiality for arbitrators in international arbitration: A comparative study between the standards of the SCC, the ICC, the LCIA, and the AAA*, Master’s Thesis, Faculty of Law, Uppsala University, p.21.

Analysis of ICC challenge decisions from July 1 to August 1, 2009 by the ICC indicates that the ICC Court commonly refers to the *IBA Guidelines* when evaluating challenges.⁶⁴ Yet, because the ICC neither publishes nor provides reasons for its challenge decisions, it is difficult to discern much additional information regarding the ICC Court's interpretation and application of its rules' challenge standard.

⁶⁴ IBA Conflicts of Interest Subcommittee. (2010). The IBA guidelines on conflicts of interest in international arbitration: The first five years 2004–2009, *Dispute Resolution Journal* 4, 28–29.

3.0 Decisions Regarding the Dual Arbitrator/Counsel

The propriety of arbitrators serving as counsel, and counsel serving as arbitrators, in investor-State arbitration is an issue that is gaining increased attention by disputing parties, their representatives, arbitral institutions, arbitrators and reviewing courts. In a number of cases, parties have challenged arbitrators based on their dual roles as purportedly impartial and independent decision-makers, and partisan advocates. Parties have also protested against their opponents' use of decisions issued by arbitrators who contemporaneously act as counsel in investor-State disputes. And in a more recent development, some parties are even challenging opposing parties' counsel due to counsel's relationship with an arbitrator.

The fact patterns are thus diverse, and the decisions are scattered. To date, the decisions on this issue within the arbitration system and by reviewing courts have failed to produce clear standards or consistent outcomes. Some recognize the threat that the dual-role issue can pose to the legitimacy of an arbitral proceeding (and awards rendered under it), and respond by either sustaining challenges, or directing the challenged arbitrator to resign from his or her role as arbitrator, or as counsel. Other decisions, in contrast, appear to view the dual-role issue as an acceptable and commonplace aspect of the practice of international commercial law. Based on the decisions that are publicly available, determining factors in the decisions seem to be the extent to which the authority reviewing the challenge unquestionably accepts the status quo overlap between arbitrators and counsel, and whether it recognizes the distinction between general commercial arbitration and investor-State arbitration. Another notable pattern in the decisions—though of uncertain cause-and-effect relationship—is that arbitral decisions rejecting challenges seem less frequently published than those sustaining them.

3.1 Service as an Arbitrator and Counsel For or Against One of the Parties in Investor-State or other Matters

Conflicts of interests arising from the dual role issue can manifest themselves through a variety of fact patterns; and exploring them all is, tellingly, beyond the scope of this paper. Thus, this paper focuses on two categories: (1) an arbitrator's service as counsel for or against one of the parties in investor-State or other matters; and (2) an arbitrator's service as counsel in investor-State matters. The first category can involve conflicts of interest arising from the arbitrator's relationship with the parties and with the issues in the case. The second category, which also can include cases from the first category, primarily involves problems created by issue conflicts.

Beginning with the first category, in 2009, in the ICSID dispute *S&T Oil v. Romania* (2009), Romania challenged the arbitrator on the ground that the arbitrator’s law firm was concurrently representing a foreign investor in a separate dispute against Romania. The arbitrator withdrew, releasing the tribunal from the duty of resolving the challenge.⁶⁵

That same year, similar issues arose in *ICS v. Argentina* (2009).⁶⁶ In this UNCITRAL dispute, Argentina challenged the claimant-appointed arbitrator, Mr. Alexandrov, on the ground that his and his law firm’s concurrent representation of Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. in a separate, long-running case against Argentina gave rise to justifiable doubts as to the arbitrator’s independence and impartiality.⁶⁷ In contrast to *S & T Oil*, the arbitrator in *ICS v. Argentina* (2009) did not voluntarily resign in response to Argentina’s challenge.

The appointing authority, Jernej Sekolec, upheld Argentina’s challenge. Key to Sekolec’s decision was the fact that Alexandrov and his firm were concurrently in a position adverse towards Argentina, a situation to “be avoided, except where circumstances exist that eliminate any justifiable doubts as to the arbitrator’s impartiality or independence.”⁶⁸ In further support of his decision, Sekolec questioned the statement made by Alexandrov’s in his declaration of independence and impartiality under ICSID Arbitration Rule 6 and ICS’s arguments in response to the challenge that the *Vivendi* and *ICS* cases were “unrelated.” Sekolec also clarified that even if the *Vivendi* case were to soon conclude, that would not eliminate the “justifiable doubts” and cure the conflict.

Sekolec, like the parties arguing the merits of the challenge, further referred to the *IBA Guidelines* to support his decision. Sekolec noted that two examples of potential conflicts of interest on the Orange list of the *IBA Guidelines* were relevant to the case. As explained further in Section 4 of this paper, the Orange list is a non-exhaustive list of situations that the drafters of the *IBA Guidelines* categorized as giving rise to *justifiable doubts* regarding an arbitrator’s independence and impartiality, as judged from the *eyes of the parties*. In contrast, the Red list contains those situations deemed to give rise to justifiable doubts as to the arbitrator’s independence and impartiality from the eyes of an objective observer—a more difficult standard to meet. Sekolec explained that one Orange list situation present in *ICS* was that in which “an arbitrator’s law firm is currently acting adverse to one of the parties”; a second was where “[an] arbitrator has within the past three years served as counsel against one of the parties in an unrelated matter.”⁶⁹ Sekolec then concluded that held that “given that the facts underlying Mr. Alexandrov’s disclosure [were] reflected in both [Orange list] scenarios,” the

⁶⁵ *S&T Oil Equipment and Machinery Ltd v. Romania*, Investment Arbitration Reporter, 11 May 2009.

⁶⁶ *ICS Inspection and Control Services Limited v. Argentine Republic* (UNCITRAL), Decision on Challenge to Mr. Stanimir A. Alexandrov, 17 December 2009

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, p. 4.

⁶⁹ *Ibid.*, p. 4.

“conflict in question [was] sufficiently serious to give rise to objectively justifiable doubts as to Mr. Alexandrov’s impartiality and independence.”⁷⁰

According to Sekolec’s analysis, the specific facts of the case, which included the similarities between the *ICS* and *Vivendi* (2001) disputes and the confluence of two Orange list scenarios, elevated the conflict to one that gave rise to *objectively* justifiable doubts warranting disqualification under the UNCITRAL Arbitration Rules. This decision therefore illustrates how appointing authorities or others evaluating challenges can use the *IBA Guidelines* to inform application of the arbitral rules, and can also take advantage of the flexibility inherent in the guidelines to account for unique aspects of investor-State arbitration, including the repeat occurrence of specific issues. Yet, it also illustrates that, under the current UNCITRAL Arbitration Rules and the *IBA Guidelines*, there is no specific rule automatically putting such situations on the Red list or otherwise requiring disqualification and providing useful ex-ante clarity on the issue.

Another case relating to an arbitrator’s concurrent involvement in a case adverse to the respondent State arose in *Eureko v. Poland* (2006).⁷¹ In this UNCITRAL dispute, the arbitrator, Judge Schwebel, had a close professional relationship with, but was not an attorney of, the law firm, Sidley Austin Brown & Wood (“Sidley Austin”), which was then representing claimant Cargill Corporation in another investor-State dispute against Poland. Although Judge Schwebel was not personally involved in the *Cargill v. Poland* (2008)⁷² dispute, he was working with Sidley Austin as co-counsel in at least two other investor-State disputes (*Vivendi v. Argentina* [2001]⁷³ and a case against Turkey), and maintained an office in the same building as Sidley Austin. Poland argued that these relationships gave rise to objectively justifiable doubts as to Judge Schwebel’s independence and impartiality, and that they violated the principle developed in the case law of the European Court of Human Rights that “justice must not only be done, it must also be seen to be done.”⁷⁴

The Belgian Court of First Instance rejected the challenge. It reasoned that, because Judge Schwebel stated he was not *personally* involved in the Cargill case, and there was no evidence to the contrary, the only fact possibly supporting Poland’s application was that the arbitrator maintained an office in the same building as Sidley Austin. According to the court, that fact was “not sufficient to maintain a suspicion with regard to [the arbitrator’s] independence and impartiality.”⁷⁵ Poland appealed the

⁷⁰ Ibid.

⁷¹ See, for example, *Republic of Poland v. Eureko*, RG 2006/1542/A, 22 December 2006; Sheppard, A. (2009 Arbitrator independence in ICSID arbitration. C. Binder, U. Kriebaum, A. Reinisch & S. Wittich (Eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford: Oxford University Press, p.147.

⁷² *Cargill Incorporated v. Republic of Poland*. New York Southern District Court, 4 September 2008.

⁷³ *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Challenge to the President of the Annulment Committee, 3 October 2001.

⁷⁴ *Republic of Poland v. Eureko*, RG 2006/1542/A, 22 December 2006, p. 4.

⁷⁵ Ibid. p. 5.

court's decision, and also made additional allegations about Judge Schwebel's involvement in *Vivendi v. Argentina* (2001) (discussed further below) to support its challenge. The Belgian Court of Appeals refused to consider the new arguments related to *Vivendi v. Argentina* (2001) on the procedural ground that they had not been raised before the lower court. It also rejected the appeal, stating that "Mr. Schwebel has his own professional integrity which, when he is an arbitrator, can be considered as more important than his sensibility and the goals he pursues as a counsel, which he can share with the members of the firm Sidley Austin."⁷⁶

The appellate court's language suggests that it based its decision on its faith in Judge Schwebel's integrity and its belief that separating the two roles—arbitrator and counsel—was merely a matter of will. Such considerations, however, do not seem to address whether the challenged relationships created either an appearance of impropriety, or objectively justifiable doubts as to the arbitrator's independence or impartiality.

