

**CODE OF CONDUCT – BACKGROUND PAPERS****REPEAT APPOINTMENTS<sup>1</sup>****I. Introduction – Repeat Appointments**

1. There is no specific definition of what a repeat appointment is. However, a repeat appointment is often described as the situation where an arbitrator receives more than one (and perhaps multiple) appointment(s) from:
  - a) the same party (e.g. same State or company/individual),
  - b) the same counsel or firm, and/or
  - c) the same disputing-party type generally (i.e. Respondent States or Claimants/investors).<sup>2</sup>
2. Repeat appointment has been discussed by various commentators. The issues raised in respect of repeat appointment include:<sup>3</sup>
  - Potential for financial dependence on the appointing party (i.e. that the arbitrator who receives repeat appointments may become dependent on the income derived from such appointments and thus decide in a certain way in order to increase the likelihood of future appointments).
  - Development of affinity/loyalty to the appointing party (i.e. that the arbitrator who receives repeat appointments might feel indebted (consciously or unconsciously) to the party or counsel who appointed them, and thus decide in favor of their appointing party or render compromise awards).
  - Lack of diversity of appointed arbitrators, which in turn might make it harder for newcomers to break into the field or hinder the enlargement of the pool of potential ISDS arbitrators.<sup>4</sup>

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<sup>1</sup> This background document is intended to assist the discussions of delegates concerning the Code of Conduct, and should not be taken as a legal opinion on the matters addressed. The cases included in this background paper are for illustrative purposes and do not constitute an exhaustive list of decisions addressing the matter discussed.

<sup>2</sup> See for example, Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* (Brill 2016) p 64 et seq; Will Sheng Wilson Koh, “Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges” in Maxi Scherer (ed), *Journal of International Arbitration* (2017) pp 711-740; Daphna Kapeliuk, “The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators”, *Cornell L Review* (2010) p 47. See also, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Possible reform of investor-State dispute settlement (ISDS) Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, 30 August 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.151>, paras 22-24.

<sup>3</sup> Maria Nicole Cleis (n 2), p 64 et seq and Daphna Kapeliuk, (n 2), p 61. See also, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Possible reform of investor-State dispute settlement (ISDS) Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, 30 August 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.151>, paras 22-24.

<sup>4</sup> Daphna Kapeliuk, (n 2), p 68, citing to several references in that respect. See also, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Fifty-first session, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), 14 May 2018, <https://undocs.org/A/CN.9/935>, paras 73-74.

- Additional costs and delay of proceedings that might occur because of the limited availability of arbitrators with multiple appointments. In other words, the concern that the busier an arbitrator is, the lengthier and the costlier the proceeding will be.<sup>5</sup>
  - Prejudgment of issues due to the appointment of the same arbitrator in multiple proceedings involving one of the parties or their counsel and where similar factual and legal issues are addressed.<sup>6</sup> This concern is often merged with concerns about issue conflict.
3. Other commentators express different views, noting that:
- The disputing parties’ right to appoint experienced persons as their arbitrator should not be constrained by barring repeat appointments.<sup>7</sup>
  - Repeat appointments do not lead to increased cost or delay; rather, more experienced and busy arbitrators may be more competent and have better case management skills (and may have staff that can assist).<sup>8</sup>
  - New arbitrators might try to stand out by rendering dissenting opinions which might accentuate “the likelihood of variance in the opinions of arbitration panels.”<sup>9</sup>
  - Repeatedly appointed arbitrators would not risk their reputation as independent and impartial adjudicators, which is their “most valuable trait”. They would most likely “choose to increase accuracy and to counter any real or perceived biases rather than to cater to any particular interests.”<sup>10</sup>
  - The nature of the legal issues raised in ISDS is limited to relatively few substantive obligations, and barring repeat appointment could cause a constant turnover of arbitrators and increase the likelihood of inconsistent decisions.

