Part III Procedural Issues, Ch. 20 Independence, Impartiality, and Duty of Disclosure of Arbitrators

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Much has been written on the subject of the independence and impartiality of arbitrators in international commercial arbitration. Conferences and doctrinal contributions analyse the issue at length, and professional associations have issued guidelines and non-binding regulations aimed at providing specific codes of conduct for international arbitrators. Similarly, certain permanent courts and tribunals have adopted internal rules and codes of conduct in this respect. The issue has become more pressing with the globalization of international law firms and the proliferation of dispute settlement proceedings. In the absence of a universal code of ethics applicable to the international Bar, the new challenges of the evolving world of international litigation have engendered the need for prompt disclosure in cases of conflict of interest.

The debate has moved from the general context of international commercial arbitration to the specialized field of investment arbitration as the recent amendments to the ICSID Arbitration Rules. In 2004, the ICSID Secretariat published a Discussion Paper entitled ‘Possible Improvements of the Framework for ICSID Arbitration’, in which it identified the disclosure requirements for ICSID

arbitrators as one of the areas where changes could be made. The Paper devoted two paragraphs to the issue and made three proposals in this respect: (i) to expand the disclosure requirements under ICSID Arbitration Rule 6(2) and Article 13(2) of the Additional Facility Rules, to include ‘any circumstances likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment’; (ii) to amend the same provisions by extending the duty to disclose to the entire duration of the arbitral proceedings; and (iii) to elaborate a code of conduct for ICSID arbitrators similar to the ‘codes elaborated in other intergovernmental settings’. The ICSID (p. 791) Secretariat sent the Discussion Paper to members of the Administrative Council and circulated it amongst arbitration experts and institutions as well as business and civil society groups. The results of this consultation process were finally incorporated into a Working Paper which was issued on 12 May 2005. With respect to the improvements originally suggested in the Discussion Paper in relation to the disclosure requirements of ICSID arbitrators, the Working Paper endorsed the proposal to amend Arbitration Rule 6 by extending the duty to disclose to any circumstances likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment. The Working Paper also suggested modifying the same provision by creating a continuous obligation to disclose. As a result of this process, several amendments to the ICSID Rules have been approved—by an overwhelming majority—by the ICSID Administrative Council and have come into effect on 10 April 2006. Further discussion of the amendments is contained in Section 3 below. As will be explained below, there is general agreement (amongst those who provided comments on the ICSID initiative) on modifying or supplementing the existing system in order to face the new challenges presented by the growing body of investment disputes. The 2006 Amendments indeed provide a first response to the increase in potential conflicts of interest following the extraordinary growth of ICSID arbitrations in the last ten years.

The purpose of this chapter is to provide an overview of the issues of independence and impartiality of members of investment tribunals and to offer some further reflections on this subject. In Section 1 below, Sub-section (a) will review ICSID provisions on the methodology of appointment of arbitrators and their independence and impartiality. Sub-sections (b) and (c) will provide a summary review of some available precedents in investment arbitrations (under ICSID, UNCITRAL, and ad hoc proceedings). Section (2) will examine how the question is treated by reference to a sample of institutional rules, model laws, and professional guidelines. Section (3) will analyse the approach adopted under the practice directions of the International Court of Justice and Section (4) will provide an overview of the NAFTA and WTO codes of conduct. Section (5) contains a summary review of national laws on the subject, while Section (6) looks at the contribution of professional associations. In the concluding section, Section 7, these rules are compared to assess to what extent they can provide a model for investment arbitration. Finally, some preliminary conclusions and recommendations are put forward.

(p. 792) (1) The State of Play: How is the Issue Currently Treated in Investment Arbitration?

While it cannot be said that the rule of legal precedent (stare decisis) applies in international arbitration in general, investment arbitration has witnessed a growth in reported jurisprudence. Litigation parties frequently rely on this jurisprudence to support their legal arguments and tribunals often apply these precedents as grounds for their findings. This is due to a number of reasons. Awards are frequently published and tend to have a certain degree of homogeneity, particularly when they are rendered within an institutional framework such as ICSID or NAFTA. Furthermore, arbitration based on investment law has the unique characteristic of combining elements of public international law with rules of private law. In the jurisdictional phase, this has led arbitral tribunals to focus at length on the distinction between treaty violations and contractual breaches. As a result, the legal issues to be decided by different panels sitting in different disputes in the field of investment law tend to be similar. This is not surprising given that the terms of Bilateral Investment Treaties (BITs) and the contents of the various dispute settlement mechanisms often bear a close
The paradox of this situation is that, although investment disputes are not adjudicated by a permanent court or tribunal, but, rather, before tribunals appointed under institutional rules such as those of ICSID, UNCITRAL and the ICC, the awards of these panels are systematically relied upon as forming part of the body of investment case-law not unlike the decisions of permanent judicial organs, such as the International Court of Justice.

This has led to objections being filed over the appointment of arbitrators in investment arbitrations, or to challenges being raised in the course of the arbitration, when the arbitrators in question are also involved as counsel and advocate in other pending cases. Such cases may involve different parties, but they frequently deal with similar legal issues. The rationale of an objection or challenge in these circumstances is that, to the extent that a nominated arbitrator acts as counsel in a dispute of a similar character and adopts in that context certain positions regarding issues which are common to both disputes, he or she may not be able to maintain an entirely unbiased approach to the same issues in the case where he or she is called to act as an arbitrator.

Similar types of challenges are often raised in the context of international commercial arbitration in general and the solutions adopted may vary. Generally speaking, the sole fact that an arbitrator may have represented a party as counsel in a different dispute involving different parties but dealing with related legal issues does not provide sufficient grounds for the non-confirmation or challenge of that individual. When other factors come into play, however, particularly the principle of equality of treatment between the parties and general principles of due process, the outcome may be different. As will be seen below, the success of a non-confirmation or challenge largely depends on the standards applied to the definition of independence and impartiality, assuming that these two concepts can be grouped under a common heading.

(a) Relevant ICSID Provisions

Provisions relating to disclosure requirements by arbitrators and their independence and impartiality are found in the ICSID Convention, the ICSID Arbitration Rules, and the Additional Facility Arbitration Rules. Article 14(1) of the Convention speaks of the ‘high moral character’ and ‘recognised competence in the fields of law, commerce, industry or finance’ of members of panels, and emphasizes the legal competence expected of members of all arbitral tribunals. This provision further stresses that nominees should be ‘persons that may be relied upon to exercise independent judgment’, thus including an implicit duty of impartiality and independence from the parties.\(^6\)

Pursuant to Article 40(2) of the Convention, arbitrators appointed outside the Panel of Arbitrators must possess the same qualities described in Article 14(1).\(^7\) Moreover, under Article 57 of the Convention, an arbitrator may be disqualified if he or she manifestly lacks the capacities listed under Article 14(1).

Issues of potential bias can also be avoided by stipulating strict nationality requirements. With this in mind, Articles 38 and 39 of the ICSID Convention state that arbitrators appointed by the Chairman of the World Bank cannot be nationals of either party to the dispute and that the majority of arbitrators shall be nationals of States other than those of the parties to the dispute. The nationality requirement can create inequalities between the parties to the extent that it allows the party making its appointment first the possibility of naming a national while excluding this possibility for the other party. However, this problem has been solved by Arbitration Rule 1(3), (p. 794) which requires that a national of either party may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute.

At the outset of the proceedings, nominees must sign declarations attesting that they shall act ‘fairly as between the parties’ and ‘not accept any instruction or compensation with regard to the proceeding from any source’ except as provided in the Convention, Regulations and Rules. Where applicable, a statement of the arbitrator’s ‘past and present, professional and other relationship (if any) with the parties’ may also be attached to the declaration (Arbitration Rule 6(2) and Additional Facility Arbitration Rules, Art 13(2)).\(^8\) ICSID provisions contain no definition of the kind of resemblance.
relationship that should be disclosed by arbitrators or considered as a bar to appointment. In his commentary on the ICSID Convention, Professor Schreuer provides some examples of the types of relationships which should be disclosed:

- a permanent attorney/client relationship, any other permanent or recurrent business relationship, employment by a party, including civil service in a State that is a party, substantial participation or shareholding in a company that is a party and any form of relationship in which the arbitrator stands to profit directly or indirectly from the financial gain of a party.  

This non-exclusive list shows that personal or professional contacts with a party must rise to a certain level in order to prevent a person from acting as arbitrator. Guidance in this respect is provided by the ICSID decisions to date where challenges to arbitrators have been addressed.

(b) ICSID Precedents

In *Amco Asia Corp v Indonesia*, the challenged arbitrator had given tax advice to the individual who controlled the claimants in the arbitration. In addition, the arbitrator's law firm and claimants' counsel in the arbitration had a profit-sharing arrangement and a joint office. At the time of the challenge, the profit-sharing arrangements had ended, but the two firms continued to share offices and administrative services until a few months before the beginning of the arbitral proceedings. The challenge was decided by the unchallenged arbitrators on the basis of the ICSID Convention and the existing rules and regulations which, in the view of the non-challenged members of the tribunal embodied 'general principles governing international arbitration'.

(p. 795) The claimants argued that the relationship between the arbitrator and claimants' counsel was de minimis and contended that it was to be expected that, in cases of a party-appointed arbitrator, the appointing party would already know the arbitrator in question. In response to those arguments, the unchallenged arbitrators held that there could be no distinction amongst the arbitrators, whatever the method of appointment, with regard to the standards of impartiality applicable to them. However, the two arbitrators agreed that a party-appointed arbitrator inevitably may have some degree of acquaintance with the party in question, and noted that the arbitrator in such cases cannot be disqualified simply on the basis of that acquaintance unless there is a 'manifest' or 'highly probable' lack of impartiality, something which did not exist in the particular case.

Precedents also exist with regard to situations where arbitrators disclosed facts casting doubt on their independence and impartiality which arose after their appointment. In *Holiday Inns v Morocco*, for example, the arbitrator appointed by the claimants revealed that in the course of the arbitration he had become a director of the claimants and subsequently resigned pursuant to Article 56(3).

