UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 20-CIV-24867-SCOLA/GOODMAN

GRUPO UNIDOS POR EL CANAL, S.A.,
SACYR, S.A.,
WEBUILD S.p.A. and
JAN DE NUL N.V.

Movants/Counter-Respondents,

v.

AUTORIDAD DEL CANAL DE PANAMA,

Respondent/Counter-Movant.

SECOND EXPERT REPORT OF PROFESSOR CHIARA GIORGETTI

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I. INTRODUCTION AND EXPERT MANDATE

1. GUPC S.A., Sacyr, S.A., Webuild S.p.A., and Jan De Nul N.V. (collectively, the "Movants") through their counsel, White & Case LLP, asked for my Expert Opinion on matters related to the vacatur proceedings pending in the United States District Court for the Southern District of Florida, and specifically on issues related to the duty of disclosure of arbitrators and its impact on the arbitration process.

2. On April 16, 2021, I executed a first Expert Report in relation to the above-mentioned matters.[1] I am now providing this supplemental opinion to clarify further some of the issues at stake in the vacatur proceedings and as a rebuttal to the opinion filed by Autoridad Del Canal De Panama's ("ACP" or "Respondent") expert, Mr. Gary Born.[2]

3. By way of a further introduction, I am a tenured Professor of Law at Richmond Law School, where I have been teaching courses in international law and international arbitration for the past ten years. I have, in the last few years, served as a visiting professor or lectured on matters related to international arbitration and international dispute resolution at Georgetown Law Center, George Washington Law School, Geneva University, LUISS University in Rome and Bocconi University in Milan, Italy. I lectured on dispute resolution for the United Nations and have recorded classes for the United Nations Audiovisual Library, including on the selection and removal of judges and arbitrators in international courts and tribunals.

4. I have authored, co-authored, edited and co-edited nine books, including "Selecting and Removing Arbitrators in International Investment Law" (2019), "Challenges and Recusal of

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1 Expert Report of Professor Chiara Giorgetti ("Giorgetti I") (D.E. 55-1).

2 Expert Opinion of Gary Born ("Born Opinion") (D.E. 57-92).

Arbitrators and Judges in International Courts and Tribunals" (2015) and "Litigating International Investment Disputes" (2014). I have authored or co-authored over forty articles and chapters, including a special symposium issue on ethics in international courts and tribunals for American Journal of International Law Unbound (2019), the premiere international law journal, as well as several articles and chapters focused on the selection and removal of arbitrators and judges.

5. I am an elected member of the American Law Institute, and Vice-President of the American Branch of the International Law Association, and I have served in many leadership positions at the American Society of International Law.

6. Prior to joining academia full-time, I practiced international arbitration in both Europe and the United States for several years. I serve as the representative of the Institute for Transnational Arbitration ("ITA") in the negotiations on Investor-State Dispute Settlement ("ISDS") Reform under the aegis of the United Nations Commission on International Trade Law ("UNCITRAL") and worked extensively on the proposal for a Code of Conduct for Adjudicators in ISDS, including as a scholar-in-residence at the Secretariat of the International Centre for Settlement of Investment Disputes ("ICSID"). I am admitted to practice in New York State and the District of Columbia. I clerked at the International Court of Justice, the principal judicial organ of the United Nations, in The Hague, Netherlands.

7. I also wish to say at the outset that I have the highest respect for Mr. Born, even when our opinions in this case differ. I had the privilege to work with him representing Eritrea in the Eritrea/Yemen dispute, and we have maintained a cordial relationship since.

8. My updated Curriculum Vitae, including a list of publications, is attached to this opinion as **Exhibit 1**.

II. FACTUAL OVERVIEW

9. As an introduction, it is important to recall some of the facts underlying the present proceedings, as I understand them from the documents that counsel shared with me and upon which my opinion is based.[3]

10. Movants are requesting an order to vacate the Partial and Final Awards rendered in ICC Case No. 20910/ASM/JPA in Miami, pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§9, 10, 201, 208 (2018).

11. The underlying arbitration relates to a complex construction project for the Third Set of Locks of the Panama Canal, a multi-billions dollar decade-long project, valued at about US$ 3.5 billion, to enlarge the width and depth of and add a new channel to the Panama Canal to increase its vessel capacity.[4]

12. Movants are international construction firms domiciled in Panama, Spain, Italy and Belgium. Respondent is Autoridad del Canal de Panama ("ACP") an instrumentality and domiciliary of the Republic of Panama and the operator of the Panama Canal.[5]

13. As it is typical in such complex and international projects, the parties agreed to resolve any dispute by international arbitration under the Rules of the Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules"), with the aim of ensuring a neutral venue and a decision made by independent and impartial arbitrators, appointed by the parties. The

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[3] Specifically, I have reviewed Movants' Consolidated Motion to Vacate ("Consol. Mot. to Vacate") (D.E. 55), the Declaration of Nicolas Bouchardie ("Bouchardie Decl.") (D.E. 55-3), the Expert Opinion of Gary Born ("Born Opinion") (D.E. 57-92), and any other materials cited in this opinion.

[4] *See* Bouchardie Decl. ¶¶ 2–3 (D.E. 55-3).

[5] *Id*. ¶ 1; Partial Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶¶ 1–7 ("Partial Award") (D.E. 55-5).

parties selected Miami, Florida, as the seat of the arbitration and the Federal Arbitration Act ("FAA") as the governing procedural law.[6]

14. As a result of disagreements between the parties, they initiated several dispute board proceedings, followed by arbitral proceedings, pursuant to their contractual arbitration agreements.[7] The arbitration relevant to this case was initiated in March 2015 and concluded in February 2021, taking almost six years to complete.

15. The three arbitrators selected for this case were: Claus von Wobeser, nominated by Movants on March 17, 2015,[8] Dr. Robert Gaitskell Q.C., nominated by ACP on March 17, 2015,[9] and Pierre-Yves Gunter, nominated by the parties on March 7, 2016 as President[10].

16. This is a complex, high-value case, and, because of its subject matter, a case that also had a public interest component.[11] These aspects of the case, combined with the parties' choice of international arbitration to resolve disputes over litigation in domestic courts underscore the importance the parties attached to a neutral forum, composed of arbitrators whom the parties perceived as independent and impartial.

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6 *See* Partial Award ¶¶ 406–08 (D.E. 55-5) (quoting the contractual arbitration agreements).

7 *See id.*; *see also* Conditions of Contract, Sub-Clause 20.6 (D.E. 55-8); Joint and Several Guarantee, Sub-Clause 9.2 (D.E. 55-9).

8 *See* Partial Award ¶ 9 (D.E. 55-5).

9 *See* Partial Award ¶ 10 (D.E. 55-5).

10 *See* Partial Award ¶ 45 (D.E. 55-5).

11 On arbitration as an increasingly public good, *see* **Exhibit 9:** Ralf Michaels, *International Arbitration as Private and Public Good*, *in* The Oxford Handbook of International Arbitration 409 (Thomas Schultz & Federico Ortino eds., 2020) (stating that "[t]his reality of arbitration as a purely private good no longer exists, however, if it ever did. It is worth analyzing to what extent arbitration today qualifies as a public good in ways comparable to adjudication.").

