Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals

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Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals

Edited By

Chiara Giorgetti
Per Charlotte e Alexander, semper
Contents

Preface ix
List of Abbreviations x
Contributors xi

Introduction 1
Chiara Giorgetti

1 The Challenge and Recusal of Judges at the International Court of Justice 3
Chiara Giorgetti

2 Disqualification of Arbitrators under the ICSID Convention and Rules 34
Meg Kinnear and Frauke Nitschke

3 The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration 80
Sarah Grimmer

4 Arbitrator Challenges at the Iran-United States Claims Tribunal 115
Lee M. Caplan

5 Challenges of Arbitrators, Lessons from the ICC 140
Loretta Malintoppi and Andrea Carlevaris

6 Selection and Recusal in the WTO Dispute Settlement System 164
Gregory J. Spak and Ron Kendler

7 Challenges of Judges in International Criminal Courts and Tribunals 183
Makane Moise Mbengue

8 Issue Conflicts and the Reasonable Expectation of an Open Mind: The Challenge Decision in Devas v. India and Its Impact 227
Romain Zamour
9 Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes 247
   Judith Levine

10 Repeat Arbitrator Appointments in International Investment Disputes 293
   Luke A. Sobota

11 Tall and Small Tales of a Challenged Arbitrator 320
   Charles N. Brower, Sarah Melikian and Michael P. Daly

12 The Approach of Counsel to Challenges in International Disputes 337
   Andrew B. Loewenstein

13 Challenges to Party Representatives and Counsel Before International Courts and Tribunals 363
   Hansel T. Pham and M. Imad Khan

14 Challenges to Arbitrators in Asia: The Position Before the Singapore and Hong Kong Courts 386
   Lucy Reed, John Choong and Chan Yong Wei

15 Arbitrators Challenges in Latin America 407
   Jonathan Hamilton, Francisco X. Jijon and Ernesto E. Corzo

Index 421
Preface

This book builds on a panel I organized and chaired at the Annual Meeting of the American Society of International Law in April 2014. The panel sparked an important conversation among participants and highlighted the importance of issues related to challenges and recusals of judges and arbitrators for international dispute resolution. After the panel, Marie Sheldon, Publishing Director of International Law at Brill/Nijhoff Publishers, suggested I collect the presentations made at the panel in a book. I was intrigued by the idea and—so, this book was born.

I asked the panelists and other experts to join the dialogue on this key issue and I was gratified by the positive response I received. This book now combines expertise from academia as well as from all realms of practice, from law firm practitioners, to former judicial clerks, arbitrators and members of several secretariats. I am grateful to all contributors to this book for their excellent work. Of course, their contributions are made on a personal note only and do not represent the positions of any of the institutions to which they are or may have been affiliated.

My deep gratitude also goes to Sheherezade Malik, a Juris Doctor student from Richmond University School of Law, for her impeccable research and editorial assistance. She has done a great job.

I am also sincerely and profoundly grateful to my family, Andre, Alex and Charlotte, without whom nothing has meaning.

C.G.
Washington D.C.
**List of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA</td>
<td>American Bar Association</td>
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<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>CAFTA</td>
<td>Central American Free Trade Agreement</td>
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<tr>
<td>DSB</td>
<td>Dispute Settlement Body (WTO)</td>
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<tr>
<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO)</td>
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<tr>
<td>EC</td>
<td>European Communities</td>
</tr>
<tr>
<td>ECCC</td>
<td>Extraordinary Chambers in the Court of Cambodia</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>IBA</td>
<td>International Bar Association</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce (see also below)</td>
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<td>ICC</td>
<td>International Criminal Court (see also above)</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Center for the Settlement of Investment Disputes</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<tr>
<td>ILA</td>
<td>International Law Association</td>
</tr>
<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<tr>
<td>SCLS</td>
<td>Special Court for Sierra Leone</td>
</tr>
<tr>
<td>STL</td>
<td>Special Tribunal for Lebanon</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
Contributors