## II. Relevant Jurisprudence

4. Repeat appointment has been invoked as a ground for challenge under all major sets of arbitration rules.
5. This section examines ten public ICSID disqualification decisions rendered between 2010 and 2020 that addressed repeat appointments as a disqualification ground. All of these proposals were dismissed, except two that were upheld on other grounds.<sup>11</sup> In other words, none of the challenges based on repeat appointment were successful during that time frame.

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<sup>5</sup>United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Fifty-first session, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), 14 May 2018, <https://undocs.org/A/CN.9/935>, paras 73-74.

<sup>6</sup> United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Possible reform of investor-State dispute settlement (ISDS) Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, 30 August 2018, <https://undocs.org/en/A/CN.9/WG.III/WP.151>, para 22.

<sup>7</sup> Daphna Kapeliuk (n 2), p 60.

<sup>8</sup> See *ICSID-UNCITRAL Draft Code of Conduct: Compilation of Comments by Article & Topic* as of January 14, 2021, p. 147, comment by Professor Brigitte Stern.

<sup>9</sup> *Ibid*, p 68.

<sup>10</sup> *Ibid*, p 90.

<sup>11</sup> See *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013 and *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on the

6. These decisions are summarized in chronological order:

(1) *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*<sup>12</sup>

7. The Claimants proposed the disqualification of Professor Brigitte Stern on the ground that her multiple appointments (four times) by the same party (Venezuela) and (three times) by the same counsel (Curtis, Mallet-Prevost, Colt & Mosle LLP), were not disclosed in her original declaration, and gave rise to objective and justifiable doubts regarding her independence and impartiality. Rejecting the proposal, the unchallenged members of the Tribunal decided that:

*the mere fact of holding three other arbitral appointments by the same party does not, without more, indicate a manifest lack of independence or impartiality on the part of Professor Stern. Indeed, the Two Members find no basis to infer that Professor Stern would be influenced in her decision in any way by the fact of such multiple appointments by one party. On the contrary, her conduct has been demonstrably independent of such influence. [...] the Two Members conclude that the appointment of Professor Stern on two prior occasions by Venezuela does not demonstrate a manifest lack on her part of the quality of independent and impartial judgment required of an arbitrator under the ICSID Convention.*<sup>13</sup>

(2) *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*<sup>14</sup>

8. The Claimant proposed to disqualify Professor Philippe Sands on the basis that he had developed a financial dependence due to his multiple appointments as arbitrator by Respondent State and by its counsel,<sup>15</sup> which allegedly undermined his impartiality and independence. Rejecting the disqualification proposal, the unchallenged arbitrators found that Professor Sands had significant independent financial sources unrelated to his income from his appointments as arbitrator in ISDS proceedings, and that there was no evidence of any substantial dependence of Professor Sands on these appointments.

(3) *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*<sup>16</sup>

9. The Claimant proposed the disqualification of Professor Brigitte Stern on the basis that her multiple appointments by Venezuela and its counsel, not disclosed in her original declaration, gave rise to justifiable doubts as to her ability to exercise independent and impartial judgment.<sup>17</sup> The Chair of ICSID's Administrative Council found that Professor Stern's previous appointments by the same party or the same counsel did not indicate a manifest lack of the required qualities. The Chair noted that the Claimant did

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Proposal for Disqualification of Bruno Boesch, 20 March 2014. The challenge in *Caratube* was ultimately upheld on the ground of issue conflict. See *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (II), ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch, 20 March 2014, para 90.

<sup>12</sup> *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010

<sup>13</sup> *Ibid*, para 64.

<sup>14</sup> *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, 5 May 2011.

<sup>15</sup> *Ibid*, para 18 et seq.

<sup>16</sup> *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011.