CEMEX v. Venezuela (2009) ("*CEMEX*") is another case in which a law firm associated with one of the arbitrators was concurrently pursuing a separate claim against the same respondent host State. In October 2009 the respondent in *CEMEX*, an ICSID dispute, challenged the arbitrator, von Mehren, on the ground that he was a retired partner of, but maintained an office and secretariat services at, Debevoise & Plimpton LLP ("*Debevoise*"), which was concurrently representing claimants in *Holcim v. Venezuela* (2009) ("*Holcim*"), another investor-State action against Venezuela arising out of the same general set of facts. The other two members of the *CEMEX* tribunal rejected the challenge on the ground that it was untimely and did not examine the merits.

The tribunal noted that von Mehren had given the *CEMEX* parties his curriculum vitae in February 2009, which listed a Debevoise office and telephone number as his contact information. According to the tribunal, when ICSID registered the *Holcim* dispute in April 2009, Venezuela had at hand all information necessary to put it on notice of the existence of any conflicts arising from the relationship between von Mehren, Debevoise, and Debevoise's work adverse to Venezuela in *Holcim*. Thus, for the purpose of assessing the timeliness of the challenge, the clock began running in April 2009. Venezuela had argued that it had not made any connection between Mr. von Mehren and Debevoise until the *CEMEX* tribunal was constituted in July 2009, and even at that time, was not aware of the full extent of the relationship between the arbitrator and his former law firm. Venezuela further explained that in September 2009 it asked for clarification on the relationship between von Mehren and Debevoise and the practices used for maintaining the confidentiality of the *Holcim* and *CEMEX* cases, and promptly thereafter filed the challenge. These arguments failed to persuade the tribunal.

⁷⁶ Verbruggen, C. (2008, February). Belgian court confirms independence of Judge Schwebel, *International Arbitration Newsletter*.

Notably, prior to Venezuela's September 2009 requests for information from von Mehren regarding his relationship with Debevoise, von Mehren had not disclosed to the *CEMEX* parties any information regarding the *Holcim* case, Debevoise's role as counsel, the specifics regarding his continued relationship with Debevoise, or the potential conflicts that might arise based on those facts. And in its analysis of the case, the tribunal did not address whether von Mehren should have investigated and promptly disclosed such information—a task which large modern law firms, accustomed to dealing with often complicated rules on conflicts of interests in numerous jurisdictions, should be relatively well equipped to handle. Rather, the *CEMEX* tribunal effectively placed a difficult burden on the parties to monitor the activities of the arbitrators and the persons and entities related to them, and imposed a heavy penalty for failure diligently to perform that role.

This approach to disclosure contrasts with that taken by the appointing authority in *Gallo v. Canada* (2009),⁷⁷ a NAFTA decision that presents yet another set of facts where the arbitrator's concurrent service as counsel in investment matters raised objective doubts as to the arbitrator's independence and impartiality. In that case, the claimant challenged the appointment of J. Christopher Thomas as arbitrator after learning that Thomas and his law firm were simultaneously acting as counsel to another NAFTA government (Mexico) on investment treaty issues. As a NAFTA Party, Mexico could be interested in the tribunal's interpretation and application of the treaty, and would, under NAFTA Article 1128, also be entitled to make submissions to the tribunal regarding the dispute.

The respondent first argued that the claimant's challenge was untimely and should be rejected because, in light of the law firm address used by the arbitrator for communications, it was apparent he was still acting as counsel. The appointing authority, the Deputy Secretary-General of ICSID,⁷⁸ rejected that assertion. Considering factors ignored by the *CEMEX* tribunal in its holding on timeliness, the appointing authority in *Gallo v. Canada* (2009) recognized that “allowing the Respondent to invoke evidence of constructive knowledge (even if reasonably proved) would relieve the arbitrator of the continuing duty to disclose. This would unfairly place the burden on the Claimant to seek elsewhere the notice it should have received from the arbitrator.”⁷⁹ The decision concluded that for the purposes of assessing timeliness, the clock started running on the date on that the arbitrator informed the parties of his advisory work that raised the conflict issues. Based on that date, the respondent had filed the challenge in a timely manner.

Turning to the merits of the challenge, the appointing authority noted that the applicable test was Article 10(1) of the UNCITRAL Arbitration Rules, which provides that an “arbitrator may be

⁷⁷ *Gallo v. Canada* (2009).

⁷⁸ Under the UNCITRAL Rules, arbitrator challenges are decided by the appointing authority and NAFTA provides that the ICSID Secretary-General shall act as appointing authority.

⁷⁹ *Gallo v. Canada* (2009), para. 24.

challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."⁸⁰ The Deputy Secretary-General then stated that Mr. Thomas's concurrent representation of Mexico was "problematic" in that it created a situation in which "the arbitrator could be perceived as attentive to" and his judgment "impaired by the potential interest of the advised State Party in the proceedings." The appointing authority further stated that if Mexico formally intervened in the dispute as permitted under NAFTA, "this would *necessarily* lead to the reconstitution of the tribunal."⁸¹

Despite recognizing those problems, the appointing authority rejected the claimant's proposal for unqualified disqualification of the arbitrator. The decision's treatment of the matter, however, did not stop with that rejection. The appointing authority continued to reason that, because Mexico had the immanent right to participate in the case, an apparent conflict of interest was perceptible.⁸² Applying General Standard 2(c) of the *IBA Guidelines*, the Deputy Secretary-General held that, from the point of view of a "reasonable and informed third party," there would be justifiable doubts about Mr. Thomas's impartiality and independence as an arbitrator if he were to continue his legal advisory services to Mexico while the dispute was pending.⁸³ The appointing authority thus concluded that Mr. Thomas had to either resign his role as arbitrator or "discontinue his advisory services to Mexico for the remainder of the arbitration."⁸⁴

Although clearly recognizing the conflicts created by the dual role issue, certain aspects of the *Gallo v. Canada* (2009),⁸⁵ challenge decision may take too rosy of a view of the issue and consequently could, to use the words of Paulsson, exacerbate the current problem of the "extreme cases remain[ing] unknown" with "improper behaviour [...] shrouded in urbane subterfuge and hypocrisy."⁸⁶ First, by emphasizing that the key trigger that would require Thomas's disqualification would be a formal submission by Mexico to the tribunal, the decision could have the unintended and undesirable effect of encouraging less formal "communications" from clients to their attorneys regarding the attorneys' arbitration work. Further, in a case such as this where the attorney and client had a long-standing relationship relating to investor-State issues, requiring the arbitrator temporarily to discontinue his services appears an incomplete response. In an approach prompting comparisons to the appellate decision in *Eureka v. Poland* (2006), the Deputy Secretary-General perhaps adopted his solution based on his and the parties' statements that they personally did not believe Thomas was *actually* biased. The test of independence and impartiality, however, is judged from the perspective of

⁸⁰ Art. 10(1), UNCITRAL Arbitration Rules.

⁸¹ *Gallo v. Canada* (2009), para. 33.

⁸² *Ibid.*, para. 35.

⁸³ *Ibid.*, para. 36.

⁸⁴ *Ibid.*, para. 36.

⁸⁵ *Gallo v. Canada* (2009).

⁸⁶ Paulsson, J. (2010, April 29). *Moral hazard in international dispute resolution*. Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, p. 6.

an objective third-party observer of the facts and circumstances and, as the Deputy Secretary-General noted, also takes into account appearances. Applying those standards, it is questionable that an objective observer would believe that a temporary suspension of a long-term attorney-client relationship would be sufficient to resolve the objectively justifiable doubts that the Deputy Secretary-General determined had been raised.

Another noteworthy aspect of the *Gallo v. Canada* (2009) decision is that, although the Deputy Secretary-General clearly took the view that the concurrent arbitrator/counsel role was not appropriate on the facts of this case, he repeated the refrain that performing both functions is, today, a generally accepted practice:

As things stand today, and irrespective of the advisability of such a situation, one may as a general matter be simultaneously an arbitrator in one case and a counsel in another. There is no need to disavow the possibility of assuming either role.⁸⁷

IISD subsequently sought to clarify this statement with ICSID's Secretary-General, asking "whether this [was] the legal view of ICSID as a general matter on conflicts of interest for persons acting as counsel and arbitrator at the same time in different cases, or whether ICSID has taken any other formal or informal position on this issue."⁸⁸ In her response, the ICSID Secretary-General responded that ICSID had not taken a stand on this point:

Every decision issued by ICSID with respect to alleged conflicts of interest is based on the particular facts of the case, and the written decision speaks for itself. ICSID has, otherwise, not taken a formal or informal legal view on conflicts of interest generally.⁸⁹

Other cases addressing arbitrators' (or their firms') representation of a party include *Vivendi v. Argentina* (2001),⁹⁰ *Grand River v. United States* (2010),⁹¹ *Glamis Gold v. United States* (2009).⁹² In *Vivendi*, an ICSID case, Argentina challenged the president of the ad hoc annulment committee, Yves Fortier, on the ground that a partner at Fortier's law firm had given advice on tax matters to Vivendi's corporate predecessor. In rejecting Argentina's challenge, the other two members of the annulment committee stated that an arbitrator's professional relationship with a party does not

⁸⁷ *Gallo v. Canada* (2009), para. 29.

⁸⁸ Letter from IISD to Meg Kinnear, ICSID Secretary-General, 15 December 2009.

⁸⁹ Letter from ICSID's Secretary-General to IISD, 16 August 2009.

⁹⁰ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/07/3), Decision on Challenge to the President of the Annulment Committee, 3 October 2001.

⁹¹ *Grand River Enterprises & Ors. v. United States*, discussed in Luttrell, S. (2010). Bias challenges in international commercial arbitration: The need for a 'Real Dangers' test. International Arbitration Law Library Series Set. The Netherlands: Kluwer Law International, p. 232.

⁹² See *Investment Arbitration Reporter*, 9 June 2009.

constitute an automatic basis for disqualification. In *Grand River*, the United States challenged the claimant-appointed arbitrator, James Anaya, under the UNCITRAL Arbitration Rules, due to his concurrent advocacy work against the United States before certain international bodies, including the Inter-American Commission on Human Rights and the United Nations Commission on the Elimination of Racial Discrimination. The appointing authority in the case, the Secretary-General of ICSID informed Anaya that his advocacy work was inconsistent with his role as an arbitrator, and asked whether he would remove himself from those advocacy activities. After Anaya responded that he would cease his advocacy work, but continue to assist law students in relation to theirs, the Secretary-General rejected the challenge.