17. Upon review of documents and several requests for further disclosures,[12] Movants learnt that during the pendency of the arbitration, each of the selected arbitrators had had opportunities to be in contact with the other members of the tribunal via a variety of other unrelated appointments, which were not disclosed to the parties. Specifically:

- Mr. Gunter, presiding arbitrator in this case, also served as President in a separate ICC Arbitration (ICC Case No. 24400) with ACP-appointed arbitrator Dr. Gaitskell. He was appointed as President by agreement of the two party-appointed arbitrators, including Dr. Gaitskell;[13]

- Mr. Gunter also sat as arbitrator in several other arbitral proceedings, and continuously since 2013, with Prof. Hanotiau, who presided over a previous connected arbitration between the parties;[14]

- Dr. Gaitskell, the arbitrator appointed by respondent ACP, sat in an arbitration with Mr. Gunter, presiding arbitrator in this case, and took part in the decision to appoint him as president in an unrelated commercial ICC arbitration (Case No. 24400);[15]

- Dr. Gaitskell, the arbitrator appointed by ACP repeatedly in all of the Panama claims (from Cofferdam through the present), also sat as the president of a tribunal with Mr. Loftis, a lead counsel for ACP, until 2012, but failed to disclose this circumstance until October 29, 2020;[16]

- Mr. von Wobeser, Movants' appointed arbitrator, has been sitting, since July 2019 and prior to the conclusion of the arbitration at issue in this proceeding, in an arbitration with Mr. Andrés Jana, counsel for ACP.[17]

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12 *See* Bouchardie Decl. ¶¶ 26–76 (D.E. 55-3).

13 *Id.* ¶¶ 33, 53–54, 64.

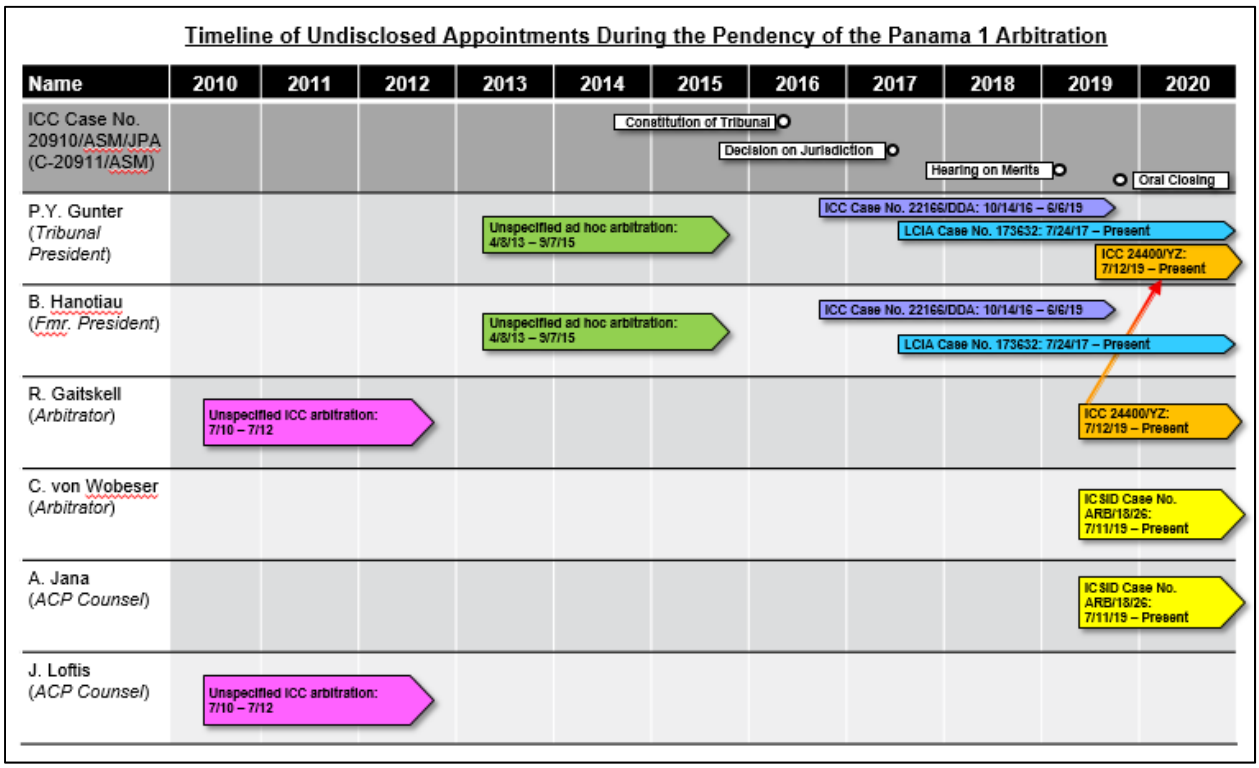
14 *Id.* ¶¶ 33, 38, 55–57.

15 *Id.* ¶¶ 33, 53–54, 64.

16 *See* Dr. Gaitskell's Answer to Claimants' Request to Update Disclosures dated October 29, 2020 ¶ 5 (D.E. 55-45) (disclosing this relationship with Mr. Loftis for the first time); *see also* Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 dated March 24, 2015 (D.E. 55-12) (no disclosure of this relationship); Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 dated May 14, 2015 (D.E. 55-15) (same); Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466 dated January 25, 2017 (D.E. 55-19) (same).

17 *Id.* ¶ 73.

18. The table below, which Movants provided to me, graphically shows the duration and extent of the overlapping appointments at critical stages of the underlying arbitration, which were undisclosed to the parties.



III. INTERNATIONAL STANDARDS AND ETHICAL OBLIGATIONS IMPOSE A CONTINUOUS AFFIRMATIVE DUTY ON ARBITRATORS TO DISCLOSE ALL POTENTIAL CONFLICTS AT THE OUTSET OF AND THROUGHOUT THE PROCEEDINGS

19. As I stated in my previous report,[18] a fundamental tenet of international arbitration, and particularly international commercial arbitration, is that the process is founded on trust between the arbitrators and the parties, who relinquished their right to go to domestic courts in favor of international arbitration.[19] In their classic treatise on international arbitration Redfern

[18] Giorgetti I ¶¶ 10-11 (D.E. 55-1).

[19] *See, e.g.*, PricewaterhouseCoopers and Queen Mary University of London, *Corporate Choices in International Arbitration: Industry Perspectives* 7, *available at*

and Hunter note that arbitration is nowadays "the principal method of resolving international disputes involving states, individuals and corporations."[20] In fact, "international arbitration gives the parties an opportunity to choose a 'neutral' place for the resolution of their dispute and to choose a 'neutral' tribunal."[21] Hunter and Redfern further explain:

> A reference to arbitration means that the dispute will be determined in a neutral place of arbitration rather than on the home ground of one of the party or the other. Each party will be given an opportunity to participate in the selection of the tribunal. . . . [I]f the tribunal is to consist of three arbitrators, two of them may be chosen by the parties themselves, but each of them will be required to be independent and impartial (and may be dismissed if this proves not to be the case). In this sense, whether the tribunal consists of one arbitrator of three, it will be a strictly 'neutral' tribunal."[22]

20. Professor Susan Franck also further confirms that, "[t]oday, businesses use international arbitration to provide a neutral, adjudicative dispute resolution process where arbitrators independently apply the law to facts, and this in turn promotes the legitimacy of international arbitration.[23] Indeed, as the Eleventh Circuit stated in *Middlesex Mutual Ins. Co. v. Levine*, "[t]he law is well settled that arbitrators exercise judicial functions, and are in fact, judicial officers. . . . It therefore becomes of the utmost importance that . . . every possible safeguard

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www.arbitration.qmul.ac.uk/research/2013 ("[A]rbitration, because of its neutrality, gives a sense of fairness that litigation in foreign courts sometimes cannot provide.").

20 **Exhibit 5:** Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* 1 ¶ 1.01 (6th ed. 2015).

21 *Id*., at 28 ¶ 1.98.

22 *Id*., at 29 ¶ 1.100.