<sup>17</sup> *Ibid*, para 13.

not establish any objective evidence of any economic dependence, relationship, or prior knowledge of some facts concerning the case that could call into question Professor's Stern ability to make an independence and impartial judgement.<sup>18</sup>

(4) [Burlington Resources, Inc. v. Republic of Ecuador](#)<sup>19</sup>

10. The Respondent invoked Professor Orrego Vicuña's repeat appointments as arbitrator by Freshfields law firm, and his non-disclosure of these appointments, to disqualify him. Specifically, the Respondent noted that Professor Orrego Vicuña had been appointed in eight ICSID cases by the same law firm between 2007 and 2013. It considered this an "excessively high number of appointments by the same law firm during such a limited period of time."<sup>20</sup> The Chair of ICSID's Administrative Council dismissed the proposal on these grounds because they had not been raised in a timely fashion, noting that the Respondent had "sufficient information to file its Proposal [...] well before it did so on July 24, 2013. Similarly, the Respondent's challenge based on the arbitrator's alleged conduct during a hearing was dismissed for lack of timeliness<sup>21</sup> However, the arbitrator was disqualified based on grounds unrelated to repeat appointment.<sup>22</sup>

(5) [Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan \(II\)](#),<sup>23</sup>

11. The Claimants proposed the disqualification of Mr. Bruno Boesch (i) because of his numerous appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent;<sup>24</sup> and (ii) because he served as arbitrator appointed by the same firm on behalf of the Respondent in the case of *Ruby Roz Agricol LLP v. Kazakhstan*.<sup>25</sup> The unchallenged arbitrators dismissed the proposal on the ground of repeat appointment, but ultimately upheld it on the ground of issue conflict which arose from the arbitrator's appointment in the *Ruby Roz* case. The unchallenged arbitrators considered that Mr. Boesch's objectivity and open-mindedness was diminished due to his exposure to similar facts and legal issues as those addressed in this proceeding.<sup>26</sup>

(6) [Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia](#)<sup>27</sup>

12. The Claimants proposed the disqualification of Professor Brigitte Stern because of her prior appointment by the Respondent in three other investment arbitrations between February 2014 and November 2016, which were all pending at the time. The Claimants further argued that these other matters involved substantially similar factual and legal issues.<sup>28</sup> The Chair of ICSID's Administrative Council dismissed

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<sup>18</sup> References within the quote have been omitted. Ibid, paras 77-87.

<sup>19</sup> *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013.

<sup>20</sup> Ibid, para 21.

<sup>21</sup> Ibid, para 75.

<sup>22</sup> Ibid, paras 79-80.

<sup>23</sup> *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch, 20 March 2014.

<sup>24</sup> Ibid, para 30.

<sup>25</sup> Ibid, para 24.

<sup>26</sup> Ibid, para 90. See to this effect, Loretta Malintoppi and Alvin Yap, "Challenges of Arbitrators in Investment Arbitration: Still Work in Progress?", in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2<sup>nd</sup> Edition, 2018), para 8.90. See also the Commentary of the Joint ICSID-UNCITRAL Draft Code of Conduct, footnote 15.

<sup>27</sup> *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32, Decision on the Proposal for Disqualification of Arbitrator Brigitte Stern, 23 April 2018.

<sup>28</sup> Ibid, para 48.

the challenge for lack of evidence showing any dependence by, or influence on, Professor Stern due to her appointments by the Respondent that could raise doubts as to her independence and impartiality.<sup>29</sup>

(7) *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*<sup>30</sup>

13. The Respondent proposed to disqualify Dr. Stanimir Alexandrov because he was appointed by claimants in 35 cases out of the total 38 known investment treaty arbitrations in which he had sat as an arbitrator at the time. The Respondent further noted that Dr. Alexandrov was the president of the tribunal in two cases, both of which were decided in favor of the claimant, and that he was only appointed once by a respondent, more than ten years prior to this proceeding.<sup>31</sup> Dismissing the proposal for disqualification, the Chair found that the Respondent did not provide any evidence establishing Dr. Alexandrov's bias towards, or dependence on, the Claimants. The Chair also noted that "[t]he Respondent's allegations [...] are the kind of speculative assumptions or arguments that would not lead a third party undertaking a reasonable evaluation of Dr. Alexandrov's appointments by claimants to conclude that the alleged lack of impartiality or independence is manifest."<sup>32</sup>