A lack of the qualities required under Article 14(1) of the Convention may lead to a proposal to disqualify an arbitrator pursuant to Article 57 of the Convention (and Rule 9 of the Arbitration Rules). Article 57 stipulates that a proposal to disqualify may be advanced 'on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14'. Pursuant to Article 58, a proposal to disqualify an arbitrator or a conciliator is to be decided 'by the other members of the Commission or Tribunal ... provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision'. Similarly, Rule 9(4) reads as follows: 'Unless the proposal [to disqualify] relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned'. If it is decided that the proposal for disqualification is well-qualified, the replacement of the arbitrator is carried out following the same procedures for the constitution of the tribunal (s 2 of Ch III or s 2 of Ch IV of the Convention).

It should be noted that, under the ICSID system, unlike other arbitral institutions, there are no strict temporal requirements for the admissibility of a request for disqualification. Pursuant to Rule 9(1), a
proposal for disqualification of an arbitrator must be made ‘promptly, and in any event before the proceeding is declared closed’. Although the term ‘promptly’ is not defined, its plain and ordinary meaning (p. 796) is tolerably clear: a disqualification proposal will be admissible only if filed in a timely manner. As to the definition of the grounds for disqualification, Professor Schreuer, in his commentary on the ICSID Convention, recalls that, during the travaux préparatoires of the Convention, discussion on that subject was finally resolved by means of a renvoi to the terms used in Article 14(1). Schreuer observes that Article 57 stipulates that the lack of impartiality must be ‘manifest’, and thus this provision ‘imposes a relatively heavy burden on the party making the proposal’.

In their Decision concerning a proposal to disqualify the president of the ad hoc committee in the ICSID case, Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic, the two unchallenged members of the ad hoc committee examined the requirement set forth by Article 57 of the Convention of ‘a manifest lack of the qualities required by Article 14’. The president of the ad hoc committee had qualified his declaration under Rule 6 of the Arbitration Rules in one respect, and the respondent subsequently challenged him. The Respondent—while not questioning the legal competence or moral character of the designated president of the tribunal—argued that legal work carried out by a partner of the president's law firm for Vivendi's predecessor, Compagnie Générale des Eaux, affected the president's ability to exercise independent judgment. It should be noted that the designated president had not been involved in the matter in question, and that most of the work had been carried out before the arbitration commenced and was completed under the instructions of the US law firm which acted as lead counsel in the case. Furthermore, the president's partner had undertaken not to accept any further instructions from Vivendi. The committee members rejected the proposal to disqualify and, in doing so, stressed the following facts as being particularly relevant: (1) that the relationship was promptly and fully disclosed, (2) that the challenged president had no personal relationship with the party for which the work was carried out by his firm, (3) that the work concerned a specific transaction and not general legal advice, and that the president's firm was not lead counsel, and (4) that the relationship would soon come to an end. In these circumstances, the committee members held that the President's independence could not be regarded as being impaired. As they stated:

[T]he mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator or Committee member. All the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently.

(p. 797) Another example is provided by the claimant's proposal to disqualify the arbitrator appointed by the respondent in the SGS v Pakistan arbitration. The disqualification proposal was based on the disclosure made by the arbitrator that he had provided legal advice to the respondent in another, unrelated, ICSID arbitration, GAMI v United Mexican States, where one of the members of the respondent's legal team in SGS v Pakistan had been nominated president of the tribunal, with the parties' agreement. According to the claimant, this situation raised 'some reasonable doubts' as to the arbitrator's impartiality. The claimant's concerns were reinforced by the disclosure made by the arbitrator in his CV that he had represented the same respondent State in a NAFTA arbitration (Robert Azinian and Others v United Mexican States), where the same individual who acted as counsel for the respondent in SGS v Pakistan presided over the tribunal. The claimant was concerned that the arbitrator might 'feel indebted' to that individual because the tribunal he presided over in Azinian had issued an award favourable to the respondent.

In dismissing the proposal for disqualification, the president of the tribunal and the other co-arbitrator noted that the claimant had failed to show what it asserted, for example, that there was 'a clear relationship of dependency' between the arbitrator and counsel for the respondent. In the absence of such showing, the challenge could not be sustained because the facts of the case did not show that a 'real risk' existed that the challenged arbitrator could not be relied upon to act with
independence and impartiality.\textsuperscript{20}

In \textit{Salini Costruttori SPA and Italstrade SpA v The Hashemite Kingdom of Jordan}, the claimants objected to the appointment of the arbitrator chosen by the respondent and noted that the appointment would be challenged if the nominee accepted the appointment.\textsuperscript{21} One of the reasons for the objection included the appointee having acted as opposing counsel in other cases involving one of the claimants. The arbitrator accepted his appointment.\textsuperscript{22} One month before the first session of the tribunal was scheduled to take place, the claimants filed a proposal for the disqualification of the arbitrator, pursuant to Article 57 of the ICSID Convention. The proceeding was suspended pending a decision on the proposal, pursuant to ICSID Arbitration Rule 9(6). However, no decision was eventually necessary since the challenged arbitrator resigned.\textsuperscript{23}

In two recent ICSID cases submitted against the government of Argentina, \textit{Azurix Corp v Argentine Republic} and \textit{Siemens AG v Argentine Republic}, Argentina (p. 798) challenged the president of the tribunal (the same individual in both cases) on the basis of an alleged connection with counsel for the claimants. Although the decisions in these two cases are not in the public domain, some of the factual aspects have been summarized in an internet newsletter.\textsuperscript{24} Both challenges involved concerns about the arbitrator's professional relationship with the law firm representing another investor in a separate ICSID arbitration. Argentina based its challenges on the fact that the law firm in question had appointed as arbitrator, in a different and unrelated case,\textsuperscript{25} the same lawyer who represented the claimants as counsel in both the \textit{Azurix} and \textit{Siemens} arbitrations.

In both cases, the proceedings were suspended in December 2004, pending the respective tribunals’ dealings with Argentina’s challenges. However, the subsequent outcomes present some differences. In \textit{Azurix v Argentina}, the two party-appointed arbitrators rejected Argentina’s challenge of the tribunal's president in a decision on 11 March 2005. It should be noted, incidentally, that in this case the challenge had been raised after the tribunal had issued a decision on jurisdiction and held hearings on the merits of the case. In \textit{Siemens v Argentina}, the unchallenged members of the tribunal could not reach a decision on a proposal to disqualify the president, who had been a staff member of the World Bank. As seen above, Article 58 of the ICSID Convention provides that if the members of the tribunal are divided on a proposal to disqualify an arbitrator, the decision shall be made by the chairman, that is, the President of the World Bank. However, in this case the President had been a staff member of the World Bank, therefore, in order to avoid any conflict of interest, the Secretary-General of ICSID informed the parties that the issue would be submitted to the Secretary-General of the Permanent Court of Arbitration (PCA) for his recommendation. By a letter of 14 April 2005, the Secretary-General of the PCA recommended that the proposal to disqualify the president of the tribunal be rejected and the Secretary-General of ICSID accordingly informed the parties that the disqualification proposal could not be sustained.

A proposal for disqualification was triggered in the ICSID case \textit{Saipem SPA v The Peoples’ Republic of Bangladesh}\textsuperscript{26} by the arbitrator’s disclosure that he had entertained on-going professional contacts with the legal counsel representing the claimant (ie the party that had nominated the arbitrator). The arbitrator further indicated that the professional contacts with the claimant's counsel were likely to continue in the future.

The respondent objected to the arbitrator's appointment, contending that the existing professional relationship between the arbitrator and the claimant's (p. 799) counsel might involve personal contacts and lead to the discussion of the issues relating to the pending arbitration. The respondent further sustained that the arbitrator had a financial and economic relationship with the claimant's lawyers since they had paid fees for his professional services. In the respondent's view, this factual situation would create a subconscious bias in favour of the claimant in the arbitrator's mind. An additional ground on which the proposal for disqualification was based was the fact that the arbitrator—an authoritative figure in the field of investment arbitration—had expressed opinions in his writings which, in the respondent's view, showed preconceived positions with regard to some of the central issues of the arbitration. The respondent insisted that, in the circumstances, there was a 'real likelihood that he [the arbitrator] will be biased in favour of the Claimant'.

The claimant replied that the arbitrator's relationship with the claimant's counsel was limited to providing expert advice in two different ICSID arbitrations on specific legal matters which bore no connection with the pending proceedings. In addition, the claimant specified that the arbitrator had been paid directly by the client and not by counsel and thus had no contractual or financial relationship with the latter. With respect to the opinions expressed by the arbitrator in his writings, the claimant argued that they could not be interpreted as an indication of lack of independence and even less of bias in favour of the claimant in the arbitration. On the contrary, in the claimant's opinion, the arbitrator's reputation and his knowledge of investment law made him particularly qualified to act as an arbitrator in ICSID proceedings.

In their Decision of 11 October 2005, the unchallenged arbitrators dismissed the disqualification proposal on the following grounds: (i) the arbitrator had no connection with any of the parties in the arbitration; (ii) the respondent's allegations that the arbitrator might have had ex parte communications with claimant's counsel and that he might be biased to the respondent's detriment were based on pure speculation since no evidence of impropriety had been adduced or proven; and (iii) the arbitrator's doctrinal opinions 'expressed in the abstract without reference to any particular case do not affect the arbitrator's impartiality and independence'. Interestingly, the Decision of the unchallenged arbitrators expressly referred to the IBA Guidelines to the extent that these provided support for their conclusions.

The situation was quite different in the Víctor Pey Casado and President Allende Foundation v Republic of Chile case where, in August 2005, the respondent State initiated a proposal to disqualify the entire tribunal, including its own nominee. Subsequent to Chile's challenge, the arbitrator nominated by Chile resigned, while the remaining co-arbitrator and the president of the tribunal did not step down. (p. 800) After lengthy submissions by the parties, the question was submitted by the Acting Secretary-General of ICSID to the Secretary-General of the PCA for his decision. Although the reasons underlying the disqualification proposal are not known, something has transpired in the same investment newsletter reporting on the various Argentine challenges recounted above. According to this source, the respondent—in addition to general claims of lack of impartiality and bias—argued that the remaining co-arbitrator should be disqualified in light of his recent appointment as Foreign Minister of his country. Chile argued that the arbitrator's continuing service in the tribunal would violate the law of his country and raise diplomatic problems in the relation between his country and the respondent State. The arbitrator rejected all the accusations moved against him. On 17 February 2006, the PCA's Secretary-General rejected the proposal to disqualify the president of the arbitral tribunal and accepted the proposal to disqualify the co-arbitrator, albeit—as it is customary—without giving any reasons for this conclusion. Consequently, it is not possible to establish whether the arbitrator's political functions may have played a role in the PCA's decision.