Representing yet a third outcome, after the United States challenged the arbitrator in *Glamis Gold* on the ground that Anaya was concurrently involved in litigation adverse to the U.S. government, the arbitrator resigned.⁹³

3.2 Concurrent Service as Arbitrator and Counsel in Investor-State Matters

S&T Oil v. Romania (2009), *ICS v. Argentina* (2009) and *CEMEX v. Venezuela* (2009) all involved situations when the arbitrator, his law firm or an otherwise associated law firm were concurrently adversely involved in a treaty-based investor-State arbitration against one of the parties (the respondent State in all cases). The conflict issues those matters raise relate both to the arbitrator's relationship with the parties and to the arbitrator's relationship with the issues in the case. In another set of cases, the conflict is limited to the latter type, relating to the issues in the case. Cases such as *Ghana v. Telekom Malaysia* (2004), *Siemens v. Argentina* (2008),⁹⁴ *Azurix v. Argentina* (2006)⁹⁵ and *Vivendi v. Argentina* (2001) are emblematic of this species of conflict.

In *Ghana v. Telekom Malaysia* (2004),⁹⁶ a dispute under the UNCITRAL Arbitration Rules, Ghana learned that one of the arbitrators, Gaillard, was concurrently serving as counsel in an application to annul the award in *RFCC v. Morocco* (2003),⁹⁷ an award that Ghana sought to rely on in its defence against Telekom Malaysia's claim. Ghana raised its concerns before the tribunal, but Gaillard refused to withdraw. Ghana then formally challenged Gaillard in accordance with the UNCITRAL

⁹³ See *Investment Arbitration Reporter*, 9 June 2009.

⁹⁴ *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8 (Germany/Argentina BIT). Argentina's Response to US Department of State Letter, 2 June 2008 (referred to in-text as "*Siemens v. Argentina*").

⁹⁵ *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12 (United States/Argentina BIT). Award, 14 July 2006 (referred to in-text as "*Azurix v. Argentina*").

⁹⁶ *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667; and Challenge 17/2004, Petition No. HA/RK/2004/778, November 5, 2004.

⁹⁷ *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003 (referred to in-text as "*RFCC v. Morocco*").

Arbitration Rules. The Secretary-General of the PCA, the appointing authority in the dispute, rejected Ghana's challenge. Unfortunately, the reasons for that decision are not publicly available.

Ghana then sought relief before the District Court of The Hague, arguing that “on the basis of the so-called ‘third person test,’” Gaillard, “who in his capacity of counsel opposes a specific notion or approach, cannot be unbiased in his judgment of that same notion or approach in a case in which he acts as arbitrator.”⁹⁸ Ghana further argued that Gaillard would not be able to be (or would not appear to be) unbiased in his evaluation of the implications of the *RFCC v. Morocco* (2003) decision, and invoked the *IBA Guidelines* in support of its position.

In its October 2004 judgment, the District Court of The Hague held that Gaillard's duty to advance his client's position in the *RFCC* annulment proceedings was incompatible with his duty as arbitrator in the *Ghana v. Telekom Malaysia* ((2004) case. In reaching that conclusion, the court applied Dutch law, which, like the UNCITRAL Arbitration Rules that would have governed the challenge before the Secretary-General of the PCA, tests whether “from an objective point of view [...] justified doubts exist with respect to [the arbitrator's] impartiality or independence” and also “take[s] account of outward appearance.”⁹⁹ The court stated:

Account should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Morocco award. This attitude is incompatible with the stance Prof. Gaillard has to take as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the RFCC/Morocco award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Morocco award, account should in any event be taken of the appearance of his not being able to observe 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.¹⁰⁰

In an opinion that notably contrasts with the appellate decision in *Eureka v. Poland* (2006), the court thus recognized the issue conflicts that would arise if the arbitrator were arguing one position as counsel but obligated to remain open and unbiased toward the opposing opinion as an arbitrator. The decision also affirms and applies the general rule that the appearance of bias, not just actual

⁹⁸ *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667, p. 3.

⁹⁹ *Ibid.*, p. 6.

¹⁰⁰ District Court of The Hague, civil law section, provisional measures judge, Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision of 18 October 2004, reprinted at 23 *ASA Bulletin* 186, 192 (2005).

bias, can support a challenge. The court ordered Gaillard to resign as counsel within ten days if he wished to remain as arbitrator in the *Telekom Malaysia* case, which he promptly did.¹⁰¹

Considering the district court's order giving Gaillard the right to choose whether to continue as arbitrator or counsel an incomplete solution, Ghana then filed a second petition in the Dutch courts seeking to have Gaillard removed as arbitrator. A second district court judge rejected the request. In support of its finding, the court looked to general practices in international arbitration. "After all," the court opined, "it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators."¹⁰² The judge did not question whether that was a valid or appropriate practice or whether there was any basis for distinguishing between general commercial arbitration and investor-State arbitration.

Similar issues were raised in two cases involving Argentina as the respondent State, *Azurix v. Argentina* (2006)¹⁰³ and *Siemens v. Argentina* (2008).¹⁰⁴ In both cases, Argentina challenged the appointment of Andres Rigo Sureda, who was serving as chairman of the tribunal in each of the two ICSID proceedings. The facts supporting the challenges were that Rigo Sureda's law firm, Fulbright & Jaworski, was concurrently representing the claimant in an investor-State dispute against Peru. To mix matters further, the same person Fulbright & Jaworski appointed as an arbitrator in its case against Peru was representing the claimants before Rigo Sureda in *Azurix* and *Siemens*. Rigo Sureda reportedly resigned from his position at Fulbright & Jaworski after the challenges were filed.

In *Azurix v. Argentina* (2006), the tribunal rejected the challenge in an unpublished decision. In *Siemens v. Argentina* (2008), after the two remaining tribunal members could not agree on how to resolve the challenge, they referred the matter to the chairman of the ICSID Administrative Council, who then referred it to the PCA. Without providing any reasons for its decision, the PCA, like the *Azurix* tribunal, rejected the challenge.¹⁰⁵

Another dispute involving Argentina, *Vivendi v. Argentina* (2001), involves similar issues as *Telekom Malaysia*, *Azurix* and *Siemens*, but raised from a somewhat different perspective. In *Vivendi v. Argentina* (2001), claimants' counsel, Judge Steven Schwebel, was concurrently serving as an arbitrator in a different investor-State dispute, *Eureko v. Poland* (2006). Judge Schwebel had co-authored an award in *Eureko v. Poland* (2006) that the *Vivendi* claimants then submitted in support of their case against Argentina. Argentina argued to the tribunal that the claimants should not be able

¹⁰¹ Ibid.

¹⁰² Challenge 17/2004, Petition No. HA/RK/2004/778, November 5, 2004.

¹⁰³ *Azurix v. Argentina* (2008)

¹⁰⁴ *Siemens v. Argentina* (2006).

¹⁰⁵ Sheppard, A. (2009), Arbitrator independence in ICSID Arbitration. In C. Binder, U. Kriebaum, A. Reinisch & S. Wittich (Eds.), *International investment law for the 21st century: Essays in honour of Christoph Schreuer*. Oxford: Oxford University Press, p.146.

to rely on the *Eureko v. Poland* (2006) award due to the fact that claimants’ counsel, Judge Schwebel, had been directly involved in drafting it. The *Vivendi* tribunal did not formally decide Argentina’s request. It can nevertheless be inferred that the tribunal rejected Argentina’s petition given that it ultimately cited the *Eureko v. Poland* (2006) award as support for its broad interpretation of states’ treaty obligations to provide investors full protection and security.¹⁰⁶

3.3 Summary

The challenge decisions discussed above show that there might be some general recognition of the problems raised by the more egregious cases such as *ICS v. Argentina* (2009) and *S&T Oil v. Romania* (2000) in which an arbitrator in one investor-State case is concurrently acting as counsel directly adverse to a party to the arbitration in another matter. Even in those cases, however, there was apparently such ex ante uncertainty regarding how the matters would be treated that the arbitrators accepted appointment in the first place or, even after a challenge was brought, declined to withdraw. In another broad category of cases—those in which the conflicts primarily arise from the issues involved in the disputes—a consistent approach is more difficult to find. The *Telekom Malaysia v. Ghana* (2004) challenge decisions may illustrate the current response to the dual role issue in these cases best: from one set of facts, and applying the “objectively justifiable doubts” standard, there resulted a reasonless rejection of the challenge, a qualified acceptance of it, and a final rejection of Ghana’s claim for full relief justified on the ground that the complained-of conduct was, in the eyes of the court, part of normal practice.

In sum, although certain decisions have, in fact, recognized that the dual arbitrator/counsel role is problematic and can warrant a successful challenge, the rules regarding disclosure and disqualification nevertheless remain unclear. Exacerbating the resulting uncertainty and further threatening the proceedings’ legitimacy, many of the decisions are either kept secret or issued without supporting reasons.

Given the lack of consistency that is explained by neither the rules nor the variations between the cases, this next Section 4 examines certain professional association guidelines that, particularly in the case of the *IBA Guidelines*, have been used by authorities to inform their evaluations of challenges, and that may be used to improve treatment of the dual role issue.

¹⁰⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/07/3), Award, 20 August 2007, para. 7.4.17 & n. 339.