(8) *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*<sup>33</sup>

14. The first ground for disqualification by the Respondent was that Mr. Peter Rees lacked independence or impartiality because he (i) failed to disclose that he had been previously appointed by the same firm in two high-profile cases, and (ii) had been appointed in three cases by the same firm.<sup>34</sup> The unchallenged arbitrators rejected the proposal for lack of objective evidence (financial dependence or a particular relation between the cases) demonstrating that Mr. Rees' independence or impartiality was tainted due to his prior appointments by the same firm.<sup>35</sup>

(9) *Ayat Nizar Raja Sumrain and others v. State of Kuwait*.<sup>36</sup>

15. The Claimants proposed the disqualification of Professor Zachary Douglas (President appointed by agreement of the parties) because: (i) he was simultaneously sitting as an arbitrator appointed by Kuwait in another pending ICSID proceeding; and (ii) he had been appointed mainly by States in the cases in which he had served as arbitrator. Noting the commonalities between the Kuwaiti cases in question, the Chair found that their overlap was not significant.<sup>37</sup> The Chair further noted that:

the mere fact that [an arbitrator] has been appointed repeatedly by States is insufficient by itself to establish a manifest lack of independence and impartiality. Rather, there must also be objective circumstances demonstrating that these prior appointments manifestly influence the arbitrator's ability to exercise independent judgment in the arbitration in question. Moreover, a finding that a lack of impartiality or independence is manifest "must

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<sup>29</sup> Ibid, para 50.

<sup>30</sup> *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov, 17 May 2018.

<sup>31</sup> Ibid, para 16.

<sup>32</sup> Ibid, para 89.

<sup>33</sup> *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, decision on the proposal to disqualify Mr. Peter Rees QC, 19 November 2019.

<sup>34</sup> Ibid, para 57.

<sup>35</sup> Ibid, para 63.

<sup>36</sup> *Ayat Nizar Raja Sumrain and others v. State of Kuwait*, ICSID Case No. ARB/19/20, Decision on the Claimant's Proposal to Disqualify Prof. Zachary Douglas and Mr. V. V. Veeder, 2 January 2020.

<sup>37</sup> Ibid, para 120.



exclude reliance on speculative assumptions or arguments” and “the circumstances actually established ... must negate or place in clear doubt the appearance of impartiality.”<sup>38</sup>

(10) *VM Solar Jerez GmbH and others v. Kingdom of Spain*<sup>39</sup>

16. The first ground invoked in Spain’s proposal for disqualification of Prof. Tawil related to his multiple appointments by investors in other cases against Spain addressing similar issues as this arbitration. Dismissing the proposal, the Chair found that:

The existence of multiple appointments does not establish by itself a manifest lack of independence and impartiality. In each case, the arbitrator exercises the same independent arbitral function. Objective circumstances must be present to demonstrate that the arbitrator’s ability to exercise independent judgment can be questioned. A decision to disqualify an arbitrator may arise from several factors, which collectively support a founded concern about the independence or impartiality of that arbitrator. Repeated appointments by investors and income from that arbitration work has not been considered sufficient in and of itself to establish lack of independence and impartiality.

17. Repeat appointment was also invoked in a disqualification proposal in *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*,<sup>40</sup> but the challenged arbitrator resigned before the decision on disqualification was made.