(c) Other Investment Arbitration Precedents

In the majority of cases, non-ICSID investment arbitrations remain confidential and the resulting awards are often not published. It is thus more difficult to provide an accurate overview of how challenges to arbitrators and related issues are dealt with in this type of case. However, although limited, some examples do exist, and these may provide a degree of guidance on the particular characteristics of investment arbitrations when it comes to the independence of arbitrators and the requirement for disclosure.

In a NAFTA arbitration conducted under the UNCITRAL Rules brought by a US company against the government of Canada, SD Myers v Canada, the claimant objected to the participation of the arbitrator appointed by the respondent because he was a registered lobbyist in connection with the softwood Lumber Agreement between the United States and Canada. The decision on the challenge, which had not alleged actual bias but, rather, lack of independence, was made by the Secretary-General of ICSID under Article 12.1 of the UNCITRAL Rules.
The Secretary-General of ICSID informed the parties that he would uphold the challenge of the arbitrator unless he discontinued his lobbying activities. The following day, the arbitrator tendered his resignation from the arbitral tribunal.

(p. 801) Certain features of this case deserve brief comment. First, it should be noted that, at the outset of the proceedings, the Government of Canada requested the tribunal's consent to its constitution and membership being made public. The tribunal agreed that this information be put in the public domain. The essential elements of the challenge are recalled in the partial award of 13 November 2000. However, the limited background provided in that award does not make it possible to ascertain whether the arbitrator had disclosed the information which formed the basis of the challenge or whether this had been discovered through the claimant's independent investigations. Assuming that the relevant circumstances had not been disclosed by the challenged arbitrator, the appointing authority clearly adopted the right course of action, since the arbitrator's lobbying activities concerning an agreement between one of the parties and the country of which the other was a national represented a matter which should have been disclosed. The arbitrator's failure to disclose in this instance—assuming that there had indeed been failure to disclose—undermined his appearance of impartiality.

A similar situation arose in the arbitration Canfor Corp. v United States. In that case, the claimant, a Canadian softwood lumber producer, argued that certain measures adopted by the US Department of Commerce and the US International Trade Commission imposing anti-dumping and countervailing duties on softwood imported from Canada, violated the NAFTA's investment chapter. The case was submitted to arbitration under the UNCITRAL Rules in November 2002 and the claimant appointed its arbitrator with effect as of that date. By contrast with the situation in the SD Myers challenge reviewed above, the arbitrator disclosed that—prior to his appointment, that is, in May 2001—he had given a speech to a Canadian government council where he commented on a preliminary determination of the US International Trade Commission that the US softwood lumber industry was threatened with material injury by imports from Canada of softwood lumber. Both this determination and an earlier one by the US Department of Commerce were alleged by the claimant to represent violations of the US obligations under the NAFTA investment chapter and were thus central to the claimant's case. In his speech, the arbitrator appointed by Canfor had stated, in relation to the lumber dispute:

Aside from agricultural subsidies, there are other issues that we have with the US. Take the softwood lumber dispute, for example. This will be the fourth time we have been challenged. We have won every single challenge on softwood lumber, and yet they continue to challenge us with respect to those issues. Because they know the harassment is just as bad as the process.

(p. 802) The USA challenged the arbitrator, arguing that his comments revealed that his judgment was biased in favour of the claimant and, accordingly, that he was not in a position to decide the case independently and impartially. Following Canfor's refusal to agree with the challenge and the arbitrator's decision not to resign, the USA requested that the challenge be decided by the Secretary-General of ICSID, which is the appointing authority under NAFTA, Article 1124(1). Both parties filed remarks and the challenged arbitrator expressed his position on the challenge. According to a commentary by Barton Legum, the USA contended that the arbitrator's comments 'reflected a prejudgment of two of the measures alleged by Canfor to constitute a breach of the NAFTA—and that Canfor, as part of its claim, characterised those measures in much the same way as the arbitrator had'. As to Canfor, they argued that the arbitrator's remarks were general statements which did not address the dispute between Canfor and the USA per se. Three months after the challenge was introduced, in March 2003, the Secretary-General of ICSID announced his intention to issue a decision upholding the challenge if the arbitrator did not wish to withdraw. The arbitrator resigned shortly thereafter and subsequently no formal decision was issued by ICSID. Even in the absence of a decision by ICSID, this case shows that public positions taken by an
arbitrator regarding measures which form the subject-matter of the dispute may be a sufficient basis for a successful disqualification proposal. Having said that, in the circumstances of this case, the tone of the arbitrator's remarks appeared to endorse Canada's position with respect to a key issue in the dispute in fairly clear terms. It remains to be seen whether the outcome of the disqualification would have been the same had the arbitrator's words been more carefully chosen.

The third example discussed below concerns UNCITRAL proceedings relating to the Bilateral Investment Treaty between Ghana and Malaysia. This case has attracted the attention of the arbitration community because it involved the central issues to be decided by the relevant domestic jurisdiction in relation to the arbitrator's challenge: that is, the vexata quaestio of someone serving as an arbitrator in one investor-State arbitration while acting as counsel in another.

In October 2004, the Dutch District Court in The Hague was called upon to decide on the challenge of a party-appointed arbitrator in the UNCITRAL arbitration Telekom Malaysia Berhard v Republic of Ghana ('TMB/Ghana'). In that case, the arbitrator appointed by the Claimant had disclosed, after his appointment and after it had become apparent during the proceedings that the respondent based its allegations on an award in an unrelated ICSID case, the RFCC v Morocco arbitration, that he had been instructed to represent one of the parties as counsel in a request for annulment of the award relied on by the respondent in TMB/Ghana. The respondent challenged the arbitrator on the basis of this disclosure, and the challenge was heard by the arbitral tribunal, which decided that the proceedings should continue. The respondent subsequently filed a challenge with the Secretary-General of the Permanent Court of Arbitration, as required by the applicable rules, and the challenge was rejected. Dissatisfied with this result, the respondent filed a challenge with the competent judicial authority of the place of arbitration, the Provisional Measures Judge of the District Court in The Hague.

The respondent argued that the challenged arbitrator's role as counsel in the annulment proceedings in RFCC v Morocco was incompatible with his role as an impartial arbitrator in the UNCITRAL proceedings because the two disputes had common features. In the TMB/Ghana arbitration, Ghana was reproached for having expropriated TMB's rights in violation of the relevant BIT. The same issues were present in RFCC v Morocco, where the tribunal held that an expropriation provision in the Italy/Morocco treaty represented an 'acte de puissance publique'. The respondent was concerned that, in the annulment proceedings of RFCC v Morocco, the challenged arbitrator—acting as counsel—might argue in favour of a certain interpretation of or approach to expropriation, and thus that he could not maintain an unbiased view of that issue in a case where he acted as arbitrator.

The claimant argued first that the respondent had forfeited its right to challenge the arbitrator because, although it was aware that the latter had represented parties in two other unrelated cases which touched on similar legal issues, it did not challenge the arbitrator then. Furthermore, the claimant contended that the factual background of the two cases was different and that, in any event, any of the legal and factual issues would not be considered in the annulment proceedings, given the limited grounds listed under Article 52 of the ICSID Convention governing appointments. The challenged arbitrator stated that his independence and impartiality would not be affected in any way by the fact that he had been asked to act as counsel for an unrelated party in an unrelated case. As reported in the judgment of 18 October 2004, the challenged arbitrator noted that:

[E]xperience shows that each case is different and that, in BIT arbitrations, the arbitrators’ primary task is to apply the relevant rules of law, first and foremost the treaty on the basis of which the arbitration is initiated—here the bilateral treaty between Malaysia and Ghana—to the facts of the case at hand.

The Court first dismissed TMB's argument that the right to challenge was lost because Ghana had not challenged the arbitrator's impartiality on the basis of his involvement in two previous cases. As
the Court noted, if it were to be assumed that the arbitrator's actions did indeed justify a challenge, 'the mere circumstance of (p. 804) Ghana not having relied thereon does not automatically mean that as a result thereof Ghana should have lost its right to still challenge . . . at a later stage of the arbitration proceedings, as a result of his (future) role in another arbitration action'. The Court then looked at the merits of the challenge in the light of the lex fori, Dutch law, and concluded that an allegation of lack of impartiality or independence had to be assessed from an objective point of view. Thus, the Court observed, account should also be taken of the 'outward appearance' of the situation, that is, not only whether the arbitrator could distance himself in the principal case from the factual and legal issues in the other case, but also whether it appeared that he could not observe such a condition. In response to the argument that annulment proceedings under the ICSID Rules do not necessarily entail a full review of all the legal and factual issues considered at the merits stage, the Court resorted to its own practice as a reference and observed that, in its experience of reversal proceedings, all objections against the judgment whose annulment is requested are advanced and therefore the challenged arbitrator in his capacity as counsel will put forward all possible arguments against the award. On those grounds, the Court found that there were justified doubts as to the arbitrator's impartiality, since he could not at the same time:

be unbiased and open to all the merits of the RFCC/Moroccan 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 v. 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.38

Consequently, the Dutch Court invited the challenged arbitrator to resign within ten days either as counsel in the RFCC v Morocco case or as arbitrator in the TMB/Ghana case.