4.0 Guidelines on Arbitrator Independence and Impartiality

Various associations of practitioners, government representatives, and academics have developed guidelines relevant to arbitrator conduct in international arbitrations. Among them, the IBA adopted its *Guidelines on Conflicts of Interests in International Arbitration* in May 2004; and a study group of the International Law Association, in association with the academic affiliated Project on International Courts and Tribunals, published its *Burgh House Principles of Judicial Independence in International Law* in 2004.¹⁰⁷

These guidelines vary in scope and detail. The *IBA Guidelines* focus on the ethical obligations of arbitrators, and use a two-part approach to address the issue. The first sets forth General Standards and explanations of those standards; and the second provides examples of a variety of situations that arbitrators might face, and categorizes those situations as Green, Orange, or Red.¹⁰⁸ According to the Working Group that drafted the *IBA Guidelines*, the Green list includes situations that should not be considered to give rise to an appearance of a lack of impartiality or independence; the Orange list enumerates situations that may, in the eyes of the parties, give rise to justifiable doubts as to an arbitrator's impartiality or independence; and the Red list contains situations that give rise to objectively justifiable doubts as to an arbitrator's impartiality and independence.¹⁰⁹ The Red list is further divided into "waivable" and "non-waivable" situations. The Working Group explains that it adopted this approach based on the rationale that it would contribute to improving the clarity and consistent application of standards listed in arbitration rules and laws.

The *Burgh House Principles*, in contrast to the *IBA Guidelines*, were drafted to apply primarily to standing international courts and tribunals. The Principles make clear, however, that they "should also be applied as appropriate to [...] international arbitral proceedings and to other exercises of international judicial power."¹¹⁰ Consequently, they concentrate less than the *IBA Guidelines* on arbitrators' duties as such, but are nevertheless relevant. Indeed, the Principles' different focus adds value in a number of ways. Importantly for this paper, where aspects of the *IBA Guidelines* seem to have been shaped with a view toward facilitating continuation of the status quo in international arbitration, the *Burgh House Principles* appear less affected by such considerations. The *IBA Guidelines*'

¹⁰⁷ These principles were drafted to "apply primarily to standing international courts and tribunals (hereafter "courts") and to full-time judges." The Principles state, however, that they "should also be applied as appropriate to [...] international arbitral proceedings and to other exercises of international judicial power" (Burgh House Principles, 2004, Preamble).

¹⁰⁸ For a discussion of the purpose and background on the IBA Guidelines, see Wijnen, D.W, Voser, N. & Rao, N. (2004). Background information on the *IBA Guidelines on Conflicts of Interest in International Arbitration*. *Business Law International*, 5(3).

¹⁰⁹ Ibid., p. 434–435.

¹¹⁰ Preamble, Burgh House Principles.

General Standard 6, for instance, explicitly distinguishes between arbitrators and their law firms for the purpose of determining whether conflicts of interest exist or disclosures should be made. This dampens the *IBA Guidelines*' impact on the current system in which arbitrators are frequently associated with large law firms and both the arbitrators and their associated firms often concurrently serve as counsel in other arbitration matters.¹¹¹ In contrast, the *Burgh House Principles* do not similarly shield judges from imputation of conflicts. This can be seen in Principle 11. That Principle flatly prohibits judges from sitting in a case if either they, *or any persons or entities closely related to them*, have a material personal, professional or financial interest in the outcome of the matter.¹¹²

This next section examines each of these guidelines in more detail, addressing how they relate to the dual role issue and how they can be used to improve the current inconsistent and inadequate treatment of the matter.

4.1 *IBA Guidelines on Conflicts of Interest in International Arbitration*

The *IBA Guidelines* address, among other things: arbitrators' general obligations of independence and impartiality; circumstances under which arbitrators should decline appointment, disclosure obligations, obligations to withdraw, the meaning of "justifiable doubts" justifying withdrawal, duties to investigate potential conflicts, and waiver. The *IBA Guidelines* also include a useful list of practical situations in which arbitrators might find themselves and divide the situations into Red (waivable and non-waivable), Orange, and Green lists, based on whether and to what extent each situation gives rise to doubts as to the arbitrator's impartiality and independence. The Guidelines are expressly stated to be non-exhaustive. They are not legally binding, but are increasingly seen as representing good practice¹¹³ and have been cited as guidance in arbitrator challenge decisions under each of the four sets of arbitration rules examined in this report.¹¹⁴

It is important to note that the *IBA Guidelines* are applicable to international arbitration in general. They apply to investor-State arbitration alongside other types of international arbitration, but are not designed to address specific issues arising with respect to investor-State arbitration.

¹¹¹ General Standard 6 & Explanation to General Standard 6, *IBA Guidelines*.

¹¹² Principles 11.1 & 11.2, *Burgh House Principles*.

¹¹³ Sheppard, A. (2009), Arbitrator independence in ICSID Arbitration. In C. Binder, U. Kriebaum, A. Reinisch & S. Wittich (Eds.), *International investment law for the 21st century: Essays in honour of Christoph Schreuer*. Oxford: Oxford University Press., p. 136.

¹¹⁴ IBA Conflicts of Interest Subcommittee. (2010). The IBA guidelines on conflicts of interest in international arbitration: The first five years 2004–2009, *Dispute Resolution Journal* 4., 28–29 (2010). See also *Participaciones Inversiones Portuarias S.A.R.L v. Gabonese Republic* (ICSID ARB/08/17), Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009, para. 24, stating that the IBA Guidelines are "only of informative value, even though it is recognized that they might provide useful guidance."

General Standard 1 states the fundamental rule 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” (emphasis added).¹¹⁵ And as a key means of ensuring adherence to those principles of independence and impartiality, the *IBA Guidelines* require potential and actual arbitrators to disclose any items that “may, *in the eyes of the parties*, give rise to doubts as to the arbitrator’s impartiality or independence” (emphasis added).¹¹⁶

General Standard 2 addresses when arbitrators should or must refuse appointment or, if already appointed, withdraw. It states, in part:

- (a) An arbitrator shall decline to accept an appointment or, if an arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or ability to be impartial and independent.
- (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment that, from a *reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence*, unless the parties [have validly waived their objections to the arbitrator’s service in accordance with General Standard 4]. (Emphasis added).¹¹⁷

General Standard 2(c) expands upon the meaning of “justifiable doubts,” stating that “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” (emphasis added).¹¹⁸

General Standard 2(d) further states that certain situations *necessarily* give rise to justifiable doubts, and provides examples of those situations, explaining that:¹¹⁹

Justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has *a significant financial or personal interest in the matter at stake*. (Emphasis added)

¹¹⁵ General Standard 1, *IBA Guidelines*.

¹¹⁶ General Standard 3, *IBA Guidelines*.

¹¹⁷ General Standard 2, *IBA Guidelines*.

¹¹⁸ General Standard 2(c), *IBA Guidelines*.

¹¹⁹ General Standard 2(d), *IBA Guidelines*.

General Standard 4 subsequently clarifies that these types of conflicts described in General Standard 2(d) cannot be waived by agreement of the parties.¹²⁰ As such, they are also reflected in the non-waivable items on the Red list. The Red list also contains a number of other situations that give rise to objectively justifiable doubts but that are waivable by the parties. The Orange list then includes situations that, in the *eyes of the parties*, may give rise to justifiable doubts as to an arbitrator's independence or impartiality. Even if a situation giving rise to such subjective doubts may not support a challenge in a particular case, it may, as is the case under the *IBA Guidelines* and other authorities such as the ICC Arbitration Rules, require disclosure and trigger further inquiry.

Notably, General Standard 6 limits the scope of arbitrators' disclosure obligations and relaxes the *IBA Guidelines*' protections against conflicts by tacitly recognizing and approving the dual arbitrator/counsel role, and establishing a default rule against automatic imputation of conflicts between an arbitrator and his or her law firm. More specifically, General Standard 6(a) states that when determining whether “a potential conflict of interest exists or whether disclosure should be made, the activities of an arbitrator's law firm, if any, should reasonably be considered in each individual case” but that, for instance, “the fact that the activities of the arbitrator's firm involve one of the parties shall not automatically constitute a source of such conflict or a reason for disclosure.”¹²¹

In its explanation of that provision, the Working Group evidences its willingness to safeguard the status quo. It states that “the growing size of law firms should be taken into account as part of today's reality in international arbitration,” and that efforts to “maintain confidence in the impartiality and independence of international arbitration” must be balanced against “the interests of a party to use the arbitrator of its choice.”¹²² This deference to existing practices echoes the reasons given for rejecting arbitrator challenges in decisions such as *SGS v. Pakistan* (2002) discussed above. Notably, and like the *SGS* decision, the *IBA Guidelines* fail to explicitly recognize that the distinct aspects of investor-State arbitration (including the limited universe of claims and defences, and the public interest in such disputes) counsel *against* endorsement of the accepted state of affairs in international arbitration. Yet, in recognizing the need for a case-by-case reasonable consideration of the circumstances requiring disclosure and amounting to conflicts of interests, and as shown by the appointing authority's decision in *ICS v. Argentina* (2009), the *IBA Guidelines* do allow room for development of specific and stricter approaches applicable in investor-State arbitrations.

Looking at how the *IBA Guidelines* and listed situations might apply in the specific context of the dual-role issue in investor-State dispute settlement, it appears that application of some provisions as drafted should reign in rather egregious practices, and that others may warrant slight adjustments.

¹²⁰ General Standard 4, *IBA Guidelines*.

¹²¹ General Standard 6, *IBA Guidelines*.

¹²² Explanation to General Standard 6, *IBA Guidelines*.

For instance, Practice Standard 2(d) states that if an arbitrator has *a significant financial or personal interest in the matter at stake*, that fact *necessarily* gives rise to justifiable doubts.¹²³ One fact pattern that would seem to trigger this rule is if an arbitrator in one investor-State dispute were similarly concurrently involved in litigating another investor-State dispute involving similar issues. It cannot be doubted that counsel representing a party in such an action has a significant personal and professional interest in having good precedent for that case. It is also arguable that an arbitrator's duties to his or her client in the dispute would prevent the arbitrator from drafting a decision that could be harmful to his or her client's position. Even if the arbitrator did not draft the award in a manner that would support the position he or she is advocating as counsel—by, for example, consciously or subconsciously inserting a key, subsequently citable phrase, disparaging a contradictory decision, omitting certain findings or facts from the decision, or shaping the ultimate finding on liability—the actual *interest* the arbitrator and his client have in the outcome of the case is apparent. The conflict would be even clearer if the attorney/arbitrator took cases on a contingency fee basis (a reportedly increasingly common practice), giving the attorney a financial stake in the outcome of the client's dispute.