23 Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. Int'l &Comp. L. 499, 504 (2006).

should be thrown about the proceedings to insure [*sic*] the utmost fairness and impartiality of those charged with the determination of the rights of the parties."[24]

21. The trust of the parties in the adjudicative neutrality of the arbitrators relies on the fact that arbitrators disclose immediately "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 parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality," as required by Article 11 of the ICC Arbitration Rules, applicable in the arbitration underlying this case.[25]

22. Indeed, as noted by the Eleventh Circuit in *Middlesex Mutual Insurance Co. v. Levine*, a "code of strict morality and fairness . . . underlies the arbitrator's duty of disclosure."[26] And Justice White explained in his concurrence in *Commonwealth Coatings Corp. v. Continental Cas. Co.* that:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved. . . . This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator . . . . And it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with the knowledge of the relationship and continuing faith in his objectivity, than to have it come to light after the arbitration . . . .[27]

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24 675 F.2d 1197, 1200–201 (11th Cir. 1982) (quoting *Cassara v. Wofford*, 55 So. 2d 102, 105 (Fla. 1951)).

25 *See* Giorgetti I ¶ 10 (D.E. 55-1) (quoting Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules") art. 11 (D.E. 55-10).

26 *Middlesex Mutual*, 675 F.2d at 1200–201 (finding that the district court had properly vacated the arbitration award on the ground of evident partiality of the neutral third arbitrator who "had violated his duty to reveal potential bias").

27 393 U.S. 145, 151 (1968) (White, J., concurring).

23. Extensive disclosure is particularly important for international arbitration because being an international arbitrator is not a permanent or full-time career, indeed "there is always a before, often an after, and sometimes other professional activities in parallel."[28]

24. Moreover, because the existence of commercial arbitral proceedings and resulting awards are often kept confidential, parties must rely on the completeness of disclosure by arbitrators themselves to become fully aware of all relevant circumstances. Disclosure can thus also level the playing field by ensuring all parties have the same information.[29]

25. There is no drawback to complete and continuous disclosure, as the Supreme Court in *Commonwealth Coatings* explained:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the

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[28] Hélène Ruiz Fabri, *Conflicts of Interests: Navigating in the Fog*, 113 AJIL Unbound 307 (2019), *available at* https://www.cambridge.org/core/journals/american-journal-of-international-law/article/conflicts-of-interests-navigating-in-the-fog/00C27F1CE7147C9A251087453600C5BB.

[29] *See*, *e.g.*, Alexis Mourre, *Conflicts Disclosures: The IBA Guidelines and Beyond*, *in* The Evolution and Future of International Arbitration ¶ 23.2 (S.L. Brekoulakis, J.D.M. Lew et al. eds., 2016) (D.E. 57-126)

> Arbitrators exercise their mission on a temporary basis, and the only course of their authority is the parties' consent and the parties' trust. Because arbitrators derive their power from the parties, they are under the permanent watch of the parties. And in contrast to a judge, an arbitrator has to gain the parties' trust and establish his or her legitimacy.

> parties any dealing that might create the impression of possible bias.[30]

26. Disclosure does not impose any excessive or undue burden on arbitrators, who already keep record of their appointments and know well how much time and effort they allocate to each matter. This standard of complete and continuous disclosure as articulated by the United States Supreme Court is consistent with international standards and current best practices, in particular the disclosure standard under the ICC Arbitration Rules, which by virtue of the parties' selection is directly applicable here, as discussed immediately below.

27. In the instant case, the parties chose to conduct their arbitration under the ICC Arbitration Rules. Article 11 of the ICC Arbitration Rules provides that arbitrators:

- "must be and remain impartial and independent" (Art. 11(1));
- "disclose in writing to the Secretariat 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 parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality" (Art. 11(2)); and
- "shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration" (Art. 11(3)).[31]

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30 *Commonwealth Coatings*, 393 U.S. at 148–50 (holding that vacatur of an arbitration award is supported where the arbitrator fails to "disclose to the parties any dealings that might create an impression of possible bias").

31 ICC Arbitration Rules, art. 11 (D.E. 55-10).

28. Article 11 thus is clear that arbitrators have a *continuous* duty to disclose *any facts or circumstances* which may call into question an arbitrator's independence *in the eyes of the parties*.

29. As such, an arbitrator's failure to be transparent and disclose such circumstances may lead to the challenge of the arbitrator, or ultimately the set-aside of the award.[32]

30. Mr. Born disagrees with me that extensive disclosures are essential to trust in the arbitrators and the arbitral proceedings, claiming that "[d]isclosure guidelines and obligations aim to strike a proportionate balance and not to mandate 'extensive' disclosure of all conceivable information."[33] Mr. Born's statement, however, is inaccurate.

31. Indeed, I did not say, nor do I believe, that "all conceivable information" need be disclosed. Disclosure requirements concern relevant facts or circumstances that may call into question the independence of the arbitrators in the eyes of the parties, as mandated by the ICC Arbitration Rules.[34] In case of doubt, the default under the ICC Arbitration Rules is disclosure.[35] In this instance, it should have been "conceivable" to the arbitrators that overlapping appointments and service with counsel could have been relevant to the parties, in their eyes, and required disclosure.[36]

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32 *See* Giorgetti I ¶¶ 10–13 (D.E. 55-1).

33 Born Opinion ¶ 76 (D.E. 57-92).

34 ICC Arbitration Rules, art. 11(2), (3) (D.E. 55-10).

35 *See, e.g.*, Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466 (D.E. 55-19).

36 *See* **Exhibit 6:** W. Michael Reisman, W. Laurence Craig, William W. Park & Jan Paulsson, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* 571 (2d ed. 2015) (stating that problems may arise

> where the arbitrator has come to a substantive determination of issues which remain to be decided in the second arbitration. Having made up his mind before the party in the second arbitration has had

32. While disclosure guidelines aim to strike somewhat of a balance and trivial matters need not be disclosed, there is no doubt that the duty of disclosure exists, is continuous, and expansive, and that the applicable standard is the viewpoint of the parties. Arbitrators should resolve any doubt on whether to disclose "in favor of disclosure" as expressly explained in the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ("ICC Note 2021" or "ICC Note").[37] Indeed, the arbitrator acceptance statements signed by each of the arbitrators here expressly replicates this language, requiring arbitrator to disclose:

> [W]hether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.[38]

> the opportunity to be heard, he cannot be expected to be able to eliminate his prior decision from his thoughts: he will be subject to challenge for bias or prejudice by reason of predetermination of an issue.).

37 ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ¶ 20 (2021) ("ICC Note 2021") (D.E. 57-114).

38 Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 (D.E. 55-12); Mr. von Wobeser's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 (D.E. 55-13); Mr. von Wobeser's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 (D.E. 55-14); Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 (D.E. 55-15); Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 (D.E. 55-17); Mr. Gunter's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 (D.E. 55-18); Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466 (D.E. 55-19) (emphasis in original).

33. Mr. Born rightly notes that it is "both very common and virtually inevitable" that arbitrators and counsel have a variety of professional connections.[39] Indeed, it is for this very reason that arbitration rules provide for extensive disclosure. Michael Reisman, Laurence Craig, William Park, and Jan Paulsson, eminent scholars and active international arbitrators, note, "it is vital for an arbitrator to disclose at an early stage any and all possible facts which may affect or appear to affect his independence. If an arbitrator fully discloses the relevant facts, he limits the risk of being subsequently challenged and the risk of subsequent refusal by the petitioned forum to enforce the award."[40]

34. Moreover, the plain language of Article 11 of the ICC Arbitration Rules, as elaborated further below, is clear. Article 11 requires arbitrators, before appointment or confirmation, to "disclose in writing . . . 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 parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality," and to "immediately disclose in writing . . . any facts or circumstances of a similar nature . . . concerning the arbitrator's impartiality or independence which may arise during the arbitration."[41]

35. With international arbitration becoming increasingly common and the dispute-resolution instrument of choice for international business parties, what is required of arbitrators also has evolved and has become more scrutinized.[42] For example, the ICC Arbitration Rules

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39 Born Opinion ¶ 47 (D.E. 57-92).