Following the judgment of the Dutch Court, the challenged arbitrator resigned as counsel in RFCC v Morocco. However, the respondent challenged him again, because in its view the Dutch Court's ruling implied that the arbitrator's dual role would not taint his role as an arbitrator (provided the arbitrator resigned as counsel in the annulment proceedings) because the challenged arbitrator had not yet participated in the tribunal's decisions in the Ghana/TMB case. The respondent argued that decisions had been made by the tribunal in that case where the challenged arbitrator must have played a role and that, consequently, he should resign from the tribunal as well. The Dutch Court seized of the new challenge found that the arbitral tribunal's decisions adopted until then were purely procedural in character and could not have had an adverse effect on the respondent's case. The Court therefore stated that it saw no further grounds for the challenge and added, in relevant part (p. 805)

After all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore, it could easily happen in arbitrations that an arbitrator has to decide a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration.39

The Dutch Court's conclusions call for some brief remarks. First of all, the challenged arbitrator's conduct in the case appears to have been beyond reproach. From what can be ascertained from the Dutch Court's decision, the arbitrator disclosed his involvement in the RFCC v Morocco case as soon as it became apparent that one of the parties relied on it in its legal arguments. In playing the devil's advocate, one could argue that this might have been anticipated and a statement to that
effect could have been included in the declaration of independence before the proceedings began. But that position suggests that an arbitrator has a duty to anticipate the legal arguments that a party might make in a given case before such arguments are actually made. Can arbitrators generally be expected to divine in advance the legal submissions of a party? That is perhaps too much to ask. The fact remains that disclosure was made and that it was made in a timely manner.

As to the decision of the Dutch Court, while a difference of views may exist, it is hard to quarrel with its conclusions. Each challenge should be assessed on its merits and in light of its factual context. In this instance, the two arbitrations appeared to have too many common elements to allow the challenged arbitrator to maintain his dual role without the risk of tainting at least the appearance of independence, as noted by the Court. The fact that the arbitrator himself felt the need to disclose his involvement as counsel in the RFCC v Morocco case may have been a sign of his growing discomfort at preserving both advocate’s and arbitrator’s ‘hats’.

This being said, two aspects of this case still leave one with questions. The first is the contrast between the decision of the arbitral institution which was initially designated to decide the challenge and the decision of the national court. It is obvious that uniformity of decisions between such different bodies cannot necessarily be expected. However, the decision of the Permanent Court of Arbitration to reject the challenge may have the result of confirming the public’s perception that the world of international arbitration is an exclusive club where the interests of members take priority over the parties’ interests. Although this may be no more than a perception, it should not be taken lightly, since arbitral institutions need to set an example as they are the ultimate guardians of the sanctity of the arbitral process.

The second criticism concerns a certain parochialism shown by The Hague Court. Although its conclusions may be valid, the fact that they were based solely on provisions of national law and that the Court referred to its own practice to decide (p. 806) questions which should, arguably, have been answered in the light of the ICSID Rules and practice, is problematic. This chapter, for one, represents a small contribution towards showing that there is no shortage in the practice of international arbitration of case-law and rules on the independence and impartiality of arbitrators and there appears to be no reason why the Dutch Court should not have taken them into account.

It is possible that the Dutch Court found comfort in applying its own law and practice when confronted with a team of international experts arguing the case on the basis of international law principles and without much reference to the lex fori. Nonetheless, the Dutch Court’s attitude is alarming to the extent that it may be considered representative of the reluctance of national courts to fully embrace arbitration practices at a time when arbitration is generally tabled as a preferred method for the resolution of international disputes.

It should also be mentioned that a third challenge against the same arbitrator as in the Azurix and Siemens ICSID arbitrations was initiated by Argentina in an arbitration under the UNCITRAL Rules: National Grid Transco PLC v Argentina. The challenge was referred by the PCA—which was requested by the respondent state to designate an appointing authority in the case—to the ICC International Court of Arbitration. Once again, Argentina’s attempts to have this arbitrator removed from an arbitral panel failed when the ICC Court rejected the challenge in December 2005. In conformity with Article 7(4) of the ICC Rules, no motivation for the Court’s decision was given.

The last case that deserves to be mentioned is an ad hoc arbitration between a Dutch investor and the government of Poland, the Eureko v Poland case, with Brussels as the place of arbitration. In October 2005, Poland filed a challenge against the arbitrator appointed by the investor before the Court of First Instance of Brussels. Before the challenge was filed, the majority of the tribunal had issued a Partial Award on liability against the host State on 19 August 2005.40 Poland’s objections included the fact that the challenged arbitrator had not disclosed that he worked in collaboration with the law firm representing the claimant. Poland added that the arbitrator had also not revealed that he—together with the same law firms—had allegedly represented the company Cargill Inc in another arbitration against Poland which presented close similarities with that case.

In a ruling of 22 December 2006, the Court of First Instance of Brussels held that the link between
the challenged arbitrator and the law firm was too tenuous to justify doubts as to the arbitrator's impartiality and independence and rejected the challenge.\textsuperscript{41} The respondent appealed the decision and, in the appeal, the respondent included as an additional ground for challenge the fact that the challenged arbitrator acted as co-counsel for the claimant with the same law firm in the \textit{Vivendi v Argentina} ICSID arbitration. Poland argued that the fact that in the legal (p. 807) arguments advanced in \textit{Vivendi} the challenged arbitrator relied on the award in \textit{Eurêko v Poland} supported the respondent's doubts as to the capacity of the arbitrator to act in an independent and impartial manner.\textsuperscript{42}

(2) Review of Selected Arbitration Rules on Independence, Impartiality, and the Duty to Disclose

The terms 'independence' and 'impartiality' are often used interchangeably, but ought to be distinguished. Independence, the notion most frequently employed in national laws and arbitration rules suggests the absence of any connection, financial or otherwise, with a party to the proceedings. Impartiality suggests the absence of prejudice or bias. According to a definition provided by the European Court of Human Rights in a recent case:

\textit{[I]}n order to establish whether a tribunal can be considered as 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence … . As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect … . \textsuperscript{43}

(a) UNCITRAL

The UNCITRAL Rules and Model Law mention both the independence and impartiality requirements. Both instruments allow a challenge when 'circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence' (p. 808) (Art 10 of the Rules and Article 12(2) of the Model Law). They also specify the need for the arbitrator to disclose any such circumstances to the parties (Art 9 of the Rules and Art 12(1) of the Model Law). The Model Law further stipulates that the duty to disclose exists 'from the time of his appointment and throughout the arbitral proceedings' and that it shall be exercised 'without delay'.

Under Article 12(1) of the UNCITRAL Rules, the decision on a challenge is made by the institution chosen as the appointing authority. In the absence of a specific choice by the parties, the Secretary-General of the PCA will designate an authority to decide the challenge.\textsuperscript{44}

(b) ICC

Not all arbitration rules insist on both the independence and impartiality requirements. For instance, the ICC Rules do not expressly include impartiality in the general provision addressing the qualities of an arbitrator. Article 7 of the ICC Rules simply requires that 'every arbitrator must be and remain independent of the parties involved in the arbitration'. The impartiality requirement can however be considered to be encompassed in Article 11 to the extent that this provision stipulates that a challenge may be made 'for lack of independence or otherwise'. In addition, Article 15(2) expressly provides that 'in all cases, the Arbitral Tribunal shall act fairly and impartially'.

In the ICC system, the Court of Arbitration considers issues of independence and impartiality at two stages of the proceedings: at the outset (ie at the time of confirmation or appointment of an arbitrator) and during the course of the arbitration. In both instances, the standard applied for disclosure is the same: a prospective arbitrator has to disclose '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
In this day and age, when global law firms are expanding, lawyers may cooperate in a variety of situations. Challenges relate to the professional relationship that may exist between the prospective arbitrator's law firm and the law firm representing one of the parties.

Other instances which often give rise to challenges relate to the professional relationship that may exist between the prospective arbitrator's law firm and the law firm representing one of the parties.
ways, setting up different degrees of financial integration and involvement in their mutual businesses. Clearly, these situations need to be disclosed and, once they are, must be evaluated in their full context. But it is to be expected that a decisive factor for the ICC Court will be the degree of financial connection between the relevant law firms.

Lastly, the publication of legal articles by an arbitrator is not necessarily upheld as a basis for challenging the arbitrator. Again, this hinges on the facts of the case but, as a general rule, a prospective arbitrator should not be disqualified merely because of the ideas he or she has expressed in a doctrinal contribution. At most, parties may wish to carry out their own due diligence in order to verify what a prospective arbitrator may have written prior to his or her appointment.

(c) LCIA

The LCIA Rules impose duties of both impartiality and independence on arbitrators (Arts 5–12). Before any appointment is made by the LCIA, arbitrators must provide records of past and present professional positions and sign declarations of independence. A challenge can be raised by a party along the lines required by the UNCITRAL Rules, that is, ‘if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence’ (Art 10.3). This latter situation includes the case of an arbitrator who is a member of a large multinational law firm. As noted above, the possibility that a conflict of interest might arise in that context (p. 811) is real, and experience shows that facts relating to such relationships should be disclosed even when they arise in the course of the arbitration and not at the time of appointment.

Under the LCIA Rules, arbitrators must remain at all times impartial and independent of the parties (Art 5.2), and sign declarations to that effect at the time of appointment (Art 5.3). Challenges may be raised ‘if circumstances give rise to doubts as to’ the arbitrator's impartiality or independence along the lines of what is required under the UNCITRAL Rules. Article 11 of the LCIA Rules allows the LCIA to decide whether to follow the original nominating process in the event that a nominee is not suitable or independent or impartial or if an appointed arbitrator has to be replaced for any reason.

Pursuant to Article 29 of the LCIA Rules, the LCIA's decisions, including decisions on challenges, are administrative in nature and the Court is ‘not required to give reasons for its decisions’. With its announcement in 2006 that it will publish its decisions on challenges to arbitrators, the LCIA has also made known that nothing in its Rules prevents the publication of decisions on challenges and that—in any event—confidentiality and transparency are not irreconcilable. The LCIA has accordingly decided to publish abstracts of all of its decisions, and not just a selection of them.

(3) The Practice of the International Court of Justice (‘ICJ’ or the ‘Court’)

Although the issue of independence of the international judiciary, that is, of members of permanent international tribunals, does not fall within the scope of this chapter, and challenges to permanent judges remain a rare occurrence, one recent challenge to a Member of the ICJ is worthy of mention.