Regarding the issue of imputation, numerous aspects of treaty-based investor-State arbitration support requiring imputation of conflicts to be the default rule in these cases. These factors include: the limited universe of issues involved in such disputes that elevate the risk for conflicts, the public interest nature of investor-State disputes, and certain practices of law firms, including their efforts to market their international arbitration “practice groups,” and their practices of revenue sharing. Weighed against those factors, the motivation behind General Standard 6's non-automatic imputation rule—that is, the desire to facilitate existing practices of large law firms—is not compelling. Thus, when arbitrators and authorities deciding challenges in treaty-based investor-State matters seek guidance on what disclosures should be made and whether a conflict exists, they should take into account the unique aspects of these disputes, and interpret and apply General Standard 6 to require imputation of conflicts in those cases as a general rule.

General Standard 2(d), combined with reasoned application of General Standard 6, thus would appear to preclude an investor-State arbitrator and his firm from concurrently representing clients in investor-State matters, as such scenarios give rise to objectively justifiable doubts as to the arbitrator's independence and impartiality and are of such a nature that they should be non-waivable. The principle underlying the Working Group's decision to isolate these non-waivable conflicts, namely, the principle that “no one is allowed to be his or her own judge,” further supports this conclusion. In the world of investor-State arbitration, arbitrators are *de facto* generating law. They are elaborating, for instance, on the meaning of certain key obligations repeated in treaties worldwide, as well as the scope of the customary international law defence of necessity and the

¹²³ Practice Standard 2(d), *IBA Guidelines*.

significance of the ICSID Convention’s provision on jurisdiction. These elaborations are then being cited and relied upon for support in subsequent investor-State disputes. Yet, this law that arbitrators are creating when drafting decisions is the very same law about which the same arbitrators, when acting as counsel, argue should be given certain meaning. Arbitrators in investor-State disputes who concurrently act as counsel in such matters therefore effectively become judges of their own arguments.

Even if not covered by General Standard 2(d)’s list of non-waivable conflicts, situations in which an arbitrator in an investor-State dispute concurrently represents a party in other investment disputes would seem to be covered by the general formulation of “justifiable doubts” set forth in General Standard 2(c).¹²⁴ That standard, which is judged from the common “objective” perspective, is satisfied if there is a “likelihood” that the arbitrator “may” be influenced by other factors than the merits of the case before him or her as argued by the parties. Using language from *Gallo v. Canada* (2009), the standard encompasses situations in which an “apparent conflict of interest is perceptible,” and which cause arbitrations to proceed “under the shadow” of the “possibility” of actual conflicts.¹²⁵ These situations include those when the arbitrator’s concurrent client has a perceptible interest in the subject matter of the dispute.¹²⁶

Apart from this situation of *concurrent* service as arbitrator and counsel in investor-State matters, the *IBA Guidelines*’ coverage of the dual-role issue seems less clear. One decision applying the Guidelines, *Gallo v. Canada* (2009), effectively determined that the conflicts that exist with concurrent service as arbitrator and counsel are cured if the arbitrator merely (temporarily) resigns from one of those roles. However, in another case applying the Guidelines, *ICS v. Argentina* (2009), the appointing authority did not accept the argument that the cessation of the arbitrator’s activities as counsel would remove the conflict.

It appears a questionable conclusion that apparent conflicts will be removed if an arbitrator simply suspends his work as counsel in investor-State matters during the pendency of a case. It is foreseeable that the arbitrator’s past relationships, or plans or prospects of future work as counsel can give rise to a “*likelihood* that the arbitrator *may* be influenced by factors other than the merits of

¹²⁴ One additional reason for classifying these conflicts as “non-waivable” is that doing so protects not only the legitimacy of the dispute over which the arbitrator is presiding, but also that in which the arbitrator is currently acting as counsel. To illustrate: it is one thing when counsel submits his party’s arguments directly to the tribunal for evaluation. In that case, the arguments are clearly arguments of a party to be evaluated by the tribunal. It is another when counsel is able to insert those same positions in an award he or she has drafted, and then rely on that award as legal authority and support for his client’s arguments. The counsel, having crafted the legal authority on which it seeks to rely, effectively becomes a judge of his or her own cause. Allowing the parties to waive the arbitrator’s conflicts in the case he or she is arbitrating thus fails to protect the legitimacy of the case in which the arbitrator is acting as counsel.

¹²⁵ *Gallo v. Canada* (2009), para. 35.

¹²⁶ *Ibid.*

the case” (emphasis added).¹²⁷ The *IBA Guidelines*, however, do not provide any clear examples or bright line rules preventing appointment of arbitrators who had acted as counsel on similar matters within a set time frame (e.g., for the previous three years). Although *IBA Guidelines* coloured lists of conflicts can aid in determining whether “justifiable doubts” exist in certain circumstances (e.g., when there was a previous relationship between the arbitrator and party), they do not appear to adequately acknowledge the problem of issue conflicts in treaty-based investor-State dispute settlement. One way of addressing this gap may be to use the flexibility inherent in the *IBA Guidelines* to add new scenarios to the explicitly non-exhaustive categories. Currently, for instance, if an arbitrator has represented one of the parties within the three years preceding his or her arbitral appointment, that situation is included in the Orange list. That list could easily be expanded to include situations in which the arbitrator in an investor-State dispute had, within the previous three years, served as counsel in an investor-State matter.

In sum, like the arbitral rules themselves, the *IBA Guidelines*—if properly applied—should restrict the dual arbitrator/counsel role in investor-State arbitrations by, perhaps most importantly, preventing arbitrators in investor-State disputes from concurrently serving as counsel in those matters. Moreover, although the *IBA Guidelines*’ approach to imputation and its Red, Orange, and Green lists do not adequately reflect the specific types of conflicts or the public interest considerations that arise in treaty-based investor-State arbitration, the Guidelines allow for sufficient flexibility that those issues can and should be taken into account in specific cases.

4.2 The Burgh House Principles on the Independence of the International Judiciary

The *Burgh House Principles* reflect a different focus than, and are an important supplement to, the *IBA Guidelines*. The Principles begin by affirming that “principles of international law [...] of general applicability” include the “independence of the judiciary”; judicial freedom from “undue influence”; ability of judges to “decide cases impartially”; and the requirement for judges to “*avoid any conflict of interest, as well as being placed in a situation that might reasonably be perceived as giving rise to any conflict of interest*” (emphasis added).¹²⁸ They then proceed to address specific principles that support those broad notions.

One important Principle relevant to the dual role issue is Principle 9.2. It states: “Judges shall not serve in a case with the *subject-matter of which they have had any other form of association* that may affect or may reasonably appear to affect their independence or impartiality” (emphasis added).¹²⁹ Principle 11

¹²⁷ General Standard 2(c), *IBA Guidelines*.

¹²⁸ Preamble, *Burgh House Principles*.

¹²⁹ Principle 9.2., *Burgh House Principles*.

then flatly prohibits judges from sitting in a case if either they, *or any persons or entities closely related to them*, have a material personal, professional or financial interest in the outcome of the matter.¹³⁰ Thus, in contrast to the *IBA Guidelines*, the *Burgh House Principles* do not shield judges from automatic imputation of conflicts. The starting point for analysis of whether conflicts exist provides for imputation; then the *Burgh House Principles* contain provisions injecting some flexibility by allowing parties to agree (by giving their express and informed consent) to waive conflicts that might otherwise prevent a judge or arbitrator from presiding over a case.¹³¹

As indicated by that provision allowing parties to give their express and informed consent to waive conflicts of interests, the *Burgh House Principles*, like the *IBA Guidelines*, employ disclosure requirements as a key means of ensuring independence and impartiality while also giving informed parties latitude to proceed with a particular arbitrator notwithstanding potential conflicts. Principle 14 on disclosure requires judges to “disclose to the court and, as appropriate, to the parties, circumstances which come to their notice at any time” that are related to the Principles on (i) judicial freedom of expression, (ii) extra-judicial activity, (iii) past links to a case, (iv) interest in the outcome of a case, (v) past and present links to a party, and (vi) post-service activities.¹³²

One aspect of the *Burgh House Principles* relevant to arbitration, but not addressed in the *IBA Guidelines*, is the role of institutions. For instance, the *Burgh House Principles* mandate each court to “establish appropriate procedures to enable judges to disclose to the court and, as appropriate, to the parties to the proceedings matters that may affect or may reasonably appear to affect their independence or impartiality in relation to any particular case.”¹³³ They also direct courts to establish rules and procedures for determining whether judges should be disqualified from sitting in a particular case, and for deciding on specific complaints alleging judicial misconduct or breach of duties that may affect independence or impartiality.¹³⁴ In the context of arbitration, arbitration institutions and procedural rules currently govern these tasks.

¹³⁰ Principles 11.1 & 11.2, *Burgh House Principles*.

¹³¹ Principle 15, *Burgh House Principles*. This principle does not give the parties full autonomy over whether a judge will be allowed to preside over a case, notwithstanding his or her conflicts. It states that if a judge has made appropriate disclosures, the parties have given their express and informed consent, and the court approves, that judge “shall not be prevented from sitting” in the case.

¹³² Principle 14.1, *Burgh House Principles*.

¹³³ Principle 14.2, *Burgh House Principles*.

¹³⁴ Principle 17, *Burgh House Principles*.

5.0 How Other Procedures have Addressed the Dual-Role Issue

While there are currently no express rules on the dual arbitrator/counsel role in the investor-State context, in recent years, the issue of dual roles has been addressed within several other international processes, including the ICJ and the Court of Arbitration for Sport (CAS). Similar issues have also been addressed by arbitration systems that, like treaty-based investor-State arbitrations, deal with specific sets of issues and types of parties. One example discussed here is the government-supervised, but self-regulated U.S. Financial Industry Regulatory Authority, which primarily handles disputes between investors and the financial industry.