#### Observations

18. A number of common themes arise from these cases:

- (i) a repeat appointment in and by itself is not a sufficient basis for disqualification;
- (ii) evidence of financial dependence or affinity arising from repeat appointment would be required to establish dependence or partiality;
- (iii) mere allegations or speculative arguments and assumptions as to bias are not proof of bias;
- (iv) the fact of commonalities between cases does not prove bias; rather, a significant or problematic overlap of facts or legal issues with the other proceedings where the arbitrator was involved would be required;
- (v) some decision makers stressed that the number of appointments was of little relevance because, in their opinion, whether repeat appointments raise justifiable doubts should be assessed through a qualitative approach rather than a quantitative one. When reference was made to the number of appointments, it was usually found that there were no more than two or three appointments over the last three years.

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<sup>38</sup> Ibid, paras 125-126.

<sup>39</sup> *VM Solar Jerez GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil, 24 July 2020.

<sup>40</sup> *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013.

19. A review of non-ICSID cases shows that a similar analysis has been regularly followed in the disqualification decisions where repeat appointments were invoked, hence reaching the same conclusion.<sup>41</sup>

### **III. How Are Repeat Appointments addressed in Rules and Treaties?**

20. Repeat appointments have not been directly addressed by International Investment Agreements (IIAs) or Arbitration Rules. Rather, the issue of repeat appointments has been addressed by imposing a duty to disclose any interest, relationship or matter that is likely to affect the arbitrator's independence or impartiality and related provisions requiring arbitrators to avoid impropriety and the appearance thereof, and to be independent and impartial.

#### *i. IIAs*

21. The Comprehensive Economic and Trade Agreement (“CETA”) between Canada and the European Union, Annex 29-B (Code of Conduct for arbitrators and mediators),<sup>42</sup> requires broad disclosure, including “*any past or existing financial, business, professional, family or social relationship with the interested parties in the proceeding, or their counsel, or such relationship involving a candidate's employer, partner, business associate or family member*”.<sup>43</sup>

22. The CETA Code of Conduct for Members of the Tribunal, Members of the Appellate Tribunal and Mediators released on January 29, 2021, also requires extensive disclosure of “*any past and present interest, relationship or matter that is likely to affect, or that could reasonably be seen as likely to affect, their independence or impartiality, that creates or could reasonably be seen as creating a direct or indirect conflict of interest, or that creates or might reasonably be seen as creating an appearance of impropriety or bias*” within the last five years before their selection.<sup>44</sup>

23. Article 4 further indicates that “*Members shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party, disputing party or any other person involved or participating in the proceeding, fear of criticism or financial, business, professional, family or social relationships or responsibilities.*”

24. The CETA Code of Conduct requires former members of the Tribunal or the Appellate Tribunal to avoid any actions that may create the appearance that they were biased during their tenure or derived any advantage from the decisions or awards rendered by the Tribunal or the Appellate Tribunal.<sup>45</sup>

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<sup>41</sup> See for example: [LCIA: Claimant X v Respondent Y](#) (decided by Vice President of the LCIA Court (acting alone), proposal rejected), LCIA Reference No. UN101693, Decision Rendered 28 October 2010; [Merck Sharpe & Dohme \(I.A.\) LLC v. The Republic of Ecuador](#), PCA Case No. 2012-10, Decision on Challenge to Arbitrator Judge Stephen M. Schwebel 8 August 2012; and [Valeri Belokon v. Kyrgyz Republic](#), PCA Case No. AA518, Decision on Challenges to Arbitrators Professor Kaj Hober and Professor Jan Paulsson, 6 October 2014.

<sup>42</sup> Comprehensive Economic and Trade Agreement between the European Union and Canada (signed 30 October 2016, provisionally in force since 21 September 2017).

<sup>43</sup> CETA Annex 29-B (Code of Conduct for arbitrators and mediators), point 4(3) (“Disclosure Obligations”).

<sup>44</sup> Decision No 001/2021 of the Committee on Services and Investment of January 29, 2021 adopting a code of conduct for Members of the Tribunal, Members of the Appellate Tribunal and mediators, Article 3 (“Disclosure Obligations”).

<sup>45</sup> Ibid, Article 5 (“Independence and Impartiality of Members”).