In its Order of 30 January 2004 in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case (‘the Wall case’), the Court decided a challenge brought to its attention by the government of Israel against Judge Elaraby. Israel contended that Judge Elaraby had, both in his professional capacity when acting as legal adviser to the Egyptian government and in various negotiations involving the West Bank and Gaza Strip, and in his personal capacity in statements made to the Egyptian press, ‘been actively engaged in opposition to Israel including on matters which go directly to aspects of the question now before the Court’.

The Court found that the views of Judge Elaraby—expressed many years before the case was brought to the Court—did not really concern the question before the Court, that is, the legality of the construction of a wall by Israel in Palestinian territory, and dismissed the challenge mainly on that basis. As it had previously done in a challenge against three of its members in the 1970 South
West Africa case, the Court held that, when a judge has made previous statements while acting on behalf of his or her government concerning issues which are later before him or her as a member of the Court, the judge in question cannot be said to have previously acted in the case ‘as agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity’ (Art 17(2) of the Court's Statute). Accordingly, he or she should not be excluded from sitting in the case. For the Court, a legal adviser or diplomatic representative acts on behalf of his or her country and executes the latter's instructions. The inevitable conclusion, although not stated by the Court in so many words, is that in this kind of situation there can be no bias or threat to the judge's impartiality.

Judge Bürgenthal disagreed with the majority to the extent that, in his view, the statements made by Judge Elaraby to the press did create an appearance of bias. In his dissenting opinion, Judge Bürgenthal noted that Article 17(2) of the Statute had to be interpreted as reflecting broad notions of justice and fairness. One passage of his dissent is particularly worthy of mention: ‘Judicial ethics are not matters strictly of hard and fast rules. I doubt that they can ever be exhaustively defined—they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy.’

Another issue that is interesting to note in this context is the recent adoption by the International Court of Justice of new measures adopted ‘in the interest of the sound administration of justice’. The situations addressed by these measures may have some similarities with conflicts that may arise in investment arbitrations. The ICJ embarked on a new process to improve its procedures by issuing in October 2001, February 2002, and July 2004 a series of twelve Practice Directions, two of which, Practice Directions VII and VIII, have some relevance for the present chapter. In Practice Direction VII, the Court has directed that parties should refrain from appointing as judges ad hoc persons who are acting as agents, counsel, or advocates in another case before the Court or have acted in that capacity during the three years preceding the date of the nomination. Similarly, parties should refrain from appointing as agent, counsel, or advocate in a case before the Court a person sitting as a judge ad hoc in another case before the Court. Practice Direction VIII provides that a person who has been a member of the Court, a judge ad hoc, registrar, deputy-registrar, or high (p. 813) official of the Court cannot, for a period of three years after leaving his or her position, be designated as agent, counsel, or advocate in a case before the Court.

The main consequence of these developments is obvious: the professional distinction existing on a national level between Bench and Bar has been elevated to the international plane, albeit in a somewhat informal manner. Moreover, given the unique role of judges ad hoc in the Court, which has no direct counterpart in domestic jurisdictions, coupled with the length of ICJ proceedings, the Practice Directions will have the inevitable effect of reducing the number—already limited in some practitioners’ view—of those who can be selected as judges ad hoc in ICJ cases. As noted by a well-respected practitioner:

In practice, any regular practitioner before the Court is unlikely to be able to or willing to serve as a judge ad hoc, unless he or she is willing to give up practice altogether. Whereas this option might make sense where a practitioner gives up practice in order to become a full-time Member of the Bench, it is less clear that it does so where what is at stake is a temporary appointment as a judge ad hoc. There is a serious question whether this virtual exclusion of current practitioners from the ranks of those from whom judges ad hoc may be selected is of real long-term advantage for the Court.

The similarities with international arbitrations dealing with investment disputes are obvious. In a system, such as that of investment arbitration, where judicial precedents can play an important role not dissimilar from the role that the ICJ jurisprudence plays, it is not impossible to imagine that a similar practice may sooner or later be adopted as well. In practice, this may already have occurred, at least informally, since—in order to prevent issues of conflicts of interest—a number of well-known international practitioners have made it known that they will refrain from acting as
counsel in investment arbitrations so long as they continue to accept appointments as arbitrators in such cases. Others have preferred to turn down arbitrators’ appointments and limit their practice to the representation of parties.

(4) NAFTA’s and WTO’s Codes of Conduct

Both the NAFTA and WTO dispute settlement mechanisms contain specific requirements for the qualifications of members of panels and their appointment and have adopted compulsory codes or rules of conduct in this area.

(p. 814) (a) NAFTA

The NAFTA system contains a specific dispute settlement process for investment disputes which revolves around the provisions of Chapter 11 (‘Settlement of Disputes between a Party and an Investor of Another Party’). Under Chapter 11, a NAFTA investor alleging a breach by the host government of its investment obligations can have recourse to the mechanisms offered by the ICSID or UNCITRAL Rules. In this case, obviously the relevant provisions of the applicable rules will apply. In addition, it is interesting to note, although this does not strictly speaking concern disputes arising out of an investment, that Chapter 19 Article 1909 of NAFTA contains a code of conduct for arbitrators which is intended to ensure respect for the principles of the integrity and impartiality of proceedings conducted pursuant to NAFTA Chapters 19 (‘Review of Final Antidumping and Countervailing Duty Determinations’), and 20 (‘Institutional Arrangements and Dispute Settlement Procedures’).

Annex 1901.2 to NAFTA imposes certain requirements on members of bi-national panels, who shall in any event be ‘lawyers in good standing’ (para 2) and be subject to the code of conduct established pursuant to Article 1909 (para 6). If a party believes that a member of the panel violates the code of conduct, the parties may consult and agree to remove the panelist and appoint a new one. Panelists are required to sign protective orders for confidential information supplied by the parties and may be disqualified if they fail to do so. To the extent that it does not interfere with the performance of his or her duties and does not run contrary to the code of conduct, a panelist can engage in other business during his or her term as a panelist (para 10). Annex 1901.2 specifically provides that ‘while acting as a panelist, a panelist may not appear as counsel before another panel’ (para 11).

The Extraordinary Challenge Procedure established under Annex 1904.13 deserves separate mention. This procedure can be used in exceptional situations to challenge a decision of a bi-national panel, that is, a US-Canada panel established under the Free Trade Agreement, which has been effective since 1 January 1989 for the purpose of final determinations in relation to countervailing duty and anti-dumping investigations. Although a discussion of the Extraordinary Challenge Procedure falls beyond the scope of this chapter, it warrants mention to the extent that its raison d’être is the preservation of the integrity of the panel process.

A panel decision can be subject to review following the extraordinary challenge procedure if a party alleges, inter alia, that ‘a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct’ (Art 1904.13). If any of the actions listed in this provision have ‘materially affected the panel’s decision and threatens the integrity of the binational panel review process’, the party can avail itself of the Extraordinary Challenge Procedure. The fact that this procedure is adopted only in exceptional circumstances is evident from the use of the terms characterizing the conduct of the (p. 815) panel members: ‘gross misconduct’, ‘serious conflict of interest’, ‘materially violated the rules of conduct’.

(b) WTO

With respect to the WTO system, there is a general requirement that WTO Dispute Settlement
Panels be composed of well-qualified individuals who may (but do not have to) be selected from a non-compulsory list maintained by the WTO Secretariat. Pursuant to Article 8.3 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (the ‘DSU’), panelists are selected with a view to preserving their independence and in order to ensure that the panel consists of panelists with a diverse background and variety of experience. Under Article 18 of the DSU, ex parte communications between panel or Appellate Body members and the parties are prohibited.

The Rules of Conduct for the Understanding of the Rules and Procedures Governing the Settlement of Disputes (the ‘DSU Rules of Conduct’) were adopted on 11 December 1996. Their goal is to preserve the integrity and impartiality of the dispute settlement proceedings, ‘thereby enhancing confidence in the new dispute settlement mechanism’ (Preamble to the DSU Rules of Conduct). The Rules of Conduct apply to members of WTO dispute settlement panels, the Standing Appellate Body and arbitrators, as well as to members of the Secretariat and experts participating in the proceedings (s IV para 1 of the DSU Rules of Conduct).

The governing principle of the DSU Rules of Conduct, embodied in Sections II and III, imposes independence and impartiality on all persons covered therein, strict adhesion to the provisions of the DSU, disclosure of any matter or relationship that the covered person is expected to know ‘and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality’ (s III.1 and VI). The covered persons are also required to ‘take due care in the performance of their duties to fulfil these expectations, including through avoidance of any direct or indirect conflicts of interest in respect of the subject-matter of the proceedings’ (s III.1).

When a party becomes aware of evidence pointing to a material violation of the obligations under the DSU Rules of Conduct, it must submit such evidence, ‘at the earliest possible time and on a confidential basis’, to the appropriate body, depending (p. 816) on the procedure adopted, that is the Chair of the Dispute Settlement Body, or the Director-General of the Standing Appellate Body (s VIII.1). However, failure to disclose will not be sufficient ground for disqualification ‘unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interest and that the integrity, impartiality or confidence of the dispute settlement mechanism would be impaired thereby’ (s VIII.2). Under section VIII.20 of the DSU Rules of Conduct, all information concerning possible or actual violations of the Rules shall remain confidential.

(5) Summary Review of National Laws

National laws and judicial precedents analyse in detail the question of the independence of the judiciary. However, do the same standards apply to international arbitrators? International doctrine is divided on the issue. The famous maxim by Lord Hewart CJ in the English case R v Sussex Justices, ex parte McCarthy, 57 that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’ remains valid today in the case of arbitrators. Nonetheless, if national laws do not contain specific provisions regarding the duties of arbitrators with respect to independence and impartiality, the standards governing national judges will apply.

Depending on the rules applicable to the arbitration and public policy provisions of the lex fori, national courts may be called upon to decide a challenge of an arbitrator or review general issues affecting the proper constitution of a tribunal, such as an arbitrator’s bias or lack of independence, in the context of a request for the annulment of an award.