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has been a Judge of the Iran-United States Claims Tribunal for 30 years, has served as Judge ad hoc of the Inter-American Court of Human Rights, and currently serves also as Judge ad hoc of the International Court of Justice. He is also a member of 20 Essex Street Chambers in London. He has served as Acting Legal Adviser to the United States Department of State and as Deputy Special Counsellor to the President of the United States. Judge Brower in 2009 was awarded the American Society of International Law’s Manley O. Hudson Medal for “pre-eminent scholarship and achievement in international law ... without regard to nationality”; in 2010 received the Stefan A. Riesenfeld Award of the University of California Berkeley School of Law (Boalt Hall) in recognition of “outstanding achievements and contributions in the field of international law”; in 2013 received the American Bar Association’s Section of International Law’s Lifetime Achievement Award; and in 2013 received the Pat Murphy Award of the Institute for Transnational Arbitration of the Center for American and International Law “For Exceptional Civic Contributions and Extraordinary Professional Achievements in International Arbitration.” In October 2014 he became the first inductee into the Legal Media Group Euromoney “Hall of Fame” for “significant contributions to commercial arbitration during his career.”

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Andrea Carlevaris is Secretary General of the ICC International Court of Arbitration and Director of the ICC Dispute Resolution Services since September 2012. Before joining ICC, Mr Carlevaris was a partner in the Rome office of Bonelli Erede Pappalardo. His practice covered international arbitration, judicial proceedings involving issues of public international law, conflicts of law and international civil procedure. Mr Carlevaris was a member of the ICC International Court of Arbitration and of the ICC Commission on Arbitration. Prior to Bonelli Erede Pappalardo, Mr Carlevaris was counsel at the Secretariat of the ICC International Court of Arbitration. Mr Carlevaris is a member of the Steering Committee of the International Arbitration Commission of the Union international des Avocats (UIA) and of the Board of Directors of the Italian Association for Arbitration (AIA). He is one of the founders of the Italian Forum on International Arbitration and ADR (ArbIt). Mr Carlevaris graduated magna cum laude from the University of Rome (La Sapienza), where he received a doctorate in international law in 1998. He is the author of numerous articles and of a monograph on conservatory and provisional measures in international arbitration.

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Chiara Giorgetti
is Associate Professor of Law at Richmond University School of Law and serves as the Faculty Director of the School of Law's LL.M. Program. She teaches and writes in the areas of international law, international arbitration, and international dispute resolution. Professor Giorgetti has authored over a dozen publications on these topics, including the monography A Principled Approach to State Failure, and two edited volumes: The Rules, Practice and Jurisprudence of International Courts and Tribunals (Brill 2012) and Litigating International Investment Disputes (Brill, 2014). Prior to joining the Richmond Law faculty in 2012, Professor Giorgetti practiced international arbitration with White &
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Herring arbitration between Denmark and the European Union; and the Abyei arbitration involving Sudan. She has assisted tribunals in investor-state and commercial cases including multi-billion dollar arbitrations under the Energy Charter Treaty between former shareholders of Yukos Oil Company and the Russian Federation. From 2011 to 2012, Judith served as the PCA Representative and Legal Officer in Mauritius. From 2003 to 2008 Judith was an attorney at White & Case in New York where she represented private and sovereign clients in international arbitrations; advised on dispute resolution clauses for contracts and on issues relating to boundary delimitations and oil concessions. Judith had an active pro bono practice before U.S. courts in asylum, torture convention and domestic violence cases. In 2002–2003 Judith served as law clerk to three judges at the International Court of Justice. Her experience in Australia includes work as an adviser to the Attorney-General, judge's associate at the High Court of Australia, and lecturer in contract law at UNSW. Judith has served as a member of Australia’s delegation to UNCITRAL and is a director of the Australian Centre for International Commercial Arbitration. She holds a BA/LLB (with University Medal) from UNSW and an LLM from NYU School of Law where she studied on a Hauser Global Scholarship and Fulbright Award. She is admitted to practice law in New York and New South Wales (Australia).