40 **Exhibit 6:** W. Michael Reisman et al., *International Commercial Arbitration*, *supra* note 36, at 561.

41 ICC Arbitration Rules, art. 11(2), (3) (D.E. 55-10).

42 And indeed, the United States Supreme Court agreed on the fundamental role of arbitrators, stating that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as

themselves evolved and have become more explicit in requiring extensive disclosure from arbitrators.[43] Thus, Article 7 of the 1955 ICC Arbitration Rules says nothing about arbitrator requirements, and Article 2(4) of the subsequent 1975 ICC Arbitration Rules merely requires that an arbitrator be "independent of the party nominating him."[44] Under the applicable version of the ICC Arbitration Rules at Article 11, however, arbitrators and prospective arbitrator are required 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 parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."[45]

36. Similarly, because arbitration is often used to resolve international commercial disputes, parties and their counsel are attentive to issues related to disclosure and concerned about possible biases.[46] Indeed, expectations are clear, and were clear when the arbitrators first

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well as the facts and are not subject to appellate review." *Commonwealth Coatings*, 393 U.S. at 149.

43 Alexis Mourre, an international arbitrator who served as the President of the ICC Court of Arbitration for six years, from 2015 to 2021, confirms that "in the last four decades . . . requiring disclosure has become a systematic requirement in arbitration rules." Alexis Mourre, *Conflicts Disclosure*, *supra* note 29, ¶ 23.7 (D.E. 57-126).

44 Rules of Arbitration of the International Chamber of Commerce (1975), art. 2(4), *available at* https://library.iccwbo.org/content/dr/RULES/RULE_1975_Concil-Arb_Arbitration_2.htm?l1=Rules&l2=Arbitration+Rules; *see also* Rules of Arbitration of the International Chamber of Commerce (1955), art. 7, *available at* https://library.iccwbo.org/content/dr/RULES/RULE_1955_Concil-Arb_7.htm?l1=Rules&l2=Arbitration+Rules.

45 ICC Arbitration Rules, art. 11(2) (D.E. 55-10).

46 Indeed, some have said that arbitration has suffered a backlash partially brought about by additional scrutiny of the arbitration process and arbitrators' appointment specifically. *See e.g.*, **Exhibit 2:** Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Rev. Foreign Inv. L.J. 339, 348-55 (2010); **Exhibit 3:** Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, *in* FDI Perspectives: Issues in International Investment ch. 33 (2011) (arguing that

> party-appointed arbitrators should be banned unless their role as advocates for the party that appointed them is fully disclosed and

undertook their duties, that an extensive and continuous duty of disclosure exists. For example, the 2014 International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines" or "Guidelines"), cited with approval by Mr. Born, note that "[t]he growth of international business, including larger corporate groups and international law firms, has generated more disclosures and resulted in increased complexity in the analysis of disclosure and conflict of interest issues."[47] In a Note issued by the Secretariat of the United Nations Conference on International Trade Law ("UNCITRAL") related to the drafting of a code of conduct for ISDS arbitrators, the Secretariat noted with respect to international arbitration in general that

> although existing legal standards differ in exact wording, they all seek to impose broad rules of independence and impartiality at the outset of the proceedings. Generally, arbitrators are required to be free of evident conflicts before and during proceedings and should disclose any potential conflicts before appointment. Most rules also impose an obligation to keep this disclosure current if the arbitrator is appointed and a subsequent matter for disclosure arises.[48]

> accepted. Until this is done, arbitration can never meet its aspiration of providing dispassionate adjudication by those with special skills and experience in a process designed to combine efficiency with expertise" and that "arbitration should either fully adopt the US model of party-appointed arbitrator as an advocate on the arbitral panel, with full disclosure and acceptance of this role, or abandon the party-appointed method altogether).

47 International Bar Association Guidelines on Conflicts of Interest in International Arbitration 1 (2014) ("IBA Guidelines") (D.E. 57-111).

48 UNCITRAL Working Group III, *Possible Reform of Investor-State Dispute Settlement: Background Information on a Code of Conduct*, Note by the Secretariat, ¶ 17 U.N. Doc. A/CN.9/WG.III/WP.167 (July 31, 2019), *available at* https://undocs.org/en/A/CN.9/WG.III/WP.167; *id.* ¶ 45 (noting that "[m]ost national laws and arbitral rules have adopted objective standards for disclosure").

37. The ICC Note, which informs arbitrators and parties about the applicable ICC Arbitration Rules and is designed to ensure that arbitrators are forthcoming and transparent in their disclosure of potential conflicts, also relies on the fundamental principle that "parties [to an arbitration] have a legitimate interest in being fully informed of all facts or circumstances that may be relevant[.]"[49]

38. In sum, applicable arbitration rules as well as relevant precedents and doctrine all show that arbitrators have a positive, expansive and continuous duty of disclosure. Any doubts on whether a disclosure is required should be resolved in favor of disclosure.

39. As noted above and in my previous report, Article 11(2) of the ICC Arbitration Rules requires an arbitrator to disclose to the parties "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 parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."[50] The ICC Arbitration Rules further mandate that such facts and circumstances be disclosed immediately.[51]

40. Mr. Born argues that the ICC Arbitration Rules do not require disclosure of "*all* connections and relationships" between arbitrators, and arbitrators and counsel, and that "the ICC Note leaves it to the *judgment of the arbitrator* whether to disclose relationships with other arbitrators or counsel and does not impose specific requirements in assessing when such relationships should be disclosed."[52] While it is true in part, as elaborated above, that not all

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49 ICC Note 2021 ¶ 24 (D.E. 57-114).

50 Giorgetti I, ¶ 15 (D.E. 55-1) (quoting ICC Arbitration Rules, art. 11(2) (D.E. 55-10)).

51 Giorgetti I, ¶ 15 (D.E. 55-1) (quoting ICC Arbitration Rules, art. 11(3) (D.E. 55-10)).

52 Born Opinion ¶ 51 (emphasis added) (D.E. 57-92); *see also id.* ¶ 144.

connections and relationships need disclosing, nonetheless it is incorrect to claim that it is in the judgment of the arbitrators whether to disclose a relationship.

41. Article 11 of the ICC Arbitration Rules is clear that the prospective arbitrator (and once appointed, the arbitrator) must disclose, in writing, "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 parties*."[53]

42. The ICC Note which "is intended to provide parties and arbitral tribunal with practical guidance concerning the conduct of arbitrations"[54] under the ICC Arbitration Rules specifies that "[t]he parties have a legitimate interest in being fully informed of *all* facts or circumstances that may be relevant *in their view* in order to be satisfied that an arbitrator or prospective arbitrator is and remains independent and impartial or, if the parties so wish, to explore the matter further and/or take the initiatives contemplated by the Rules."[55]

43. Indeed, the ICC Arbitration Rules have become ever more explicit in requiring extensive disclosure from arbitrators. Professor Reisman notes that the rule "adopted in its present form in the 1988 version of the ICC Arbitration Rules, replaced an earlier version that was more subjective. The earlier version required the arbitrators to disclose facts which *in their opinion* might call their independence into doubt in the eyes of the parties."[56] Since 1988, the ICC Arbitration Rules require arbitrators and prospective arbitrators to disclose "any facts or

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53 ICC Arbitration Rules, art. 11(2) (D.E. 55-10).

