procedure.'' They acknowledge that ''this course may create delay'' but stress that ''it helps to discourage unmeritorious disruptive tactics.''[17]

Sadly, there are some situations in which resignation seems to be the result of bad faith collusion with a party.[18] In former times and in purely ad hoc arbitrations this may have led to a procedural quandary, but the main rules applicable to investor-state arbitrations currently provide four types of solutions. First, the rules may require that the institution or co-arbitrators give their consent in order for the resignation to be effective.[19] Second, a party might be deprived of its right to appoint the replacement arbitrator, as contemplated by the 2010 UNCITRAL Rules in ''exceptional circumstances.''[20] Third, depending on the rules and/or *lex arbitri*, the remaining arbitrators may be entitled to proceed as a truncated tribunal.[21] Fourth, there may be consequences as to liability or fee entitlement for arbitrators who resign in bad-faith.[22]

## Remarks by Charles N. Brower*

### Introduction

Thank you for inviting me to join today's panel. As the only member of the panel who has been challenged, I can provide a different perspective on this issue.

In her remarks, Meg Kinnear mentioned the first-ever ICSID challenge in *Amco Asia* v. *Indonesia*. As counsel for Indonesia in that case, I was involved in challenging the claimant's appointee. Over 30 years later, I can report that I have been challenged six times (that I can remember). Of note, I am the only U.S. member of the Iran-United States Claims Tribunal, in the Tribunal's 33-year history, to have been challenged by Iran—and, in another case, I was challenged by the party that appointed me.

[17] Nigel Blackaby et al., Redfern and Hunter on International Arbitration 286 (5th ed. 2009). Derains and Schwartz describe the dilemma as follows:

> [A]n arbitrator may consider that, whatever the actual merits of the challenge, it would be in the best interests of the arbitration and of both parties ultimately for the arbitrator to be replaced, in order to permit the arbitration to proceed in a better climate of confidence and trust and to minimize the likelihood of recourse against the arbitral award when it is rendered. The decision of whether to stay or to go in such circumstances inevitably involves the consideration of a number of different factors that may be particular to the case in question. . . . [T]here appears to be a relatively broad international consensus . . . that an arbitrator may legitimately choose to withdraw if challenged, even if the challenge is not considered to be founded, and withdrawal in such case need not constitute an admission of the validity of the challenge.

Derains & Schwartz, *supra* note 2, at 185. Finally, Article 13(3) of the UNCITRAL Rules acknowledges this reality, providing: ''When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.''

[18] *See, e.g.,* Himpurna Cal. Energy Ltd. v. Rep. of Indon., Final Award of 16 October 1999, 15 YB Comm. Arb. 186 (2000).

[19] ICSID Convention art. 56; Christoph H. Schreuer, The ICSID Convention: A Commentary 1192 (2d ed. 2009); ICC Rules art. 15(1).

[20] UNCITRAL Rules art. 14 (2010). The UNCITRAL Rules (2010) have been described as a major departure from the UNCITRAL Rules (1976) and as an improvement thereon. David D. Caron & Lee M. Caplan, The UNCITRAL Arbitration Rules: A Commentary 314–17 (2d ed. 2013). *See also* PCA Arbitration Rules art. 14(2); Brooks W. Daly, Evegeniya Goriatcheva & Hugh A. Meighen, A Guide to the PCA Arbitration Rules, paras. 4.62–4.65 (2014) (which uses a slightly different formulation).

[21] *See* PCA Arbitration Rules art. 12(4) and UNCITRAL Rules (2010) art. 14(2). For a novel solution in a national arbitration law, see Mauritian International Arbitration Act 2008, Sections 15–16.

[22] For example, with regard to arbitrations conducted in England, there are relevant provisions in the English Arbitration Act 1996 which subject such entitlements to the English courts. Arbitration Act, 1996, c.23, § 25 (Eng.). *See also id.* § 27 (provisions on filling of vacancies in the event of resignation).

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In the current debate over the ''crisis of legitimacy'' in international arbitration there has not been much focus on challenges, or on how they are decided, but it is worth considering these perspectives.

## Background on How Challenges Are Decided

The distinctions in challenge decisions have more to do with the different arbitral institutions than with varying standards. Consider, for example, the International Court of Arbitration of the International Chamber of Commerce (ICC), where you do not know who will decide the challenge. This is because there are many members of the Court, who never meet in full complement, so the result to a challenge can depend on who shows up for the meeting. Thus, the reasons behind a decision can vary considerably, and for that reason the ICC does not provide reasons for its decisions. Similarly, the Arbitration Institute of the Stockholm Chamber of Commerce does not issue reasoned decisions.