(a) France

French case-law has analysed the question of the extent of an arbitrator’s duty to inform the parties of circumstances which may raise doubts as to his or her independence and impartiality. French courts have upheld an objective test of ‘intellectual (p. 817) independence’ (‘indépendance d’esprit’) as one of the essential qualities of arbitrators. 58 In two judgments rendered on 6

November 1998, the Court of Cassation ruled that ‘toute personne a droit à ce que sa cause soit entendue par un tribunal impartial’ and added that ‘cette exigence doit s’apprécier objectivement’.59

In France, until 1995, the grounds for challenging international arbitrators were limited to those listed under Article 341 of the new code of civil procedure for the challenge of national judges.60 A series of judgments has modified this approach and distinguished the situation of arbitrators from that of national judges.61 French courts have also stressed that the duty to disclose facts which might raise reasonable doubts as to an arbitrator’s independence continues throughout the arbitration.

For instance, the Paris Court of Appeals—in a judgment of 12 January 1999 relying on the Court of Cassation’s decision in Maec SA v P Mumbach—stated that an arbitrator has the obligation to ‘révéler dès qu'il en a connaissance, tout fait ou circonstance de nature à faire légitimement douter de son indépendance’. The Court of Appeals defined such facts or circumstances as being ‘caractérisées par l’existence de liens matériels et intellectuels, une situation de nature à affecter le jugement de l’arbitre en constituant un risque certain de prévention à l’égard de l’une des parties à l’arbitrage’. The Court of Appeals added that the obligation to disclose ‘n’existe pas seulement au moment de la désignation de l’arbitre mais se continue tout au long de l’exercice par celui-ci de sa mission’.62

The scope of the duty to disclose was further reviewed in two judgments where the Paris Court of Appeals and the Court of Cassation were called upon to decide on the challenge of an arbitrator who had been repeatedly appointed by the same party in a number of arbitrations and had failed to reveal this fact.63 Both courts underscored the impropriety of the conduct of an arbitrator who chose not to (p. 818) inform the parties of the fact that he had been appointed arbitrator by the same party for cases involving similar contracts at least ten times. Particularly noteworthy is the decision of the Court of Appeals, where it noted:

... il est de principe que l’arbitre doit révéler aux parties toute circonstance de nature à affecter son jugement et à provoquer dans l’esprit des parties un doute raisonnable sur ses qualités d’impartialité et d’indépendance, qui sont de l’essence même de la fonction arbitrale.64

(b) England and Wales

The English 1996 Arbitration Act prescribes a duty of impartiality for arbitrators (sections 1(a), 24(1) (a) and 33(1)(a)), with no mention of independence. The final decision on an arbitrator’s impartiality will be made by English courts and the latter will decide even when the arbitration is conducted under institutional rules, such as those of the ICC or the LCIA.

English law applies the same standards of impartiality to judges and arbitrators.65 Although the Arbitration Act contains no specific duty to disclose, an implicit obligation exists, drawn by analogy from the position of national judges. Thus, the following dictum of the English Court of Appeal can be considered to extend to arbitrators and deserves to be quoted in full:

A judge must recuse himself from a case before any objection is made if the circumstances give rise to automatic disqualification or if he feels personally embarrassed in hearing the case. If, in any other case, the judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. Where objection is then made, it will be as wrong for the judge to yield to a tenuous or frivolous objection as it will be to ignore an objection of substance. However, if there is a real ground for doubt, that doubt must be resolved in favour of recusal ... The level of disclosure appropriately depends in large measure on the stage that the matter has reached. Thus, if, before a hearing has begun, the judge is alerted to some matter which, depending on the full facts, may throw doubt on his fitness to sit, he should inquire into the full facts, so far as they are ascertainable, in
order to make disclosure (p. 819) in light of the facts. In contrast, where a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is sufficient for the judge to disclose what he then knows. If he does make further inquiry and learns additional facts, he must also disclose those facts.66

This approach touches on a number of delicate points, including the fact that judges/arbitrators may sometimes resign in the presence of an objection, no matter how frivolous. This practice is condemned by the English Court of Appeals which has at the same time stressed the importance of a continuing duty to disclose and the fact that disclosure must be made as early as possible.

Since the enactment of the 1998 Human Rights Act on 2 October 2000, English courts are obliged to abide by section 3 of the Act imposing an interpretation of the law compatible with the rights under the European Convention on Human Rights. Thus, the case law of the European Court of Human Rights (‘ECHR’) on judicial independence and impartiality can no longer be ignored by English courts or by arbitrators sitting in England.67 This means, in particular, the need to take into account the subjective/objective test for bias elaborated by the ECHR in the Findlay v United Kingdom in the following terms: ‘As to the question of “impartiality”, there are two aspects to this requirement. First, the tribunal must be subjectively free from judicial bias. Secondly, it must also be impartial from an objective point of view, that is, it must offer sufficient guarantees to exclude any legitimate doubts in this respect.’68

(c) Switzerland

Swiss law only refers to the notion of independence on the part of the arbitrator and not to impartiality. Under Article 180(1)(c) of the Swiss Private International Law Act, an arbitrator can be challenged when ‘circumstances exist which give rise to justifiable doubts concerning his independence’. However, the right to an impartial judge is guaranteed by the Swiss Constitution and has been consistently extended to arbitrators by Swiss courts as a fundamental principle of public policy.69

Article 180 of the Swiss Private International Law Act leaves open to the parties the possibility of specifying by prior agreement the qualities of an arbitrator, and an arbitrator can be challenged if he or she does not meet such requirement. Additionally, the grounds of challenge and the challenge procedure can be specified by agreement between the parties.70 The Swiss (cantonal) judge at the seat of arbitration is (p. 820) competent to decide upon the challenge unless the parties have agreed that other rules—such as the ICC Rules—apply.71 If, for example, the ICC Rules apply, the decision of the ICC Court under Article 7(4) of the 1988 Rules is final (Art 180(3) of the Swiss Private International Law Act) and there is no appeal against the decision, either to a superior cantonal court or to the Federal Supreme Court.

(d) USA

In the USA, the federal statutory law of arbitration in the form of the Federal Arbitration Act (‘FAA’) contains no express provisions regulating challenges to or replacements of arbitrators. The FAA applies to international arbitrations in the USA and generally supersedes State law. In the absence of specific norms relating to challenges or replacements of arbitrators in the FAA, an individual State can issue specific rules to that effect. However, the existing State arbitration laws adopted by a number of States (the Uniform Arbitration Act (‘UAA’) adopted by 34 States and the District of Columbia) contain no express provisions regulating challenges to or replacements of arbitrators.72 Therefore, the courts—and the relevant professional associations to a certain extent, as will be seen below—have stepped in to fill this gap.

An objective test of impartiality for arbitrators and a strict duty to disclose was articulated as early as 1968 in the Commonwealth Coatings Corp v Continental Casualty Co case,73 where the US Supreme Court required disclosure of any dealings which may convey an impression of bias, including social connections with the parties and their counsel.74 Such a strict impartiality
requirement applies to all arbitrators, whether party-appointed or not. Curiously, because of the absence of specific provisions on the subject in US legislation, a party cannot challenge an arbitrator or raise an objection to his or her appointment before a court until the award is rendered unless the parties have previously agreed to abide by arbitration rules that contain specific provisions in that respect.\(^75\)

\((p. 821) (6)\) The Contribution of Professional Associations

The need for a general code of conduct, or at least non-mandatory guidelines for international arbitrators, has received the attention of professional associations, which have been seeking to provide practical answers to the problem. The American Arbitration Association/American Bar Association Code of Ethics ('AAA/ABA Code of Ethics') was the pioneer in this field. Its first text on the subject was finalized in 1977 (and revised in 2004). This was followed in 1987 by the International Bar Association's Rules of Ethics for International Arbitrators ('the IBA Rules') which have been superseded by the 2004 IBA Guidelines.

Professional associations certainly have an important role to play in this field, but caution should be exercised when using their proposals so as not to misunderstand their status and function. What are set forward are not binding provisions of law, but informal guidelines or general recommendations. This is recognized by the drafters of the IBA Guidelines who, at paragraph 6 of the Introduction, specified that '[T]he Guidelines are not legal provisions and do not override any applicable national law or arbitral rule chosen by the parties'. A similar disclaimer is contained in the Preamble of the AAA/ABA Code of Ethics.

\((a)\) The IBA Guidelines on Conflicts of Interest in International Arbitration

The IBA Guidelines have been elaborated by a group of business lawyers over a period of several years. They were finally approved by the IBA Council on 22 May 2004. The Guidelines are the product of a compromise between different interests and they have been the object of some criticism by members of the legal community. Nonetheless, they clearly respond to an existing need because they are repeatedly used as a code of reference by parties in the context of challenges or objections to the appointment of arbitrators. Moreover, in at least one of the examples of challenges discussed above, the Saipem v Bangladesh ICSID arbitration, the tribunal expressly referred to the IBA Guidelines in its decision.\(^76\)

The general principle inspiring the Guidelines is that arbitrators must 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' (General (p. 822) Standard 1). The Guidelines adopt a broad and objective standard based on whether there are 'any doubts as to the ability [of an arbitrator] to be impartial and independent' justifying the arbitrator in resigning or declining his or her appointment (General Standard 2(a)).

The objective standard for disqualification mentioned above is accompanied by a different test for disclosure. In that respect, the Guidelines accept the position of most institutional arbitration rules that disclosure requirements should be seen from the parties' perspective. They have thus adopted the same subjective standard for disclosure as that contained in Article 7(2) of the ICC Rules. The Working Group also pointed to the dangers of 'unnecessary disclosure' which might undermine the parties' confidence in the arbitral process when there are no real risks that the arbitrator's impartiality or independence may be affected (General Standard 3 (c)). The Guidelines conclude that challenges or disclosures—and their possible consequences—should not be considered differently depending on the stage of the proceedings at which they arise.

The stated purpose of the Guidelines is to be a practical tool for arbitration users. Accordingly, they include three colour-coded lists (red, orange, and green) encompassing a number of situations, illustrated by examples, where the duty to disclose varies: if a matter falls under the red list, the
arbitrator should not accept the appointment, or resign (but exceptions are made for matters that can be waived by the parties); the orange list is an intermediate area describing situations where the arbitrator may or may not disclose or resign, and the green list contains situations where the disqualification is unfounded and there is no need to disclose.