54 ICC Note 2021 ¶ 1 (D.E. 57-114).

55 Giorgetti I ¶ 16 (D.E. 55-1) (quoting ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2019) ("ICC Note 2019") ¶ 25 (D.E. 57-113)); *see also* ICC Note 2021 ¶ 24 (D.E. 57-114).

56 **Exhibit 6:** Reisman et al., *International Commercial Arbitration*, *supra* note 36, at 561. Note that though Prof. Reisman et al. wrote in 2015, they referred to changes that had already occurred and were in place as of 1988.

circumstances which might be of such a nature as to call into question the arbitrator's independence in the *eyes of the parties*."[57]

44. Alexis Mourre, President of the ICC International Court of Arbitration from 2015 to 2021, agrees that "[i]t is of course widely accepted that an arbitrator must disclose all circumstance [*sic*] which can affect its appearance of independence and impartiality in *the eyes of the parties*, and that this duty is a continuous one."[58]

45. Mr. Mourre, in the very passage cited by Mr. Born, warns of the "moral hazard" that inevitably goes with the assessment of what needs to be disclosed as "the arbitrator is expected to stretch his or her mind and make judgment on the possible *views of a third party*."[59] Indeed,

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[57] International Chamber of Commerce Rules of Arbitration (1988), art. 2(7) (emphasis added), *available at* https://library.iccwbo.org/content/dr/RULES/RULE_Arbitration_1988_2.htm?l1=Rules&l2=Arbitration+Rules.

[58] Alexis Mourre & Alexandre Vagenheim, *Conflicts of Interest: Towards Greater Transparency and Uniform Standards of Disclosure?*, Kluwer Arb. Blog (May 9, 2009), *available at* http://arbitrationblog.kluwerarbitration.com/2009/05/19/conflicts-of-interest-towards-greater-transparency-and-uniform-standards-of-disclosure/ (emphasis added) (arguing that more common rules on disclosure are desirable to achieve consistency among different arbitral institution and saying, in its entirety, that

> [a]s for the rules of arbitral institutions, they present common features, but diverge on important aspects. It is of course widely accepted that an arbitrator must disclose all circumstance [*sic*] which can affect its appearance of independence and impartiality in the eyes of the parties, and that this duty is a continuous one. Most of the rules, however, adopt a purely subjective requirement, leaving the arbitrator to decide the circumstances to be disclosed, while others, like the ICDR Rules, provide for an objective test, with a list of questions for the arbitrators to answer in its declaration of acceptance. The result is that the same situation may be disclosed under some rules of arbitration but not pursuant others, which is not satisfactory)

[59] Alexis Mourre, *Conflicts Disclosures*, *supra* note 29, ¶ 23.19 (D.E. 57-126) (emphasis added); *see also* Born Opinion ¶ 51 (D.E. 57-92).

when the arbitrator undertakes the required, difficult exercise of disclosing, she or he will have to think about the appearance of independence and impartiality in the eyes of the parties.[60] Ultimately, "the arbitrator is not the judge of his or her own independence and impartiality."[61]

46. Mr. Born concludes that it was "perfectly reasonable for the arbitrators to conclude . . . that no disclosure was required" and that he would expect "the vast majority of international arbitrators" would have done the same.[62] By doing so, he highlights a key problem. As seen above, the evaluation has to be made from the perspective/*eyes of the parties*, not the arbitrators, and disclosure is required in the event of doubt. Indeed, research shows that arbitrators constantly overvalue their ability to be independent. A 2017 empirical research study on arbitrators' decision-making showed a full 85% of the pooled arbitrators thought that they would be able to make more accurate and impartial decisions than their peers present in the room.[63]

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60 Alexis Mourre, *Conflicts Disclosures*, *supra* note 29, ¶ 23.19 (D.E. 57-126). Mr. Mourre concludes calling for reform of the disclosure rule to better clarify its requirements. *See id.* ¶ 23.35. He warns that

> the risk is essentially of a psychological nature. An experienced arbitrator who always acts in a perfectly impartial manner may not see the need to disclose circumstances which he or she believes are irrelevant or which he or she things will give rise to unnecessary procedural objections. To the contrary, someone who does not act as arbitrator on a regular basis may place more value in his or her relationship with their appointing party than in the arbitral process. A young arbitrator may fear that disclosure will prejudice a hardly sought appointment, etc.

Id. ¶ 23.20.

61 *Id.* ¶ 23.19; *see also* Born Opinion ¶ 51 (D.E. 57-92).

62 Born Opinion ¶ 144 (D.E. 57-92); *see also id.* ¶ 78.

63 *See* Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 Emory L.J. 1115, 1165 (2017). This seminal article by Professors Franck et al. reports the first ever set of empirical research on international arbitrators' decision-making, offering an objective, empirical and evidence-based approach. The authors sampled international arbitrators present at the prestigious biennial Congress of the International Council for Commercial Arbitration (ICCA) held in

47. As stated in my first report, while the IBA Guidelines contain non-exhaustive lists of circumstances that should or should not be disclosed, it is not binding on the ICC.[64] The IBA Guidelines are just one of the many interpretative tools that exist.

48. While Mr. Born agrees that the IBA Guidelines are not binding, he claims that I elided the "critical point" that the IBA Guidelines are cited "in a substantial majority" of cases "and are widely relied upon" by counsel, arbitrators and institutions, including the ICC.[65]

49. I do not think I elided the critical point that the IBA Rules are often cited.[66] The critical point in my view is that they are not binding on the parties in this case. In any event, even if the IBA Guidelines did apply, they would also call for disclosure.

Miami in 2014. *See id*. at 1131. The sample represented 53% of arbitrators registered for the ICCA Congress, and included individuals who self-identified as having served as arbitrator in at least one international arbitration. *Id*. at 1132–133. The authors concluded that arbitrators were

> bullish in assessing their capacity to provide unbiased decisions. When asked: 'If the researchers were to rank all of the arbitrators currently in this room according to their skill at making accurate and impartial decisions, what would your rate be?', nearly 85% of responding arbitrators indicated they were better than the median arbitrator present at an elite conference.

Id. at 1165.

64 Giorgetti I ¶ 19 (D.E. 55-1).

65 Born Opinion ¶ 57 (D.E. 57-92). I note that Mr. Born provides no support for his statement.

66 For example, Margaret Moses, in reviewing the use of the IBA Guidelines, notes that

> [a]rbitral institutions . . . have tended to view the Guidelines with a certain agnosticism. The ICC International Court of Arbitration is perhaps the institution that has provided the most extensive discussion of the Guidelines. The ICC has made clear that when an arbitrator's confirmation is subject to objection, or when an arbitrator is challenged, any reference by the Secretariat of the ICC Court of Arbitration to the ICC Court as to an article in the Guidelines does not bind the Court, and does not mean the Court is applying the Guidelines. Rather, such references are for information only.