By contrast, the London Court of International Arbitration (LCIA) is not required to include reasons for its decisions on challenges, yet in practice they are provided. Recently, the Court even published a collection of these decisions. The LCIA explains that it provides reasons because it ''considers that the parties (particularly the party bringing the challenge) and the arbitrators (particularly the arbitrator who has been challenged) should be made aware of the LCIA Court's view of the matters said to give rise to doubts as to the arbitrator's independence or impartiality.''[1] Similarly, the Permanent Court of Arbitration (PCA) and the International Centre for the Settlement of Investment Disputes (ICSID) issue reasoned decisions on challenges. However, unlike the ICC or LCIA, it is not the ''Court'' of the PCA that decides those challenges, but rather its Secretary-General, presumably advised by the institution's legal counsel.

Additionally, sometimes the PCA is asked to select another institution or even an individual to decide the challenge. As expected, the particular qualifications of the individuals who are appointed in that capacity vary. At ICSID, challenges to one member of a three-arbitrator Tribunal are submitted to the Tribunal for the other (non-challenged) members to decide. If the Tribunal is unable to reach a decision or is divided, or if the Tribunal has only a sole arbitrator, or if two or all three members of a three-arbitrator Tribunal are challenged, then pursuant to ICSID Rule 58 the decision will be made by the Chairman of the Administrative Council, presumably on the recommendation of the ICSID Secretary-General.

## Basis for Challenges

Arbitrators can be challenged for a variety of reasons. One notable example that comes to mind is the challenge of an arbitrator for views he or she has expressed in scholarly publications, when similar questions may be at issue in a current proceeding. This was the case for Professor Campbell McLachlan, who was challenged in his first-ever appointment as arbitrator in an ICSID case, *Urbaser S.A. v. Argentine Republic*.[2] One of the issues in *Urbaser* was the application of the most-favored nation (MFN) clause in the Spain-Argentina BIT, which claimants argued should give them access to the more relaxed dispute settlement

[1] London Court of International Arbitration, *Frequently Asked Questions,* http://www.lcia.org//Frequently_Asked_Questions.aspx (last visited May 5, 2014).

[2] Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (Aug. 12, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1690_En&caseId=C255.

provisions of Argentina's BITs with Peru, Chile, the United States, and France, which did not require that the dispute be first submitted to the courts of the host country. In his 2007 book, *International Investment Arbitration: Substantive Principles*, Professor McLachlan had written the following:

> The application of MFN protection will not be justified where it subverts the balance of rights and obligations which the parties have carefully negotiated in their investment treaty. In particular, it will not apply to the dispute settlement provisions, unless the parties expressly so provide.[3]

Claimants challenged Professor McLachlan on the basis that he ''has already prejudiced an essential element of the conflict that is the object of this arbitration.''[4] I happen to think this was a good challenge, an opinion I have shared with Professor McLachlan. But in their decision his co-arbitrators rejected the application, finding that ''[i]f Claimants' view were to prevail . . . the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter, whether . . . procedural, jurisdictional, or touching upon the substantive rights deriving from the BIT.''[5] Instead, his co-arbitrators considered that Professor McLachlan's opinions were made ''in his capacity as a scholar and not in a decision that could have some kind of a binding effect upon him,'' such that his opinion would be subject to change ''as required in light of the current state of academic knowledge.''[6] As would be expected, the Tribunal's subsequent Decision on Jurisdiction, in which jurisdiction was accepted, had to deal with the MFN issue in a very artful way.[7]

Having been challenged myself, I would also caution: be careful of what you say. A few years ago I was asked by an old friend to give an interview for his publication, and one question asked my opinion as to the most pressing issues for international arbitration in the future. In my response I noted that certain countries, like Ecuador and Bolivia, were leaving ICSID and considering renunciation of one or more of their bilateral investment treaties, which could lead to problems. Based on the interview, respondents filed a challenge against me in the case of *Perenco Ecuador Ltd. v. Republic of Ecuador*.[8]

*Perenco* was an ICSID case, but the parties had agreed that the PCA Secretary-General would decide any challenges in accordance with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), not the ICSID Convention and Arbitration Rules. The IBA Guidelines contain a ''General Principle'' that arbitrators shall be ''impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding.'' Additionally, under a second general standard on ''Conflict of Interest,'' an arbitrator shall no longer act where there are ''justifiable doubts as to the arbitrator's impartiality or independence,'' which arise ''if a reasonable person and informed third party would reach the conclusion that there was

[3] Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles 257 (2007).

[4] *Urbaser,* para. 22.

[5] *Id.* para. 48.

[6] *Id.* para. 51.

[7] *See Urbaser,* Decision on Jurisdiction, para. 203 (Dec. 19, 2011), http://www.italaw.com/sites/default/files/case-documents/italaw1324.pdf (deciding that there was ''no need to examine whether the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the BIT'' was applicable because ''Claimants were not required to comply with the 18 month rule under the facts presented'' to the Tribunal).