Whatever their flaws, the IBA Guidelines will unquestionably continue to be used because they have the seal of approval of a well-known professional association and they provide a much-needed practical approach absent in national laws and arbitration rules. Significantly, they have been invoked by the parties seeking disqualifications in the TMB v Ghana UNCITRAL arbitration and the Saipem v Bangladesh ICSID arbitration discussed earlier in this chapter. While they were ignored in the first case by the District Court of The Hague, which preferred to base its decision on Dutch law, they were referred to by the ICSID tribunal in its challenge decision in the second case.

**(b) The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes**

Like the IBA Guidelines, this Code was not intended to replace existing laws and regulations, or even to fill gaps therein, but simply to provide guidance in this area. The changes introduced in 2004 include a presumption of neutrality for all arbitrators, including party-appointed arbitrators. This represents a complete reversal of (p. 823) the position adopted in the 1977 version of the AAA/ABA Code which, absent agreement between the parties, was based on a presumption of non-neutrality for party-appointed arbitrators.

Under the revised AAA/ABA Code, party-appointed arbitrators have a duty of timely disclosure whether they are acting as neutrals or not. In case of doubt, party-appointed arbitrators shall serve as neutrals until such doubt is dispelled.

All arbitrators, including non-neutrals, are required to disclose any interest or relationship likely to affect their impartiality and which might create an appearance of bias. This duty encompasses ‘any known direct or indirect financial or personal interest in the outcome of the arbitration’ and any existing or past such relationships which ‘might reasonably affect impartiality or lack of independence in the eyes of any of the parties’ (Canon II.A.(1) and (2)). The obligation to disclose continues throughout the arbitration, and any doubt as to whether disclosure should be made ‘should be resolved in favour of disclosure’ (Canon II.C. and D).

The AAA/ABA Code is naturally a product of US legal culture and, as such, may not always serve as a reference outside a US context. Nonetheless, its approach to the issue is not dissimilar from other arbitral rules and is relevant to the extent that it shows a certain uniformity in the way the issue has been treated by the international legal community. It is also worth noting that the AAA/ABA Code starts from the principle that fundamental differences exist between the role of judges and arbitrators. It recognizes that—although arbitrators, like judges, must serve justice—they do not occupy full-time positions (like judges). Frequently, arbitrators are experts in the same trade as the parties that appoint them and conflicts of interest may therefore be more frequent. The drafters of the Code acknowledge these realities and have taken them into account.

**(7) Can the Existing Rules Provide a Model for Investment Arbitration?**

In the light of the above, it can be concluded that there is a good deal of similarity and consistency in the general approaches applied by different institutions. Common principles and rules can be identified, and these could be adapted to form the basis of a code of ethics or guidelines to be applied to the conduct of investment arbitrations.

(p. 824) The preliminary conclusion of this author is that this area is certainly worth exploring further. With the exponential growth in international investment arbitration, the risk of a similar increase in objections to confirmations and appointments of arbitrators and actual challenges is real.

Concluding Remarks and Recommendations

It is widely accepted that standards of independence and impartiality apply to all arbitrators, whether they act as chairmen or are party-appointed. As Sir Robert Jennings noted in the Iran-US Claims Tribunal case, *Re Judge Broms*, where he acted as the appointing authority:

One ought to resist the assumption that the independence and impartiality of the members of the Tribunal who are nominated by a Party are different in their juridical nature from the requirements for one of the 'neutral' judges. No such distinction is made in the [UNCITRAL] Rules governing the challenge.77

The question of independence and impartiality of arbitrators is considered and regulated in most countries and is a question of public policy under national laws. This was recognized by the ILA Committee on International Arbitration in its Final Report on public policy as a bar to enforcement of international arbitral awards issued at the 2002 New Delhi Conference. Recommendation 1(e) specifically mentions the requirement of impartiality of arbitral tribunals as an example of procedural public policy, the refusal of which may justify a national court denying enforcement.

Awards are frequently challenged before national courts because an arbitrator's lack of impartiality has been perceived to have led to an inequality of treatment between the parties and a breach of fundamental rules of due process. As seen above, in some countries, such as England, national courts retain competence to decide challenges, regardless of whether the arbitral rules governing the proceedings confer such competence on a specific appointing authority.

The possibility of judicial recourse against decisions on challenges is also foreseen in the UNCITRAL Model Law. Pursuant to Article 13(3) of the Model Law, a party may apply to a court to decide upon a challenge that has been rejected by an arbitral institution. It should be noted that, in certain countries, like France and Switzerland, parties do not have the right to apply to a domestic court to decide on (p. 825) a challenge when a decision has already been made by an arbitral institution. In any event, as illustrated by the *TMB v Ghana* and *Eureko v Poland* challenges discussed above, the intervention of a national court in deciding upon an arbitrator's disqualification is a reality that must be taken into account.

In most cases, when a national court is called upon to decide an issue of independence/impartiality, it is likely to equate the position of an arbitrator with that of a judge. While similarities do exist, one may wonder whether judges and arbitrators should be subject to the same duties and obligations in carrying out their missions because the latter are appointed by virtue of a private undertaking while the former are appointed by States to adjudicate matters of national law. Moreover, there is no hierarchy of courts in the international system and arbitral awards are final and binding while judicial decisions are subject to appellate review.

When it comes to investment arbitration, further elements intervene to complicate matters further. The number of practitioners acting as counsel and arbitrators in investment arbitrations is still relatively small. Some of the practitioners have already made it known that they only wish to act as arbitrators and thus turn down invitations to represent parties as counsel in order to avoid being confronted with challenges that may question their professional integrity. This practice presents the risk, not unlike what may already be happening in the case of judges ad hoc at the International Court of Justice, that the pool of experts from which parties can draw potential arbitrators will become even more limited than it currently is. Is this a desirable outcome? This issue can be argued both ways, but the alternative—that is, the prospect of the appointment of arbitrators whose judgment risks being affected by the conduct of another case in which they are called on to argue partisan positions—is even less appealing.

There are other situations, such as when arbitrators write articles or express views on subjects which may turn out to be significant for a given case, or which present more difficult issues. Those situations should indeed be investigated at the appointment phase, and may lead to discarding a prospective arbitrator, but—bar extreme circumstances—challenges or objections to appointments
should not be upheld in these circumstances.

The initiative led by the ICSID Secretariat in October 2004 with its Discussion Paper has sought to respond to some of these issues. In the Discussion Paper of 22 October 2004, the ICSID Secretariat proposed expanding the disclosure requirements for ICSID arbitrators along the lines of the UNCITRAL Rules which, as discussed above, require an arbitrator to disclose to the parties any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence (Article 9). It was also recommended that consideration be given to applying this requirement to the entire proceeding and not just to the initial stages involving the constitution of the tribunal. The third and final recommendation (p. 826) advocated consideration of a code of conduct which would be specific to investment arbitration.

The Working Paper of 12 May 2005 has endorsed the first two suggestions contained in the Discussion Paper and accordingly proposed to amend ICSID Arbitration Rule 6 to read as follows:

**Rule 6  Constitution of the Tribunal**

... (2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:

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

... Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties is attached hereto 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.

... The Working Paper further suggested making similar changes to the corresponding provisions in the Additional Facility Arbitration Rules, Article 13(2).

Although the final amendments to the Rules which came into effect on 10 April 2006 differ in several aspects from the Working Paper of May 2005, there are no discernible changes with respect to Rule 6. The final amendment to this Rule corresponds to the text cited in the paragraph above and in particular still requires, (i) that the arbitrator attach a statement disclosing ‘any other circumstance that might cause [any] reliability for independent judgment to be questioned by a party’, and (ii) imposes a continuing obligation to disclose on the arbitrator.

It should be observed that the amendments to the Rules appear to accept a subjective standard of independence and make no reference to impartiality. The language is unusual, to the extent that it requires prospective arbitrators to disclose any circumstances that might cause their ‘reliability for independent judgment to be questioned by a party’. The explanatory note that accompanies the changes states that their purpose is to ‘expand the scope of disclosures of arbitrators to include any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment’. However, the text does not refer to justifiable doubts, thus seeming to adopt a broader interpretation of the circumstances that ought to be disclosed by prospective arbitrators. Furthermore, the reference to a vague notion of an arbitrator’s ‘reliability for independent judgment’—when a simple reference to the arbitrator’s independence of judgment might have been sufficient—may widen excessively the scope of the obligation to disclose.
In the light of the current state of play, certain questions need to be asked:

1. Is there a need to issue specific rules of behaviour or a code of conduct for investment arbitrators, or is it sufficient to rely on the assumption that de facto members of the international Bar will abide by generally accepted principles of deontology?

2. Can it be said that there is a body of general principles in this field?

3. Are the amendments to the ICSID Rules sufficient or should additional modifications be considered?

In response to question (1), it can be argued that, in an ideal world, a number of challenges could be avoided simply by applying common sense and basic rules of deontology governing the conduct of members of Bars across the world. However, notions of impartiality and independence find their roots in different cultural realities which maintain different approaches to the issue. Suffice it to refer to the American practice of ‘non-neutral arbitrators’, and the British system of ‘arbitrators-advocates’. Furthermore, in this day and age, arbitration is not the monopoly of lawyers, but may extend to other professionals who are not necessarily bound by the same standards of ethics.

There are strong reasons for arguing that the answer should be regulated by a system of uniform rules or by a code of conduct modelled on the examples provided by the NAFTA and WTO codes. To be effective, however, these rules must be adopted by an authoritative body to avoid the risk of an unruly proliferation of codes and regulations which would inevitably contradict one another and lead to even greater confusion.

Some of the general rules of conduct for investment arbitrators are adequately treated by the UNCITRAL Rules, but the risk remains—for both ICSID and UNCITRAL investment arbitrations—that the intervention of national courts, which adopt different standards, may lead to inconsistent outcomes. The answer to the second question may be, therefore, that, although certain principles do exist and are to some extent codified, a need for a comprehensive set of rules governing specifically the case of investment arbitration is apparent.