50. In this case, however, the IBA Guidelines can, at best, serve as a subsidiary and supplementary tool of interpretation of the ICC Arbitration Rules, because the "eyes of the parties" test of the ICC Arbitration Rules prevails over the IBA Guidelines' Green List, according to which certain situations never require disclosure, and in fact, as the ICC Note specifies, "any doubt must be resolved in favour of disclosure."[67]

51. Indeed, the parties elected to have their arbitration decided by ICC arbitration using the ICC Arbitration Rules. The ICC Arbitration Rules are accompanied by the ICC Note on how to interpret them, and it is clear. The ICC Note 2021 provides:

1. "[P]arties have a legitimate interest in being fully informed of all facts and circumstances that may be relevant *in their view* to be satisfied that an arbitrator or prospective arbitrator is and remains impartial or, if the parties so wish, to explore the matter further and/or take the initiatives contemplated by the Rules"[68];
2. "An arbitrator or prospective arbitrator must disclose in his or her Statement, at the time of his or her appointment and as the arbitration is ongoing, any circumstance that might be of such a nature to call into question his or her independence *in the eyes of the parties* or give rise to reasonable doubts as to his or her impartiality"[69];
3. "Any doubt *must* be resolved in favour of disclosure," as noted above.[70]

Margaret Moses, *The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges*, Kluwer Arb. Blog (Nov. 23, 2017) (D.E. 57-125).

67 Giorgetti I ¶ 19 (D.E. 55-1) (quoting ICC Note 2019 ¶ 21 (D.E. 57-113)); *see also* ICC Note 2021 ¶ 25 (D.E. 57-114).

68 ICC Note 2021 ¶ 24 (D.E. 57-114) (emphasis added).

69 ICC Note 2021 ¶ 25 (D.E. 57-114) (emphasis added).

70 ICC Note 2021 ¶ 25 (D.E. 57-114) (emphasis added).

4. "A disclosure does not imply the existence of a conflict."[71] Indeed, it is for the parties to decide whether to initiate a challenge after disclosure, not for the arbitrator to decide whether certain situations should be disclosed. The ICC Note confirms this by explaining that "arbitrators who make disclosures consider themselves to be impartial and independent, notwithstanding the disclosed facts, or else they would decline to serve."[72] Significantly, in the instant case, the arbitrators failed to disclose, and the parties therefore lacked the possibility of evaluating new relevant information and assessing whether a challenge was warranted, in fact they could only initiate a challenge late in the process, and after the arbitrators made the required disclosures.

5. "Each arbitrators or prospective arbitrator must assess what circumstances, if any, are such as to call into question his or her independence *in the eyes of the parties* or give rise to reasonable doubts as to his or her impartiality."[73]

52. Additionally, the IBA Guidelines are one among many instruments that inform the application of Article 11 of the ICC Arbitration Rules.[74] That said, it should also be noted that, in the arbitration clause of their underlying contract, the parties agreed that "the arbitrators will be guided but will not be bound, by the International Bar Association Rules on the Taking of Evidence

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71 ICC Note 2021 ¶ 26 (D.E. 57-114).

72 ICC Note 2021 ¶ 26 (D.E. 57-114).

73 ICC Note 2021 ¶ 27 (D.E. 57-114) (emphasis added).

74 *See, e.g.*, ICC Note 2021 ¶ 67 (D.E. 57-114) (noting that Parties and arbitral tribunals are encouraged, where appropriate, to adopt or otherwise be guided by the IBA Guidelines on Party Representation in International Arbitration").

in International Commercial Arbitration," but did not even mention the IBA Guidelines, thus giving them no particular value whatsoever.[75]

53. In any case, the IBA Guidelines do not contradict what I concluded in my report.

54. Relations amongst arbitrators do not fit squarely on the IBA Guidelines' Green List, which only relates to contact with another arbitrator or with counsel through memberships of a professional, social or charitable organization; having served previously (and not concomitantly) as arbitrators together, teaching in the same school or speaking or participating in the same conference.[76]

55. In relation to the lack of disclosure by Mr. Gunter and Dr. Gaitskell, while the IBA Guidelines do not require disclosure of the fact that an arbitrator concurrently serves or has served on the same arbitral tribunal with another member of the tribunal or with one of the counsel, the IBA Guidelines do require arbitrators to "assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is 'yes', the arbitrator should consider a disclosure."[77]

56. A similar same analysis applies to Mr. Wobeser's lack of disclosure that he served in an arbitration with Mr. Jana, counsel for ACP, during critical phases of the arbitration, as well as Dr. Gaitskell's failure to disclose that Mr. Manus McMullan, counsel for ACP, currently

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75 *See* Final Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶ 78 (D.E. 55-4) (quoting Sub-Clause 20.6 of the Conditions of Contract entitled "Arbitration," as modified by Variation Order No. 108 dated 1 August 2014).

76 IBA Guidelines, Part II ¶ 4.3 (D.E. 57-111).

77 IBA Guidelines, Part II ¶ 6 (D.E. 57-111); *see also* Born Opinion ¶¶ 98 *et seq.* (D.E. 57-92).

represents a party in an arbitration in which Dr. Gaitskell is an arbitrator,[78] and that he sat on a tribunal with a lead counsel for ACP, Mr. Loftis, immediately prior to being appointed as arbitrator in a case related to the arbitration underlying the instant case.[79]

57. Dr. Gaitskell's refusal to investigate potential conflicts at Keating Chambers, where he works, could also be seen in the light of the IBA Guidelines' Orange List, which requires disclosure where "[t]he arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers."[80]

58. Indeed, what the arbitrators failed to disclose were several, cumulative, instances of professional relationships, not only one.[81] These included relations with another arbitrator or counsel in the same case, or with an arbitrator in a related arbitration.[82] Further, the party-appointed arbitrator, Dr. Gaitskell, participated in the decision to appoint the president in this arbitration, Mr. Gunter, as president on another tribunal on which he sat.[83] Because of the cumulative, undisclosed conflicts here, the concern of an impression of bias is all the more reasonable.

59. As previously stated, the Draft Code for ISDS Adjudicators ("Draft Code") reinforces the view that arbitrators should err on the side of disclosure by noting that not every circumstance requiring disclosure is a conflict, and erring in favor of disclosure promotes

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78 *See* Consol. Mot. to Vacate 14–15 (D.E. 55); Bouchardie Decl. ¶¶ 66, 73 (D.E. 55-3); *see also* Born Opinion ¶¶ 105–22 (D.E. 57-92).

79 *See* Email from Robert Gaitskell QC to the Parties dated October 29, 2020 ¶ 5 (D.E. 55-45) (disclosing this relationship with Mr. Loftis for the first time).

80 IBA Guidelines ¶ 3.3.2 (D.E. 57-111).

81 *See* Consol. Mot. to Vacate 2 (D.E. 55).

82 *See id.* at 11–14.

83 *See supra* note 13 and accompanying text.

independence and impartiality of the arbitrator in the eyes of the parties, while a failure to disclose may foster suspicion.[84] Mr. Born suggests that the Draft Code is "irrelevant."[85] However, the drafting of the Draft Code, which takes place under the aegis of UNCITRAL and ICSID, is the first and biggest attempt to articulate common ethical standards in international arbitration at the State level. It brings together hundreds of diplomatic delegates representing all corners of the world, as well as observers from learnt societies, the private sector and NGOs. As such, this process reflects a building consensus, which confirms the disclosure standard under the ICC Rules applicable here. Indeed, the second draft of the Draft Code confirms disclosure obligations as a key part of ensuring the independence and impartiality of arbitrators. Article 10 of the Draft Code's second draft requires arbitrator to "disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to [the arbitrator's] independence and impartiality or demonstrate bias, conflict of interest, impropriety or an appearance of bias."[86] Such obligation is continuous and adjudicators should, in case of doubt, err in favor of disclosure.[87]

60. In comments published on September 3, 2021, the US delegation confirmed its support for the Draft Code as well as its overall approach on disclosure requirements and stated, in particular, that "[t]he United States welcomes the use of the subjective standard 'in the eyes of the parties,' consistent with the IBA Guidelines, as a way to encourage the broadest possible

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84 Giorgetti I ¶¶ 21–22 (D.E. 55-1) (citing *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, ICSID (2020) ("Draft Code for ISDS Adjudicators"), *available at* https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf).