25. Similar provisions exist in the EU Investment Protection Agreements with Vietnam<sup>46</sup> and Singapore,<sup>47</sup> as well as in the Comprehensive And Progressive Agreement For Trans-Pacific Partnership (“CPTPP”) Code of Conduct,<sup>48</sup> which, in addition to an extensive disclosure duty, requires arbitrators to comply with the internationally recognized principles of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”).<sup>49</sup>

*ii. Institutional Rules*

26. Similarly, the issue of repeat appointments has been implicitly covered by all major institutional rules under either their general provisions on disclosures duties, qualifications of arbitrators, and/or independence and impartiality.<sup>50</sup>

*iii. Soft Law Instruments*

27. Unlike other instruments, the IBA Guidelines<sup>51</sup> expressly identify repeat arbitral appointments when arbitrators are, within the last three years, appointed two or more times by a party or an affiliate thereof,<sup>52</sup> or appointed three or more times by the same counsel or law firm.<sup>53</sup>

28. However, the Guidelines provide an exception for repeat appointments in specialized fields of arbitration where it is the practice for parties to repeatedly appoint the same arbitrator in different cases, e.g. sports or maritime arbitration.<sup>54</sup>

29. Repeat appointments are covered by the Guidelines’ orange list which lays out non-exhaustive circumstances that “depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence” which the arbitrator has a duty to disclose.<sup>55</sup>

30. The Guidelines make clear that such a disclosure does not necessarily demonstrate the existence of a conflict of interest nor does such disclosure result in a disqualification or a presumption of disqualification.<sup>56</sup>

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<sup>46</sup> EU-Viet Nam Investment Protection Agreement (signed 30 June 2019), Code of Conduct for Members of the Tribunal, Members of the Appeal Tribunal and Mediators, Article 3 (“Disclosure Obligations”).

<sup>47</sup> EU-Singapore Investment Protection Agreement (signed 19 October 2018), Code of Conduct for Members of The Tribunal, The Appeal Tribunal and Mediators.

<sup>48</sup> Code of Conduct for Investor-State Dispute Settlement Under Chapter 9 Section B (Investor-State Dispute Settlement) of The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018; entered into force 30 December 2018).

<sup>49</sup> Ibid, point 3 (“Governing Principles”). The United States-Mexico-Canada Agreement (“USMCA”) (signed 30 November 2019, entered into force 1 July 2020) also expressly refers to the IBA Guidelines in its chapter on investment. See Article 14.D.6(5)(a).

<sup>50</sup> See for example ICSID Convention Articles 14(1) and 57, ICSID Arbitration Rules (2006) Rules 6(2) and 9 ; UNCITRAL Arbitration Rules (2010) Article 11, SIAC Investment Arbitration Rules (2017) Article 10; SCC Arbitration Rules (2020) Article 18; and ICC Arbitration Rules (2021) Article 11(1) and (2).

<sup>51</sup> IBA Guidelines on Conflict of Interest in International Arbitration (23 October 2014).

<sup>52</sup> IBA Guidelines, s 3.1.3.

<sup>53</sup> IBA Guidelines, s 3.3.8.

<sup>54</sup> IBA Guidelines, s 3.1.3, footnote 5.

<sup>55</sup> IBA Guidelines, p 18, para 3.

<sup>56</sup> IBA Guidelines, Explanation to General Standard 3(a) and (c). See also Practical Application of General Standard, para 4.



31. The IBA Guidelines are extensively referred to in ISDS proceedings with respect to the disclosure standards and disqualification considerations applicable to arbitral appointments. Nonetheless, the IBA Guidelines remain non-binding in ICSID proceedings.

#### **IV. ICSID Statistics**<sup>57</sup>

32. This section provides statistical information on the number of repeat appointments in ICSID cases during the past five calendar years, i.e. between 2016 and 2020.