With respect to the third and fourth questions, for ICSID arbitration, gaps in the system have been identified in 2004 in the ICSID Discussion Paper, partial responses were provided in the Working Paper of May 2005, and these have led to the amendments to the ICSID Rules which came into effect in April 2006. However, these may need to be supplemented. Consideration might be given to the suggestion that decisions on challenges in investment arbitrations be made public.

The new requirement that the obligation to disclose be continuing is certainly a welcome change. Disclosure does not end with an arbitrator’s appointment. This is the case for most institutional rules, and investment arbitration should be no exception. Although it is true that in the declarations signed at the outset of ICSID proceedings, prospective arbitrators attest that they shall act ‘fairly as between the parties’, thus raising an implicit obligation to do so for the duration of the arbitral proceeding, it is certainly best to spell out that the obligation to reveal any fact that may call the arbitrator’s independence and impartiality into question continues for the entirety of the arbitral proceedings.

Another area where reform may still be envisaged is the ICSID régime requiring that the unchallenged arbitrators decide upon a challenge. This practice may have the effect of putting the unchallenged arbitrators in a difficult position particularly when their decisions, and the motivations contained therein, are published. The decisions of other arbitrators may also be perceived by the outside world as protecting the interests of an elitist group of specialists, which is already under attack for being a ‘members only’ type of club with limited access. Ideally, it may be preferable for the appointing authority, which has a more detached position vis-à-vis the case, to decide on challenges and disqualifications. Alternatively, the establishment of a neutral body could be envisaged, that is a ‘Challenge Facility’ which could be composed of super partes, highly qualified members, and be charged with deciding upon conflicts of interests and requests of disqualifications of arbitrators. However, the discussion on this point is to a large extent academic since this
practice is based on Article 58 of the ICSID Convention and, as such, it is unlikely to be modified.

To preserve the integrity of the arbitral process, involvement with one of the parties in the arbitration, whether financial or intellectual, must be avoided. To paraphrase the *dictum* of the House of Lords in the *Pinochet* case, arbitrators should ‘take care not only that in their decrees they are not influenced by their personal interests, but to avoid the appearance of labouring under such influence’.80

If a person should not be a judge in his or her own case, then a lawyer advocating a position on behalf of one of the parties in one arbitration may be expected to be unduly influenced if he or she sits as an arbitrator in another arbitration involving the same or similar issues even if the parties are not the same. At a minimum, such a situation gives rise to legitimate doubts about impartiality.

Ultimately, a certain measure of common sense and practicality needs to be applied. There is general agreement that—although the right to a fair trial and principles of international public policy should be paramount—a balance should be achieved between preserving these principles and maintaining a practical approach to dispute settlement. Parties should not be deprived of the possibility of appointing qualified international arbitrators. Naturally, arbitrators are entitled to freedom of (p. 829) expression. They must be free to formulate their views on legal issues without constraint, provided that they respect the independence and impartiality of their functions as arbitrators.

The debate triggered by recent challenges contributed to amending the ICSID Rules at least by expanding the scope of the arbitrator’s declaration upon appointment and imposing a continuing duty to disclose. Nonetheless, it may still be necessary to consider enacting a code of ethics for investment arbitrators under the guidance and leadership of ICSID. Too much is at stake in this type of arbitration to continue to ignore the need for a comprehensive solution to the issue of conflicts of interest in investment arbitration.

Select Bibliography


Footnotes:


2 Ibid, paras 16–17, at 11–12.

3 The full text of the suggested changes to ICSID Arbitration Rule 6 is cited below.

4 The amendments can be found on the ICSID website, at <http://www.worldbank.org/icsid/>. It should be recalled that, pursuant to Art 44 of the ICSID Convention, unless agreed by the parties, an ICSID arbitration is conducted in accordance with the Rules in effect on the date on which the parties consented to arbitration.

5 It is generally recognized that the stare decisis rule does not apply in ICSID arbitration. Part of the doctrine interprets Art 53(1) of the ICSID Convention as excluding the application of this rule in ICSID proceedings. See Pierre Duprey, ‘Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration be Distinguished in this Regard from Arbitration Based on Investment Treaties?’ in Philippe Pinsolle, Anne Veronique Schaepfer, and Louis Degos (eds), Towards a Uniform International Arbitration Law? IAI Series on International Arbitration No. 3 (Huntington, NY, Juris Publishing, 2005) at 251–82.

6 As Professor Schreuer notes, the original draftsmen of the Convention considered that the impartiality and independence of arbitrators was a ‘given’. C Schreuer, The ICSID Convention: A Commentary (Cambridge, Cambridge University Press, 2001) at 57.

7 See, also, Additional Facility Arbitration Rules Art 13(2).

8 Rule 6(2), as amended, is also discussed below. It should be noted that the Additional Facility Rules add the word ‘relevant’ to the words ‘other relationship’, thus seemingly limiting disclosure to relations of some significance to the dispute.

9 Schreuer, above n 6 at 516–17.


11 Tupman, ibid, at 45.

12 Schreuer, above n 6 at 517.

13 Conciliation Rule 9(1) is similar.

14 Schreuer, above n 6 at 1199–200.

15 Ibid, para 16 at 1200.


17 Ibid, para 26 at 180.

18 Ibid, para 28 at 181.

20 Ibid at 405.


22 Ibid, para 5.

23 Ibid, para 9.


26 *Saipem SpA v People's Republic of Bangladesh*, Case No. ARB/05/7.

27 Unpublished.

28 ICSID Case No. ARB/98/2.

29 This challenge is also unpublished, but was reported in the IIID online newsletter.


31 Ibid, para 20 at 5.

32 Documents relating to this case can be found at <http://www.state.gov/s/ll/c7424.htm>. For a discussion of this case and the arbitrator's challenge, see Barton Legum, ‘Investor-State Arbitrator Disqualified for Pre-Appointment Statements and Challenged Measures’ 21(2) Arb Int (2005) at 241–5.

33 Cited in Legum, above n 32 at 243.

34 Ibid, at 245.


36 ICSID Case No. ARB/00/6 (Italy-Morocco BIT).

37 Ibid, at 5.

38 Ibid, at 6.


40 *Eureka BV v Republic of Poland*, Partial Award and Dissenting Opinion, 19 August 2005.

41 A copy of the decision of the 4ème Chambre du tribunal de première instance de Bruxelles of 22 December 2006 can be found at <http://ita.law.unican/>.

42 See Investment Treaty News (17 January 2007) available at <http://www.iisd.org/investment/itn>. The Appeals Court of Brussels rejected Poland’s appeal on 29 October 2007 and held that the challenged arbitrator was independent from the law firm in question. The Court of Appeals did not accept that the arbitrator could be influenced by the fact that members of that law firm acted as counsel in that case, as their ‘psychological attitude’ could not be transferred to him. The Appeals Court also stressed that, for an arbitrator, professional integrity must be more important than ‘les sensibilités et les buts qu’il pursuit en tant qu’avocat’. A

See, in this respect, Raffineries de pétrole d’Hoins et de Baniyas v Chambre de commerce internationale, Judgment of 28 March 1984, Tribunal de grande instance, Paris, in Rev Arb (1985) at 141 where the French Court did not annul a decision by the ICC Court to remove an arbitrator, holding that the decision was an ‘administrative act by the arbitral institution’ (at 146) and, as such, did not have to conform to French rules of civil procedure but, rather to the ICC Rules.

A similar situation has recently arisen in an investment arbitration context. In the recent SAUR International v Argentine Republic case, counsel representing the private investor has announced the intention to appoint the same arbitrator as that selected by the investor in the Azurix Corp v Argentine Republic case. In light of the fact that the respondent in both cases is the Argentine Republic and the issues at stake are apparently very similar, the claimant’s decision to have the same arbitrator in both cases seems reasonable. This is reported in IISD, ‘Investment Law and Policy Weekly News Bulletin’ (6 February 2004).

For a review of these examples, see Hascher, above n 45.


Milan Presse, above n 61.


Milan Presse, above n 61.


Milan Presse, above n 61.


Fremarc v ITM Enterprises, Paris Court of Appeals, judgment of 2 April 2003, above n 63. See, also, Paris Court of Appeals, 17 February 2005, Société Mytilineos Holdings v The Authority for Privatization and State Equity Administration, Rev arb (2005) at 709, commentary by M Henry, at 720–36. In Société Mytilineos Holdings v The Authority for Privatization and State Equity Administration, the Court specified that: ‘… cette obligation d’information vise à établir et à maintenir un lien de confiance entre l’arbitre et les parties, mais que tout manquement n’entraîne pas automatiquement l’annulation de la sentence dans la mesure où ce devoir d’information s’étend au-delà des causes de récusation, qu’il s’ensuit que les effets d’une éventuelle réticence doivent être appréciés par le juge de l’annulation pour mesurer si, à elle seule, ou rapprochée d’autre éléments de la cause, elle constitue une présomption suffisante du défaut d’indépendance allégué.’

R v Gough [1993] AC 646 (House of Lords) and ATT v Saudi Cable [2000] 2 All ER 625 (Court of Appeal).

Locabail (UK) Ltd v Byfield [2000] All ER 65.


Certain States have set forth grounds for challenge. In California, for example, arbitrators in international arbitrations must make mandatory disclosures of information that might lead their impartiality to be questioned. Cal Code Civ Pro § 1297.121. The disclosures are mandatory and cannot be waived by the parties with respect to persons serving as the sole arbitrator or as the presiding arbitrator in a proceeding, Cal Code Civ Pro § 1297.122. Nonetheless, unless otherwise agreed to by the parties, an arbitrator may be challenged ‘only if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, or as to his or her possession of the qualifications upon which the parties have agreed’ Cal. Code Civ Pro § 1297.124.

393 US 145 (1968).


76 Unpublished.


78 ICSID Secretariat, ‘Possible Improvements’, above n 1.

79 See the discussion on this practice in Clay, above n 69 at 293–302 and the doctrine cited therein. The 1977 AAA and ABA Codes of Ethics for Arbitrators in Commercial Disputes incorporated the notion of ‘non-neutral arbitrators’, but this has been replaced by a general presumption of neutrality for arbitrators in the most recent revisions of these texts (1 March 2004).

80 R v Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet Ugarte No. 2 [2001] 1 AC 119.