85 Born Opinion ¶¶ 93–94 (D.E. 57-92).

86 UNCITRAL & ICSID, *Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Two*, art. 10(1) (Apr. 19, 2021), *available at* https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf.

87 *Id.* art. 10(4), (5).

disclosure of potential conflicts that might be relevant to the dispute."[88] Moreover, on proposed Article 3, requiring adjudicators to be independent and impartial, the US affirmed that "[c]onsistent with the U.S. comments on the first version of the draft Code, this provision should include the duty to avoid direct and indirect relationships that give rise to conflicts of interest and reasonable steps to avoid not only the appearance of bias, but also avoid the appearance of impropriety or a lack of independence or impartiality."[89]

61. Similarly, as I previously noted, other international arbitration rules—such as those of the London Court of International Arbitration ("LCIA"), International Center for Dispute Resolution ("ICDR"), UNCITRAL, and Stockholm Chamber of Commerce ("SCC")—also mandate complete, continuous and expansive disclosures by arbitrators.[90]

62. Far from being irrelevant, these rules demonstrate that a common contemporaneous consensus exists towards more disclosure in international arbitration.[91] They are also conceptually important to demonstrate that a variety of commonly used arbitration rules clearly provide for a continuous and expansive duty of disclosure. Arbitrators are required to make complete and accurate disclosures of potential conflicts, not only at the outset of their appointment, but

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88 Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Two – April 19, 2021, Comments by State/Commenter as of September 3, 2021, at 80, *available at* https://icsid.worldbank.org/sites/default/files/documents/Code%20of%20Conduct%20V2%20-%20Comments%20by%20State-Commenter.pdf.

89 *Id*. at 77.

90 Giorgetti I ¶¶ 23–25, 37 (D.E. 55-1).

91 **Exhibit 4:** Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 J. Int'l Disp. Settlement 553, 559 (2013) ("There is currently a plethora of arbitration laws, institutional rules and especially institutional codes of ethics that set out rules and guidelines regulating the conduct of individual arbitrators in minute detail.").

affirmatively and continuously throughout their service on a tribunal. As I stated before, "[t]he guiding principle is to provide more information rather than less, and to err in favor of disclosure."[92]

63. As previously described, moreover, the ICC recognizes certain circumstances in which an arbitrator who is a member of a British barristers' chamber may be disqualified for the failure to disclose. Specifically, as I previously noted, the ICC Court "upheld the challenge of an arbitrator who was a member of the same British Chamber as the counsel for the opposing party[,]" noting that "although barristers are formally self-employed and British Chambers do not have a collective legal identity, they are perceived, especially where the concept of Chambers is foreign, to be part of a 'club.'"[93]

64. Mr. Born claims that "Dr. Gaitskell had no obligation to investigate potential conflicts relating to the activities of other barristers in his chambers" because they are unlike law firms.[94] However, the case just cited proves that conflicts may exist within Chambers when viewed from the vantage point of the parties, because they are rightly perceived as a "club".

65. Moreover, the Bar Council of England and Wales, in its 2015 Information Note Regarding Barristers in International Arbitration, emphasized the "importan[ce] that users of the Bar have complete confidence in the barristers . . . who they appoint as arbitrators to assist in resolution of their disputes" and specifically took the same position as the ICC Court in the above-referenced case stating that

> good practice would dictate that in circumstances where a barrister comes to understand that he or she has been instructed in an arbitration where one or more of the members of the Tribunal are

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92 Giorgetti I ¶ 25 (D.E. 55-1).

93 Giorgetti I ¶ 17 (D.E. 55-1) (quoting **Exhibit 8:** Maria N. Cleis, *The Independence and Impartiality of ICSID Arbitrators* 139 (2017) (discussing ICC Case No. 16553/GZ)).

94 Born Opinion ¶ 108 (D.E. 57-92).

> barristers in the same set of chambers, prompt disclosure ought to be made by those instructing the barrister advocate to the legal representatives of the other side. This will ensure as far as possible that the guidance set out in the IBA Guidelines on Conflicts of Interest in International Arbitration is followed (see further below). A failure to make prompt disclosure, could ultimately, lead to a challenge to the independence of the member(s) of the Tribunal in question.[95]

IV. THE RELEVANT VACATUR STANDARD IS THE IMPRESSION OF BIAS AS ASSESSED BY A REASONABLE PERSON, AND NOT ACTUAL PROOF OF BIAS

66. As I explained in my previous opinion, under the FAA Section 10 "evident partiality" standard as applied, an arbitrator must fulfill the "'simple requirement [to] disclose to the parties any dealing that might create an impression of possible bias' where 'the keyword in this rule is 'impression.'"" [96]

67. In *Gianelli Money*, the Eleventh Circuit held that an award should be vacated where "(1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."[97] Similarly, in *University Commons*, the Court distilled three key elements as a standard under which that an arbitration award could be vacated: "(1) the arbitrator must be aware of the facts comprising a potential conflict; (2) the potential conflict must be one that a reasonable person would recognize; and (3) the arbitrator must fail to disclose the conflict."[98]

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95 Bar Council of England and Wales, Information Note Regarding Barristers in International Arbitration ¶¶ 2, 15(d) (July 6, 2015) (D.E. 55-16). I understand that Movants brought this document to the attention of the ICC Court. *See* Updated Challenge Application in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ¶ 33 (D.E. 55-58).

96 Giorgetti I ¶ 31 (D.E. 55-1) (quoting *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002).

97 *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs.*, 146 F.3d 1309, 1312 (11th Cir. 1998).

98 *University Commons-Urbana*, 304 F.3d at 1341 (11th Cir. 2002) (citing *Gianelli Money*, 146 F.3d at 1312) (stating that under *Gianelli* "one scenario under which an arbitration award

68. As detailed above, the burden is on the arbitrators to disclose. The standard is clear, and the content the arbitrators failed to disclose was not trivial and clearly should have been disclosed. By failing to disclose, the parties were not given the chance to evaluate the relevance and impact of the new information and thus decide on whether a challenge was necessary or not, until after the award was given.

69. Once the arbitrators finally did disclose, Movants challenged them. The fact that the arbitrators failed to disclose multiple different circumstances over the course of the critical years of the underlying arbitration adds to the reasonableness of a conclusion that there is an impression of bias that would satisfy the *Gianelli* analysis in the Eleventh Circuit. As the IBA Guidelines make clear, moreover,

> [d]isclosure or disqualification . . . should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal.[99]

70. As I stated previously, the ICC Court's rejection of Movants' challenges—despite finding that the arbitrators had twice failed to disclose relevant professional relations with counsel of one of the parties, which they should have disclosed[100]—is of limited usefulness. The ICC

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could be vacated would be if 'the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists' and further explaining the standard can be further distilled into three key elements).

99 IBA Guidelines, Explanation to General Standard 3(e) (D.E. 57-111).

100 Giorgetti I ¶ 32 (D.E. 55-1).

Court applied a different standard than is applicable here.[101] Moreover, the ICC Court gave no consideration to the applicable vacatur standard under U.S. law.[102]

71. Mr. Born claims that I contradicted myself by stating that the disqualification standard under the ICC Rules was identical to that applicable in the U.S. Court and at the same time saying that the ICC Court's decision in this case was of limited usefulness.[103] Let me clarify: as I explained in my previous opinion, while the ICC Arbitration Rules do not specify the standard for disqualification, scholars and commentators largely agree that the test is whether reasonable doubts exist as to the impartiality of the arbitrator, and that also is the standard the ICC Court generally applies, without requiring proof of actual bias.[104] Against this background, I stated expressly that the ICC Court in this case, however, applied a different standard, as it effectively required proof of an actual conflict in rejecting the arbitrator challenges on the merits for lack of proof of the communications between the arbitrators.[105] In so doing, the ICC Court failed to apply the "reasonable person" standard that it should have applied and that also is applicable in the U.S. Court.[106]

72. As I previously concluded, "[a] neutral observer would reasonably doubt the independence and impartiality of arbitrators who fail to disclose circumstances which, in the eyes

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101 *Id.* ¶¶ 32–35.