[8] Perenco Ecuador Ltd., ICSID Case No. ARB/08/06, Decision on Challenge to Arbitrator (Dec. 8, 2009), http://italaw.com/documents/PerencovEcuador-Challenge.pdf.

a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties.''[9]

As noted in the decision, it was not necessary to find that I was ''actually biased,'' but the Secretary-General found that my comments gave rise to justifiable doubts about my impartiality, as well as an appearance that I had prejudged the issue. However, the Secretary-General rejected the respondents' arguments that my ''decision to go public'' (by giving the interview) demonstrated a lack of impartiality and rejected the claimant's argument that my experience and reputation were relevant factors when considering ''independence and impartiality.'' The Secretary-General also rejected the respondents' allegation that my statements breached confidentiality, as well as their argument that the stage of the proceedings was a relevant consideration.

What made this case different was that the PCA became involved in the challenge because of the parties' agreement, contrary to the mandatory ICSID Convention procedures. When the challenge was initially made, I inquired privately of the claimant which had appointed me whether it wished me to resign (as is my practice whenever challenged by the party that did not appoint me). When the PCA Secretary-General issued his decision, it was not accepted by ICSID as a disqualification within the meaning of the ICSID Convention. However, the claimant eventually did agree that I should resign so as to abide by its agreement with Ecuador and to ensure that any future award in the claimant's favor would not be open to criticism that the Tribunal had not been properly constituted. My two co-arbitrators consented to my resignation, which, according to the ICSID Rules, was necessary in order to permit the claimant to appoint my successor.[10]

Another unusual example is when I was challenged by the party that appointed me. This happened approximately eight years after the award had been issued, when the Tribunal was asked to interpret it. My law clerk at the time blogged, with my permission, anonymously about the request. Nonetheless, I was challenged on the basis that my clerk had published something about a specific case.

As for the references in other panelists' remarks to challenges based on repeat appointments from the same firm or party, I have never been challenged on this basis. And the reason is simple: whenever I am asked to serve as arbitrator I review carefully, with the counsel who has approached me, appointments within the last three years and consider whether the same counsel has previously appointed me in that period and, if so, how many times. I do not accept appointments, and have not been urged to accept appointments, by the same party or on the recommendation of the same counsel within the preceding three years. In fact, this situation is easy to avoid, unlike some of the other challenges that have been discussed today, where the issues involved are more nuanced.

## Conclusion

Personally, I am of the opinion that challenge decisions should be reasoned and published. This allows the arbitration community, including arbitrators themselves, to be as informed as possible about the standards, so they may then avoid those circumstances that form the basis of a successful challenge. Ultimately, I do not believe that there is such a difference

[9] International Bar Association, IBA Guidelines on Conflict of Interest in International Arbitration (2004).

[10] *See* ICSID Rules of Procedure for Arbitration Proceedings, Rule 8(2) (2006) (''If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto.'').

in institutional rules or standards, but the varied outcomes are due to how standards are applied. It is easy to see the difference between having a challenge decided by your two colleagues, as compared to by whoever happens to show up for an ICC Court meeting.

So, of what should an arbitrator be aware when challenged, and what steps should he or she take? The most important thing is to speak with the party which appointed you and to offer to resign if the party does not want, for example, to incur the costs of a challenge procedure. I have been asked to resign because a party did not wish to finance the challenge proceedings.

Additionally, it is very important to take the opportunity to respond to the challenge—but in doing so one must be sure not to say something that could then serve as a basis for disqualification! On that note, I will conclude with two examples. First, in the long-running case *Victor Pey Casado v. Republic of Chile*, the former Foreign Minister of Algeria and the claimants' appointee, Mohammed Bedjaoui, was challenged by the respondent based on alleged diplomatic complications due to his role in the Algerian government.[11] Based on Mr. Bedjaoui's reaction to the respondent's initial request, the respondent further alleged that Mr. Bedjaoui should be disqualified based on his alleged bias and lack of impartiality, and he was disqualified on that basis. Recently, Professor Francisco Orrego Vicuña was disqualified in *Burlington Resources, Inc. v. Republic of Ecuador* under similar circumstances. While the grounds for the respondent's initial challenge were not accepted by the Chairman of the ICSID Administrative Council because they were not promptly raised, Professor Orrego Vicuña was disqualified based on explanations he provided in response to the initial challenge, which were determined to ''evidence[] an appearance of lack of impartiality with respect to'' respondent and its counsel.[12]

[11] Background information on the case, ICSID Case No. ARB/98/2, is available at http://www.italaw.com/cases/829 (last visited May 6, 2014).

[12] Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3972_En&caseId=C300.