**One More Time About Arbitral Challenges in Investor-State Arbitration:**

**Overly Broad Challenges and the Boundaries of Responsible Conduct**

In the ISDS context, the arbitral challenge mechanism serves an important sanctioning function to ensure arbitral independence and impartiality. Both investors and states frequently take advantage of this mechanism. For example, in *Landesbank Baden-Württemberg and others v Kingdom of Spain*, Spain challenged all tribunal members twice.[1] In *ConocoPhillips Petrozuata BV and others v Venezuela*, the investors contested Yves Fortier's appointment as an arbitrator six times without any success.[2] In the *Vattenfall* case, Germany sought disqualification of all tribunal members twice.[3]

Frequent challenges throughout the proceedings can significantly delay the adjudicatory process.q Under some arbitration rules, the reason for it is structural i.e., the adjudicatory authority (i.e., the unchallenged co-arbitrators, the Chair of the ICSID Administrative Council or a third party appointed to adjudicate a challenge) must stay the proceedings to adjudicate a challenge. Under the ICSID Convention, the Chair of the Administrative Council can also request a recommendation from a third party prior to rendering a decision. This factor can contribute to the prolongation of the process and increase the total costs. Arbitral practice shows that unjustified prolongation of the arbitration process and associated costs are problematic for both claimants and respondents.

Further, repeated challenges in the same proceedings can force some arbitrators to resign, depriving a party of their first choice of arbitrator. Baker and Greenwood confirm that "challenges can be a cost-effective way to ensure an expensive delay" or even a tool to force the challenged arbitrator to resign.[4] Other scholars also suggest that disputing parties can use challenges to address procedural decisions they dislike.[5] Fernando Mantilla-Serrano attributed such conduct to the

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[1] *Landesbank Baden-Württemberg and others v Kingdom of Spain*, Decision on the Second Proposal to Disqualify All Members of the Tribunal, ICSID Case No. ARB/15/45 (15 December 2020).

[2] Lucia Raimanova, "Arbitrator Conflicts in a Global Era: Some Reflections on the Challenges in ConocoPhillips v Venezuela, as the Quantum Phase of the Case Nears its Conclusion" (10 October 2016), Thomson Reuters Arbitration Blog, online:< http://arbitrationblog.practicallaw.com/arbitrator-conflicts-in-a-global-era-some-reflections-on-the-challenges-in-conocophillips-v-venezuela-as-the-quantum-phase-of-the-case-nears-its-conclusion/>. *Conocophillips Petrozuata BV, Conocophillips Hamaca BV and Conocophillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Fourth Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 26 July 2016 at para 8.

[3] E.g., *Vattenfall v Germany* (2020), Recommendation Pursuant to the Request by ICSID Dated 8 May 2020 on the Respondent's Proposal to Disqualify All Members of the Arbitral Tribunal.

[4] Ibid 102.

[5] Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'real Danger' Test* (Kluwer Law International, 2009) at 4.

pressure legal teams face from their clients "for immediate corrective action in the face of arbitrators' procedural decisions against which there is no recourse".[6]

Of course, if the challenges raise serious allegations, the delays may be warranted to guarantee the integrity of the process. The challenges, however, can become particularly problematic if the parties bring them for tactical reasons[7] and include overly broad allegations or far-fetched speculations. Some participants in the ISDS reform process, which runs under the UNCITRAL umbrella, echoed this concern. For example, during the Arbitral Code of Conduct development, the Swiss Arbitration Association (SAA) suggested that an overly expansive formulation of the disclosure standard could lead to "meritless" challenges.[8] Furthermore, in its submissions, a party responding to the challenge sometimes labels the challenge "frivolous", "vexatious", and even "abuse of process".

In this context, I pose three sets of questions. First, what does the existing arbitral practice tell us about distinguishing between meritless challenges and those that genuinely address arbitral misconduct? Is such a distinction meaningful from a conceptual standpoint? How can the ISDS participants (states, arbitration institutions, and investors alike) address a problem of unsubstantiated challenges, particularly in reforming ISDS and the applicable rules on professional conduct? Second, can rules on professional responsibility (legal ethics) meaningfully limit such challenges? If so, what are they? What are the implications of the frequent challenges for the ISDS system? Finally, how can we rationalize the relative popularity of arbitral challenges in the ISDS context? In my guest lecture, I examine these issues in light of the ongoing investment arbitration reform under the auspices of UNCITRAL Working Group III.

## Short Bio

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[6] Fernando Mantilla-Serrano, "Towards a Transnational Procedural Public Policy" (2004) 20:4 Arbitration international at 351.
[7] Simon Greenberg, "Tackling Guerrilla Challenges Against Arbitrators: Institutional Perspective" (2010) Transnat'l Disp Mgmt 7. M. Scott Donahey, "Defending the Arbitration Against Sabotage" (1996) 13 J Int'l Arb 93 at 104.
[8] Some participants of the disputes also called challenges "entirely without merit", see *Decision on the Respondent's Proposal to Disqualify Dr. Stanimir A. Alexandrov* (15 April 2022); *Misen Energy AB (publ) and Misen Enterprises AB v Ukraine*, ICSID Case No. ARB/21/15 at para 22