33. Between 1 January 2016 and 31 December 2020, **958** appointments of arbitrators, conciliators and *ad hoc* committee members were made in cases registered under the ICSID Convention and Additional Facility Rules. Out of the 958 appointments, **204 (21%)** were made in annulment proceedings, and therefore were appointments made by the Chair of the Administrative Council from the ICSID Panel of Arbitrators (and not by the parties to the dispute).<sup>58</sup> The remaining **754** appointments (**79%**) were made in arbitration and conciliation proceedings, as well as in post-award proceedings other than annulment.

34. Out of the **754** appointments made in ICSID cases between 2016 and 2020 (which exclude annulment proceedings):

- 255 appointments (34%) were made by Claimants
- 236 appointments (31%) were made by Respondents
- 126 appointments (17%) were made by the Parties jointly
- 84 appointments (11%) were made by ICSID (Chair / Secretary-General)
- 53 appointments (7%) were made by co-arbitrators

35. For purposes of the statistics on repeat appointment, the information below corresponds to the **491** appointments made by “Claimant(s)” and “Respondent(s)”. Appointments made by ICSID, co-arbitrators or by the parties jointly have been excluded from the calculations.<sup>59</sup> Of these 491 appointments by Claimants and Respondents, a total of 186 different individuals were appointed as arbitrators or conciliators by either the Claimant or the Respondent party in ICSID cases between 2016 and 2020:

- 97 of these individuals (52%) were appointed only once.
- the remaining 48% (89 individuals) were appointed on two or more occasions.

36. The distribution of the 89 individuals who were appointed on two or more occasions to ICSID cases is as follows:

- 42 individuals (47%) had a total of two appointments
- 13 individuals (15%) had a total of three appointments
- 8 individuals (9%) had a total of four appointments

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<sup>57</sup> These statistical data has been prepared by the ICSID Secretariat for the purpose of this background paper only.

<sup>58</sup> Members of the Panels of Arbitrators or Conciliators are designated by ICSID Member States. Each State has the right to designate up to four names to each panel (Article 13 of the ICSID Convention).

<sup>59</sup> This is to focus on the appointments made by either side of the disputing parties generally i.e. respondent State or claimant/investor.

- 5 individuals (6%) had a total of five appointments
- 7 individuals (8%) had a total of six appointments
- 2 individuals (2%) had a total of seven appointments
- 4 individuals (5%) had a total of eight appointments
- 2 individuals (2%) had a total of nine appointments
- 1 individual (1%) had a total of ten appointments
- 1 individual (1%) had a total of thirteen appointments
- 1 individual (1%) had a total of fourteen appointments
- 1 individual (1%) had a total of seventeen appointments
- 1 individual (1%) had a total of twenty-two appointments
- 1 (1%) individual had a total of thirty-two appointments

37. In other words, of the 89 individuals who were appointed on two or more occasions to ICSID cases:

- 68 individuals (76%) had between two to five appointments each
- 15 individuals (17%) had between six to nine appointments each
- 4 individuals (5%) had between ten to seventeen appointments each
- 2 individuals (2%) had more than 20 appointments each

38. Of the 89 individuals who were appointed on two or more occasions to ICSID cases:

- 42 individuals (47%) were appointed exclusively by the Respondent
- 30 individuals (34%) were appointed exclusively by the Claimant, and
- 17 individuals (19%) were appointed both by Claimants and Respondents

## V. Relevant Draft Code Provisions

39. The issue of repeat appointments is mainly covered by Articles 3 (“General”), 4 (“Independence and Impartiality”) and 5 (“Conflict of Interest: Disclosure Obligations”) of the draft Code of Conduct. Other related issues, in particular, the arbitrator’s availability, is addressed in Article 8 (“Availability, Diligence, Civility and Efficiency”).

40. Comments were received from States and members of the public on Article 5 of the Draft Code are found at pp. 73-114 of the *Draft Code of Conduct: Compilation of Comments by Article & Topic* as of January 14, 2021 (available [here](#)).