5.1 International Court of Justice

The statute of the ICJ entitles a State party to a case before the ICJ that does not have a judge of its nationality on the bench to choose a person to sit as judge *ad hoc* in its case.¹³⁵ A judge *ad hoc* takes part in any decision concerning the case on terms of complete equality with his/her colleagues.¹³⁶ The ICJ takes the view that it is not in the interest of justice that a person sits as judge *ad hoc* in one case before the court and acts as counsel in another. It has adopted two Practice Directions to stop such goings-on.¹³⁷ Of particular relevance, Practice Direction VII states that the court considers that it is not in the interest of the sound administration of justice that a person who is acting or has recently acted as counsel in a case before the court sits as judge *ad hoc* in another. Practice Direction VII directs parties, when choosing a judge *ad hoc*, to refrain from nominating persons who are acting as counsel in another case before the court or who have acted in that capacity in the last three years.

In the same vein, Practice Direction VIII states that the court considers that it is not in the interest of the sound administration of justice that a person who until recently was, *inter alia*, a member of the court or a judge *ad hoc* appear as a counsel in a case before the court. Practice Direction VIII accordingly directs parties to refrain from designating as counsel in a case before the court a person who in the last three years was, *inter alia*, a member of the court or a judge *ad hoc*.¹³⁸

¹³⁵ Statute of the International Court of Justice, Article 31(2) and (3).

¹³⁶ Website of the International Court of Justice, <http://www.icj-cij.org/court/index.php?p1=1&p2=5>.

¹³⁷ The Court first adopted Practice Directions for use by States appearing before it in October 2001. They are the result of the Court's ongoing review of its working methods and are in addition to its Rules of Court. See www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0.

¹³⁸ Practice Direction VIII states: "The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a

Given the ICJ's status as the preeminent world court, its rules of procedure may be considered an important precedent for other international courts and tribunals. Of particular note is its two-way restriction, namely that a person who has served as counsel before the ICJ in the last three years cannot serve as judge ad hoc, and vice versa, that a person who has served as ad hoc judge in the last three years cannot act as counsel.

It is clear that a proceeding before the ICJ differs from an investor-State arbitration in a number of important respects. For example, the caseload of the ICJ is considerably smaller than the number of investor-State disputes ongoing around the world at any one time. A person appointed as judge ad hoc by a country in a dispute before the ICJ will very possibly never be appointed as judge ad hoc again. This differs quite considerably from investor-State arbitration where the more renowned arbitrators serve on an ever-increasing number of arbitrations. These two factors (i.e., smaller ICJ caseload and the one-off nature of many judge ad hoc appointments) mean that the compulsory three-year stand down period in the ICJ context will likely not cause too much impact on the pool of lawyers available to assist on ICJ cases. In contrast, the growing industry that is investor-State arbitration draws from largely the same pool of lawyers (and law-firms) for many of its counsel and arbitrators. This difference may have implications for the practical workability of provisions like the ICJ Practice Directions if such were adopted in the investor-State context.

It is, however, essential that the obstacles to this possible practical issue be overcome. The need to address the dual-role issue seems even more important in the investment arbitration context than in disputes before the ICJ: while the ICJ covers a wide range of international legal issues, treaty-based investment arbitration raises the same or similar legal issues again and again, making the potential for conflicts of interest very real.

An initial perceived “shortage” of arbitrators could even have possible positive effects. For one, it could actually increase the diversity and size of the community of active arbitrators. Rather than the same few individuals receiving the majority of appointments, as is currently the case, disputing parties may need to expand their candidate list to a broader range of potential arbitrators using, perhaps, a “roster” approach such as is already used in some arbitrations and suggested by Paulsson in his proposal for reforming the system of arbitrator appointments.¹³⁹ Additionally, it could prompt treaty parties to explore more significant reforms to the arbitrator selection process, including the development of an adjudicating body whose members are appointed for fixed-terms. These decision-makers could be tasked to handle all disputes or, similar to the function of the World Trade

person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court.”

¹³⁹ Paulsson, J. (2010, April 29). *Moral hazard in international dispute resolution*. Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, pp.11–12.

Organization's standing appellate body, be available to review the decisions issued by the wider arbitrator field.¹⁴⁰

5.2 Court of Arbitration for Sport (CAS)

The CAS is an institution that provides services, including arbitration services, to facilitate resolution of sports-related disputes. In 2010, the International Council of Arbitration for Sport (ICAS), the CAS's governing body, added a new provision to section 18 of its Code on Arbitration, which provides: "CAS arbitrators and mediators may not act as counsel for a party before the CAS."

In 2006, the ICAS had adopted guidelines on independence for its arbitrators and mediators, which included a guideline to the effect that arbitrators and mediators should not simultaneously act as counsel for a party before the CAS. Three years later, in light of the limited reduction in such practices resulting from the guidelines, ICAS introduced the new mandatory requirement into section 18 of its Code.¹⁴¹ For the future, ICAS is considering whether the ban should be extended to prevent law firms with whom the arbitrator/mediator is affiliated from acting as counsel for a party before the CAS.¹⁴²

¹⁴⁰ The World Trade Organization's Dispute Settlement Understanding creates a multi-tiered system for review of inter-State trade disputes. In the event of a dispute, a State can seek establishment of a panel to review and decide on the case. The panel is to be comprised of individuals "selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience." (Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, [hereafter "DSU Agreement"], Art. 8[2]). Citizens of WTO Member States whose governments are parties or third-parties to the dispute are not to sit on the panels unless the disputing parties otherwise agree. (DSU Agreement, Art. 8[3]). Providing a check on the decisions of these ad hoc panels, their decisions can be appealed to the WTO's standing Appellate Body (AB). The AB is comprised of seven persons, three of whom serve on any one case. AB members are to be of "recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government" (DSU Agreement, Art. 17). Rules of conduct adopted by the Member States specify that panellists and AB members "shall be independent and impartial [and] shall avoid direct or indirect conflicts of interests [...] so that through the observance of such standards of conduct the integrity and impartiality of [the dispute settlement mechanism] are preserved. The rules of conduct also require panellists and AB members to disclose any information known or reasonably expected to be known to them that "is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include "information on financial, property, professional, social or associational, academic, personal, and family interests relevant to the dispute. With respect to professional interests alone, these disclosures are to include information on "past or present relationships with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question" (Rules of Conduct for the DSU Agreement, WT/DSB/RC/1, 11 December 1996, Arts. II & V & Annex 2).

¹⁴¹ Section 18 of the Code provides: "The personalities who appear on the list of arbitrators may be called upon to serve on Panels constituted by either of the CAS Divisions." Upon their appointment, the CAS arbitrators and mediators sign a declaration undertaking to exercise their functions personally with total objectivity and independence, and in conformity with the provisions of this Code.

CAS arbitrators and mediators may not act as counsel for a party before the CAS.

¹⁴² Telephone conversation with the secretariat of CAS, 16 June 2010.

One explanation given for this change was that it was designed to diversify the selection of arbitrators appointed in disputes. Pursuant to the Code of the CAS, arbitrators must be appointed from a roster of at least 150 qualified candidates chosen for their specialist knowledge of arbitration and sports law who are each appointed for a four-year period. Under the pre-2010 system, the same relatively few people were reportedly frequently chosen as arbitrators from the CAS's roster. With the changes, some of those repeat players would be unable to serve, consequently requiring disputing parties to utilize other candidates from the list of pre-qualified arbitrators. This background supplies an interesting response to concerns about the workability of proposals to more firmly separate the arbitrator and counsel camps.

The CAS, in contrast to the ICJ, does not impose a stand-down period. Arbitrators are free to appear as counsel as soon as their four-year term as listed arbitrator has ended. This “revolving door” situation in the context of international sport arbitration is, however, much less problematic than it is in treaty-based investment arbitration, given the relative diversity of matters handled by the CAS (which handles any matter directly or indirectly related to sports), as compared to the relatively limited universe of treaty claims.

Although there undoubtedly are differences between the CAS and investor-State arbitration, the fact that both deal specifically with arbitration and arbitrators make the CAS prohibition on the dual counsel/arbitrator role an interesting precedent for a similar prohibition in the investor-State context.

5.3 FINRA Securities Arbitration

The Financial Industry Regulatory Authority (FINRA) is a self-regulatory organization supervised by the main U.S. agency governing securities investments.¹⁴³ Among its functions, FINRA manages and oversees arbitration disputes between its member firms and their investor customers. These disputes generally proceed to arbitration due to form contracts with mandatory arbitration provisions that investors sign when purchasing securities from investment brokers.

In light of FINRA's removal from direct government oversight and connections with the financial industry, and general concerns about the fairness of arbitral proceedings and compulsory arbitration, a host of doubts has been raised about the fairness of FINRA investor-broker arbitration. And while examination of those concerns is outside the scope of this paper, it is worthwhile to examine the steps used in FINRA to address arbitrator conflicts of interests and the dual-role issue due to the fact that its arbitrations (like treaty-based investor-State disputes) deal with a specific type of claims

¹⁴³ See FINRA (2010, May 17), Statement on key issues presented to the Securities and Exchange Commission Investor Advisory Committee Panel on Securities Arbitration, p. 1. Retrieved from: <http://www.sec.gov/spotlight/invadvcomm/iacmeeting051710-finra.pdf>.

and, for the most part (in 75 per cent of the cases), involve investment firms as respondents (analogous to the dynamic in investor-State disputes where foreign investors, often large international companies, are always the claimants).¹⁴⁴

In contrast to the CAS and ICJ, FINRA has not adopted a clear rule preventing counsel from serving as arbitrators. FINRA arbitrations, however, do contain some features that seem to limit such situations and more explicitly address the dual-role issue than the current rules on investor-State arbitration.

First, FINRA arbitrations are decided by either a sole “public” arbitrator or two “public” arbitrators on a three-member panel. A “public” arbitrator is an arbitrator who does not have ties with the securities industry. Among the numerous requirements that must be met for arbitrators to qualify as “public” are the following.¹⁴⁵

- The arbitrator is not “an attorney [...] who has devoted 20 per cent or more of his or her professional work, in the last two years, to clients who are engaged in” various business activities relating to the financial industry.
- The arbitrator “is not an attorney [...] whose firm derived 10 per cent or more of its annual revenue in the past two years from” persons or entities involved various activities related to the financial industry.
- The arbitrator “is not an attorney [...] or other professional whose firm derived \$50,000 or more in annual revenue in the past two years from professional services rendered to” various persons or entities involved in the financial industry relating to their disputes with investors.