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**Lucy Reed**

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Gregory Spak
is a partner in the Washington office of the global law firm, White & case LLP. Mr. Spak has specialized in international trade law throughout his career, and he has worked on international trade disputes in the GATT and WTO dispute resolution system. His WTO experience involves six disputes in which he served as lead counsel or advisor to one of the primary WTO Members involved in the dispute, and he has substantial “in room” experience in these cases at the Panel and Appellate Body levels. Mr. Spak received his J.D. with honors from Georgetown University in 1987.

Chan Yong Wei
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Romain Zamour

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Introduction

Chiara Giorgetti

The possibility of challenging and recusing judges and arbitrators provides a fundamental control mechanism for parties engaged in international dispute resolution. Indeed, as international courts and tribunals have increasingly become the preferred choice to resolve international disputes, this control function has also become of paramount importance to the normative and sociological legitimacy of international courts and tribunals.

Yet, not much has been written in a systematic way about the mechanisms that parties—and tribunals and courts themselves—have to correct the composition of the bench when such a correction is needed. This book seeks to provide that systematic analysis and also to spark a dialogue on the important issue of challenges and recusals of arbitrators and judges, and specifically on reasons for such challenges, the procedures to raise them and the issue of who is tasked to finally decide on such requests.

The chapters of this book can be divided into four groups.

The first seven chapters provide a thorough analysis of challenges and recusal procedures in specific forums. In the first chapter, I start the discussion with an assessment of challenges and recusals at the International Court of Justice, the principal judicial organ of the United Nations, which rely mostly on self-recusal. Meg Kinnear and Frauke Nitschke explain, in the second chapter, disqualification of arbitrators under the ICSID Convention and Rules, and provide a unique insight and assessment of arbitrator challenges in international investment disputes. In the third chapter, Sarah Grimmer describes the determination of arbitrator challenges by the Secretary General of the Permanent Court of Arbitration, which uniquely includes both State to State and investor—State disputes. Lee Caplan explores, in chapter four, arbitrator challenges at the Iran-United States Claims Tribunal, and thus provides an important historical record still relevant today. Next, in chapter five, Loretta Malintoppi and Andrea Carlevaris discuss challenges of arbitrators under the rules of the International Chamber of Commerce and discuss lessons learnt there. In chapter six, Gregory Spak and Ron Kendler examine selections and recusals in the WTO Dispute Settlement System and ponder on reasons why recusals and challenges are rare under that regimen. Finally, Makane Mbengue considers, in chapter seven, challenges of judges in International Criminal Courts and Tribunals and provides some useful comparative analysis with other forum.
These initial chapters provide a essential foundation for the analysis of challenges and recusal of judges and arbitrators. As such, they assess several specific issues, including the available procedures, reasons asserted to initiate a challenge procedure, who decides the challenges and results of the challenge procedures. Importantly, they also allow for a comparison among different forums.

The following three chapters analyze challenges from a different prospective. Namely, they examine specific issues that are often reasons for parties to begin a challenges procedure. In chapter eight, Romain Zamour considers issue conflicts and the reasonable expectation of an open mind, specifically in the context of the challenge decision in *Devas v. India*. Judith Levine, in chapter nine, examines the important issues of late-in-the-game challenges and spurious challenges and resignations within the context of tactical challenges. In chapter ten, Luke Sobota assesses repeat arbitrator appointments in international investment disputes, a oft-cited reason to challenge arbitrators.

In the next three chapters, the analysis shift to personal perspectives. In chapter eleven, Charles Brower, Sarah Melikian and Michael Daly recount tall and small tales of a challenged arbitrator from a first-hand experience. Next, in chapter twelve, Andrew Loewenstein describes the approach and consideration of counsel to challenges in international disputes. Finally, in chapter thirteen, Hansel Pham and Imad Khan examine challenges to party representatives and counsel before international courts and tribunals a unique mechanism at times used as an alternative to challenge the decision-maker.

The final two chapters analyze challenges from a geographical prospective and seek to determine whether there is a regional variation to challenges. In chapter fourteen, Lucy Reed, John Choong and Chan Yong Wei explain challenges to arbitrators in Asia, and especially the position before the Singapore and Hong Kong Courts. Finally, in chapter fifteen, Jonathan Hamilton, Francisco Jijon and Ernesto Corzo consider arbitrators challenges in Latin America.