In addition to the requirements for “public” arbitrators to hear all disputes, and the objective standards used to measure and ensure an arbitrator’s distance from the very industry always involved in the disputes, FINRA arbitrations heavily rely on comprehensive disclosure obligations to address and prevent conflicts of interests. When a case has been filed, for instance, FINRA provides the parties with extensive background information on the potential arbitrators selected from its randomly generated list of qualified candidates. This background information includes such items as education and employment history and a list of the arbitrators’ previous arbitration decisions.¹⁴⁶ Prior to and during appointment, FINRA arbitrators also have ongoing duties to disclose any information that might give rise to actual or perceived bias, including information relating to the “subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business,

¹⁴⁴ Ibid.

¹⁴⁵ Code of Arbitration Procedure for Customer Disputes, Section 12100(p), (u): http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4099.

¹⁴⁶ Gross, J. & Oshins, A. (n.d.). *Investor’s Guide to Securities Industry Disputes*. White Plains, NY: Pace Investor Rights Clinic and FINRA Investor Education Foundation, p.17.

and professional relationships with any of the parties, representatives, witnesses, or [...] co-panelists.”¹⁴⁷ To ensure the disclosures are thorough, FINRA provides arbitrators with an extensive checklist of items that should be reported and elaborated upon where necessary.¹⁴⁸

Although its approach to ensuring independence and impartiality of arbitrators may yet be inadequate, it does provide an interesting example of how bright line rules and prophylactic disclosure requirements may be used to avoid conflicts of interests arising from arbitrators’ work as counsel.

¹⁴⁷ FINRA (2010). *FINRA dispute resolution arbitrator’s practice guide*, p.16. Retrieved from: www.finra.org.

¹⁴⁸ *Ibid.*, pp.23–27.

6.0 Ways Forward

Although arbitration rules uniformly require arbitrators to be (and to appear to be) impartial and independent, and allow parties to challenge arbitrators for lack of those fundamental qualities, these rules, as applied, have to date failed to adequately address the dual-role problem. And although useful guidance to improve application of arbitration rules is available through sources such as the *IBA Guidelines* and the *Burgh House Principles*, investor-State decisions continue to discount the objectively justifiable doubts as to an arbitrator's independence and impartiality that arise when the arbitrator also serves as counsel in another such dispute. Apparently facilitating this rather relaxed view of the matter is the refrain that the dual role is common in international arbitration, and the reality that decisions on arbitrator challenges can remain hidden from scrutiny. Another factor apparently slowing an adequate response to this issue appears to be arbitrators' inadequate disclosures of dual-role conflicts. If and when parties learn of arbitrators' related work as counsel, they may be told it is too late to challenge the arbitrator or the award.

Given these issues, a strict rule on the dual role may be the best option for ensuring arbitrator independence and impartiality. One possible option could be a FINRA-type solution barring appointment of arbitrators if they or their firms perform over a certain threshold of work as counsel in investor-State matters. Another option is to adopt the approaches taken in the ICJ and CAS and flatly preclude appointment of arbitrators from concurrently serving as counsel in related matters. Indeed, the case for such a rule in the investment arbitration context seems even stronger than in the ICJ and the CAS given that, in contrast to the cases before those institutions, investor-State arbitrations in the main all revolve around a small number of legal issues.¹⁴⁹ As a consequence, the likelihood that any award that an arbitrator may draft will be potentially relevant to other investor-State arbitrations in which he or she is concurrently acting as counsel is quite high.

IISD is of the view that in the very peculiar context of investor-State arbitration, the dual arbitrator/counsel roles being exercised at the same time, or in proximate times, raise serious concerns with respect to an arbitrator's independence and impartiality. A review of the major arbitration rules indicate that the current system is arguably flexible enough to deal with these concerns, as they could allow parties to successfully challenge arbitrators who also serve as counsel in other investor-State arbitrations. However, the system today remains, in many ways, unpredictable and often dependent on the person(s) assessing the arbitrator challenge, and the traditional practices of those involved (who often rule on its permissibility), instead of a clear application of a principled approach to the rules on independence and impartiality.

¹⁴⁹ For example, jurisdiction under the IIA, fair and equitable treatment, most-favoured nation treatment and expropriation are legal issues considered in a very large proportion of investor-State arbitrations.

This section of the paper thus considers a number of options for how the current dual role played by many arbitrators who also serve as counsel in other investor-State arbitrations could be controlled in a more predictable and consistent way. The options examined here include:

1. Reform of the arbitration rules through formal amendment or interpretation
2. Institutional interpretation of the arbitration rules
3. Revision of the *IBA Guidelines on Conflicts of Interest in International Arbitration*
4. Integration of express provisions in IIAs or issuance of interpretative statements

These options are not mutually exclusive. Rather, for greater clarity and consistency, several strategies could be used in combination. For example, a code of conduct developed by an arbitration institution regarding its arbitration rules could be incorporated directly by reference into an IIA.

6.1 Reform of the Arbitration Rules through Formal Amendment or Interpretation

One approach would be to incorporate provisions expressly regulating the dual arbitrator/counsel role in all or some of the arbitration rules most frequently used in investor-State arbitrations. As noted earlier in the paper, the CAS's rules preventing counsel in one case from serving as an arbitrator in another provides an example of one clear response that has been adopted in the arbitration context. Other reforms could address issues such as disclosure requirements.

6.1.1 ICSID Convention and Arbitration Rules

With the only arbitration rules dedicated to investor-State disputes, ICSID is uniquely situated to be able to take into account certain issues particular to investor-State arbitration, such as the potential problems caused by the dual arbitrator/counsel role.

The qualifications for an arbitrator in an ICSID arbitration, and the procedure for an arbitrator's disqualification are set out in articles 14(1) and 57 of the ICSID Convention. While in theory, these provisions could be amended to prohibit arbitrators concurrently acting as counsel,¹⁵⁰ amending the Convention is generally considered politically impossible in practice. An agreed interpretation of these provisions may be a more feasible approach.

¹⁵⁰Under articles 65 and 66 of the ICSID Convention, any Contracting State may propose an amendment of the Convention. If a two-thirds majority of the members of ICSID's Administrative Council agree, the amendment will be submitted to all Contracting States for ratification, acceptance or approval. To enter into force, all Contracting States must ratify, accept or approve the amendment.

There is no formal mechanism under the ICSID Convention for Contracting States to issue interpretive statements regarding the Convention to clarify its provisions, for example, on arbitrator qualifications and independence. However, in accordance with Articles 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties, any subsequent agreement (or practice that establishes such an agreement) between the parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account in the interpretation of the Treaty.

In the current case, it would be possible for ICSID Parties to issue an interpretive statement stating their agreement that “independent judgment” in Article 14(1) requires that the arbitrator not be concurrently acting as counsel in another investor-State arbitration and that a “manifest lack” of this quality under Article 57 would include where an arbitrator is concurrently acting as counsel in such a case.

A second option would be through revising the ICSID Arbitration Rules. Revisions to the ICSID Rules are made by the ICSID Administrative Council, a body composed of one representative of each Contracting State. To be approved, revisions must be adopted by a majority of two-thirds of the members of the Administrative Council.¹⁵¹ Any revisions must be consistent with the ICSID Convention, and in particular in this case, Articles 14(1) and 57.

The ICSID Arbitration Rules contain various provisions regarding the qualifications of arbitrators (Rule 1), acceptance of appointments (rule 5), disclosure obligations (rule 6), and annulment (Rules 50-53). These Rules are all potentially relevant to issues of conflict of interest, and could be revised to provide greater clarity on the dual arbitrator/counsel role, the duty to investigate and disclose conflicts, and the impact of conflicts of interest on the validity of awards.

There is also the opportunity to reconsider the heretofore presumed view that the “manifest lack” text in Article 57 of the ICSID Convention alters the standard for arbitrator challenges. This type of interpretational review can be done within the ICSID administrative structure, as the interpretation in the event of a challenge often, as we have seen above, will fall to the office of the Secretary-General, requiring no further acts under the Rules or the Convention.

In light of ICSID’s standing as the most-used rules in investor-State arbitrations, addressing these issues through the ICSID system could impact a significant number of cases and could serve as a catalyst for similar reform in the other most-used rules.

Addressing the issue of arbitrator independence, and particularly the dual role, in ICSID arbitration is also of particular relevance for two further reasons. First, the standard set out in ICSID for

¹⁵¹ ICISD Convention, article 4(1) and 6(1).

challenging an arbitrator has, in some cases, been interpreted to be higher than under other arbitration rules due to the language used. Second, in contrast to other challenge processes, ICSID challenges are decided by the other two arbitrators and only go to an outside authority if they disagree. As Sheppard put it:¹⁵²

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.

6.1.2 UNCITRAL Arbitration Rules

Neither the 1976 UNCITRAL Arbitration Rules nor the 2010 version recently adopted specifically address the issue of dual arbitrator/counsel roles. However, like the ICSID Rules, the UNCITRAL Rules contain various provisions relating to arbitrator ethics and conflicts of interests. Relevant provisions in the current Rules include those requiring arbitrators to disclose any circumstances likely to give rise to justifiable doubts about their impartiality or independence, and those concerning challenges to arbitrators. The recent revision of the UNCITRAL Arbitration Rules also includes an amendment making arbitrators' continuing disclosure obligations clearer and adds a draft model statement of independence.

In light of the UNCITRAL Arbitration Rules' standing as the second most-used rules in investor-State disputes after the ICSID Arbitration Rules, reforms here could have broad application. In October 2010 Working Group II began its discussions on transparency in investor-State arbitration, which could result in increased disclosure of challenge proposals and decisions. Currently, however, there is no mandate from the Commission to the Group to discuss other issues relating to investor-State arbitration, such as issues relating to arbitrator independence and impartiality.

6.1.3 ICC Rules

In October 2008 the ICC created a Task Force on the Revision of the ICC Rules of Arbitration to study suggestions regarding amendments to the rules, to determine whether amendment would be useful or necessary, and to make any recommendations regarding possible amendments. In March 2009 the ICC established a Task Force on Arbitration involving States or State Entities to specifically address issues of investor-State arbitration. These processes could recommend changes

¹⁵² Sheppard, A. (2009). Arbitrator independence in ICSID Arbitration. In C. Binder, U. Kriebaum, A. Reinisch & S. Wittich (Eds.), *International investment law for the 21st century: Essays in honour of Christoph Schreuer*. Oxford: Oxford University Press, p.155.

that would put an end to the dual arbitrator/counsel role in arbitrations conducted under the ICC Rules.

Given that the revision of the rules and the parallel examination of investor-State issues are currently ongoing, the possibility of addressing particular problems of arbitrator conflicts in investor-State arbitration could be timely.

6.2 Institutional Interpretations of the Arbitration Rules

The arbitral institutions may themselves be able to issue guidance regarding the interpretation and application of their rules. By doing that, they can clarify their rules without having to revise them formally. They can, for example, use interpretative statements to elaborate on the meaning of “independence” and “impartiality,” disclosure obligations, and grounds for successful challenges.

A striking example of this approach is the ICJ’s Practice Directions VII and VIII on ad hoc judges discussed earlier in the paper. The Practice Directions, adopted by the ICJ in February 2002, are the result of the ICJ’s ongoing review of its working methods. They do not alter the Rules of Court, but are additional to them.

Alternatively, if institutions are not willing to go as far as the ICJ by issuing mandatory directions, they may wish to issue non-binding guidance on the dual-role issue. The issuance of guidance by arbitral institutions is not without precedent either. For example, following its 2003 adoption of the revised ICC Rules for Expertise, the Arbitration Commission of the ICC established a task force to examine the issue in detail and then to produce a set of guidelines for ICC expertise proceedings. The Commission has since adopted a *Guide to the ICC Rules for Expertise*, and the task force is currently working on the elaboration of explanatory notes. If institutions are reluctant to follow the ICJ’s strong lead, they may nevertheless be willing to create a “task force” to examine the issue of the dual arbitrator/counsel role and to develop guidelines on the issue.

A third form of institutional interpretation on the dual-role issue would be through the development of a clear line of institutional jurisprudence on this topic. This approach has the advantage that no new instruments or statements need to be developed. However, to have any success, the decisions of the bodies charged under the various arbitral rules with deciding challenges to arbitrators and/or awards would need to be made public on a systematic basis, rather than the piecemeal dissemination of the small number of such decisions that enter the public domain at present.

6.3 Revision of IBA's Guidelines on Conflicts of Interest in International Arbitration

At the outset, it must be noted that given the significant financial interest the arbitral and legal professions have in maintaining the possibility for the dual arbitrator/counsel role, the prospect of the profession deciding to more stringently self-regulate itself on this issue may be slightly far-fetched. However, it is conceivable that the profession could decide to take the lead on the issue in order to have more control over how it is regulated.

In this vein, the *IBA Guidelines on Conflicts of Interest in International Arbitration* could be amended, particularly since the IBA adopted the guidelines with the intent of monitoring their application and identifying future areas for possible improvement. Revision or further elaboration of the guidelines to include an arbitrator who acts concurrently as counsel in another investor-State arbitration as a red-listed situation could be a useful way of explicitly setting such a standard to be applied worldwide. The philosophical shift that recognition of the inherent conflict in the dual arbitrator/counsel requires may lead to a wider upgrading of other practical examples contained in the guidelines.

6.4 Inclusion of Express Provisions in IIAs or Issuance of Interpretative Statements

6.4.1 Express provisions in the IIA

Another option for governments who wish to put an end to the dual arbitrator/counsel role is through the inclusion of an express provision in their IIAs proscribing such conduct. Governments may choose to do this either by including an express provision in their IIAs banning arbitrators from acting as counsel in other investor-State disputes or otherwise by referring to a separate instrument or set of rules where this prohibition can be found.

To completely preclude the dual arbitrator/counsel role in any IIA dispute to which it might be a party, a State would need to not only provide for this in its future IIAs, but also amend its existing IIAs to this effect. The easiest time to do so would likely be when an IIA is, under its terms, open to renegotiation at the end of its initial or a subsequent period of being in force.

While a very direct approach, express provisions on the dual arbitrator/counsel role present at least two difficulties. First, the other party or parties to the IIA may not wish to include such a restriction. Second, even if such an express restriction were included, it may have the unintended effect of being interpreted to imply that other types of conflict that are not expressly listed must be allowed. Such a

reading would follow from the interpretative principle *expressio unius est exclusio alterius*. To avoid this side effect, parties to the IIA may end up considerably expanding the IIA's provisions on independence, and the length and complexity of the IIA itself in order to cover all conceivable conflict scenarios.

An alternative approach is for the IIA to refer to a separate instrument or process through which the clear criteria for arbitrator independence are laid down. An example of this approach is contained in the Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA), which provides that the commission of cabinet-level representatives to be established under their treaty shall, inter alia, adopt a Code of Conduct for Arbitrators (see Box 1).

BOX 1: Canada Model FIPA

Article 51

Commission

1. The Parties hereby agree to establish a Commission, comprising cabinet-level representatives of the Parties or their designees.
2. The Commission shall:
[...]
(d) adopt a Code of Conduct for Arbitrators.
3. The Commission may take such other action in the exercise of its functions as the Parties may agree, including amendment of the Code of Conduct for Arbitrators.
4. The Commission shall establish its rules and procedures.

Article 29

Arbitrators

[...]

2. Arbitrators shall:
 - (b) be independent of, and not be affiliated with or take instructions from, either Party or disputing party; and
 - (c) comply with any Code of Conduct for Dispute Settlement as agreed by the Commission.

While incorporating an express provision in the IIA may be the most “user-friendly” in that all the relevant provisions are in one document, the Code of Conduct approach may have some other advantages over an express provision proscribing the dual arbitrator/counsel role. In particular, a separate Code of Conduct could be amended as agreed between the parties without the risks attached to re-opening the treaty itself. A code could also be more comprehensive regarding the criteria for arbitrator independence than parties may want to be in the IIA.

As negotiating a Code of Conduct for each treaty would be a time-consuming process, an alternative, potentially more efficient option would be for a Model Code of Conduct to be developed by a group of States or by an appropriate international institution and then incorporated by reference into a number of States' IIAs (see Section 6.2).

6.4.2 Interpretative Statements regarding the IIA

6.4.2.1 Joint Interpretative Statements

Under article 31(3)(a) of the Vienna Convention on the Law of Treaties, any subsequent agreement between the parties shall be taken into account when interpreting the treaty. Some treaties provide for the establishment of a body that, *inter alia*, may issue interpretative statements. However, even in the absence of such a mechanism two or more parties to a treaty may come to a subsequent agreement regarding the interpretation of its provisions between themselves. Perhaps the best-known examples of such agreements in the investor-State context are the interpretative statements issued by the Free Trade Commission established by parties to the North American Free Trade Agreement. In November 2001, for instance, NAFTA Parties, through the NAFTA Free Trade Commission, issued an interpretative statement regarding transparency in investor-State arbitration. And in October 2003 NAFTA Parties issued another joint interpretative statement, this time regarding non-disputing parties.

Interpretative statements could potentially be a useful tool for two or more parties to a treaty to indicate their intention that no person may be appointed as arbitrator in an arbitration brought by an investor against a State under the treaty if he or she has acted as counsel or advised in any capacity in an investor-State dispute for a specified period beforehand. In this way, the parties involved would be able to achieve their objective to prevent arbitrators playing dual roles while at the same time avoiding the time-consuming and potentially risky prospect of re-opening the treaty. A similar, albeit less direct, strategy would be for parties to indicate in statements that they believe certain sources of guidance, such as the *Burgh House Principles*, should be used to inform arbitrator challenges.

There may still be some difficulties with the interpretative statement approach, however. The treaty-by-treaty nature of making such statements may be time consuming for countries to engage in. Moreover, parties to the treaty might not turn their mind to the potential problems caused by the dual roles until confronted with such a situation in a dispute concerning them.

6.4.2.2 Unilateral Interpretative Statements

One further possibility worth mentioning is for one treaty party to make a unilateral statement. This most probably would arise as an option if the other parties to the treaty were not interested in

making a joint interpretative statement. The International Law Commission has recognized that it is possible for one party to a treaty to issue a unilateral statement regarding its interpretation of the treaty's provisions, so long as the statement is not opposed by other parties to the treaty and not inconsistent with the treaty's object and purpose.¹⁵³

¹⁵³ *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, Text adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10), published in 2006 in *Yearbook of the International Law Commission*, 2(2).

7.0 Conclusion

The increasing number of challenges regarding arbitrators acting concurrently as counsel in other investor-State disputes testifies to the increasing disquiet around this practice, and the threat it poses to the ongoing legitimacy of investor-State arbitration in the eyes of many States, and observers. With the still-growing number of arbitrations, and the need for consistency and transparency within the system on such fundamental issues as the impartiality and independence of the “judicial” decision-makers, the time seems ripe for reflection regarding the appropriateness of this dual role.

This paper highlights issues related to the current dual-role phenomenon and proposes that the basic proposition in the investor-State context should be:

No person may be appointed as arbitrator in a treaty-based arbitration brought by a foreign investor against a State (“an investor-State dispute”) if he or she is acting as counsel in another investor-State dispute.

Under existing rules and consistent with current guidelines, that principle should already be reflected in practice. Yet, it is not. A central question in this paper is therefore whether reform can be secured through the current essentially ad hoc approach to monitoring the dual arbitrator/counsel role; or, alternatively, whether a clear proscription on these dual roles should be introduced, in keeping with those recently introduced in the ICJ and the CAS. Whether through improved analysis, formal rule changes, interpretative statements, treaty provisions, or a combination of the approaches, the problem is surmountable and past due for resolution.