102 *Id.* ¶ 33.

103 Born Opinion ¶¶ 149–50 (D.E. 57-92).

104 Giorgetti I ¶ 28 (D.E. 55-1).

105 Giorgetti I ¶ 33 (D.E. 55-1).

106 *Id.*

of the parties, must be disclosed," and the arbitrators violated their duty here, creating an impression of bias as seen by a reasonable person.[107]

73. Mr. Born contends that my statement is incorrect because (1) I conflated the standards for disclosure and removal, (2) it is "speculative" for me to state that arbitrators sitting together on other tribunals could create concerning dynamics, (3) Mr. Gunter would not find his appointment "highly lucrative" because his law firm would receive his fee rather than he, and (4) frequently sitting together cannot create an impression of bias.[108]

74. First, my previous report did not conflate the standards for disclosure and removal. We are not here discussing the appropriate standards for removal, but the standard relevant to vacatur, in other words, whether a failure to disclose is severe enough for vacatur (not removal), especially given the importance of the independent judiciary's role in assuring the reliability of arbitral awards under the FAA.[109] In any event, each standard leads to another in a logical progression.

75. Second, it is indeed impossible for a party to be certain what dynamics arbitrators sitting together may create. Indeed,

> [w]hat is at stake once a conflict of interests exists is the risk of an improper decision. That this risk does not materialize is not the issue once doubts exist regarding the reliability of the decision. Appearances of conflict count as much as actual conflicts, echoing the mantra according to which 'justice must not only be done, it should be seen to be done.'[110]

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107 Giorgetti I ¶¶ 40–44 (D.E. 55-1).

108 Born Opinion ¶¶ 164, 177, 181, 212 (D.E. 57-92).

109 *See* Expert Report of Jack J. Coe ¶¶ 8, 14, 16, 39 (D.E. 55-2).

110 Hélène Ruiz Fabri, *Conflicts of Interests*, *supra* note 28, at 308.

76. At a minimum counsel – Mr. Loftis – sitting with Dr. Gaitskell would be aware of how he decides issues, what persuades him and how best to make an argument. The other party however, could not possibly know this inside information.

77. Third, whether Mr. Gunter's fees would go to his firm or to himself is entirely speculative.[111] It is safe to assume, however, that Mr. Gunter, as a partner of his firm, stands to benefit either way, directly or indirectly.

78. Fourth, as highlighted above based on empirical research, arbitrators are hardly the best judges of their own independence.[112]

79. What is concerning in this case is not actual bias, but the fact that the arbitrators' lack of disclosure made it impossible for a party to properly assess the independence and impartiality of the arbitrators called to adjudge their dispute. "Appearances of conflict count as much as actual conflicts"[113] and can lead the parties to lose trust and confidence in the arbitral proceedings they so consciously selected when negotiating their contractual relationship.

80. Additionally, a growing body of literature shows that arbitrators are, like many of us, subject to unconscious bias.[114] Research shows that arbitrators "are prone to intuitive decisionmaking and the influence of well-known cognitive illusions like anchoring, framing,

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111 *See* Born Opinion ¶ 181 (D.E. 57-92).

112 *See supra* note 63 and accompanying text.

113 Hélène Ruiz Fabri, *Conflicts of Interests*, *supra* note 28.

114 *See* **Exhibit 10:** Frederico Singarajah, *Unconscious Bias in International Arbitration*, Practical Arb. Blog (June 14, 2021) (explaining that "[b]roadly speaking, unconscious biases can be split into two types: information processing and emotional biases. Information processing biases are statistical, quantitative errors of judgment that may be mitigated if not resolved with new information. Emotional biases are more difficult to address as they are based on attitudes and feelings both conscious and subconscious").

representativeness, and egocentrism."[115] As unconscious bias is . . . unconscious, it is difficult to take any measure to counter it. In this context, expansive and continuous disclosure is an even more important tool that allows the parties to ensure the arbitrators are and continue to be impartial and independent.

81. Moreover, Mr. Born (as the ICC Court had also done) analyses each episode and each arbitrator individually. He thus ignores the *cumulative* effect of the numerous failures to disclose, which shows that the arbitrators knew each other, had the chance to talk to each other, may have revealed their approaches and views on issues that inform the others in order to persuade during deliberations, and could have developed some common take/vision and approaches to issues crucial to the arbitration. This would have led a reasonable person to believe that a conflict might exist.

82. Mr. Born also notes that the pool of prominent arbitrators is limited and thus it is not unusual for them to sit together, and that this does not create bias.[116]

83. Even if it were true that the pool of available arbitrator is so small, and I do not believe it is as there are many international arbitrators, disclosure would be even more (not less) crucial given the increased opportunity of bias to occur. Moreover, experienced arbitrators should be expected to use extra care. It is always for the parties to assess whom to appoint and whether they are acceptable to the parties after all disclosures occurred. Fundamentally, moreover, nothing in the record or otherwise suggests that the parties waived their right to independent and objective

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115 *See* Franck et al., *Inside the Arbitrator's Mind*, *supra* note 63, at 1121; *see also id*. at 1173; *see generally* Edna Sussman, *Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 Am. Rev. Int'l Arb. 487 (2013); **Exhibit 4:** Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 J. Int'l Dis. Settlement 553 (2013).

116 Born Opinion ¶ 212 (D.E. 57-92).

arbitrators in favor of experience. Independence and impartiality are an essential right of the parties and arbitrators must respect this right at all times.

84. In any case, Mr. Born supports his statement referring only to cases involving insurance and maritime arbitration, but not any authority about construction arbitration.[117] Indeed, construction arbitration is different, and many qualified arbitrators exist.[118] As such, the failure to disclose the kinds of relationships at issue here seriously interferes with the parties' ability to select arbitrators who are free from such conflicts. This would lead a reasonable person to believe such conflicts may exist, and that an effort is being made to obfuscate them.[119]

V. CONCLUSION

85. In sum, international arbitrators have a continuous, expansive and affirmative duty to disclose all potential conflicts to the parties. In the instant case, all three arbitrators failed to disclose relevant information arising from numerous connections among them as well as counsel and relating to potential conflicts.

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117 *Id*.

118 Searching the arbitrator rosters of various institutions reveals a large pool of international arbitrators with expertise in construction disputes exists, specifically: Arbitral Women: 104; College of Commercial Arbitrators: 87; Juris Arbitration Law: 72; International Institute for Conflict Prevention & Resolution (CPR): 16. The search results are appended as **Exhibits 11–14** to this Opinion.

119 This issue is indeed part of the current discussion among stakeholders of the "legitimacy" of international arbitration as system of dispute resolution. Asked if international arbitration had a problem of legitimacy from the point of view of new entrants in the developing world, the Bahrain Centre for Dispute Resolution – BCDR (by its CEO, Nassib Ziadé) replied:

> It bears noting that the same individuals tend to be appointed repeatedly, and they even regularly appoint each other. The community of arbitrators is thus often viewed as an exclusive club of notables, access to which is hindered for newcomers.

Exhibit 7: *Survey: Arbitral Institutions Can Do More to Foster Legitimacy. True or False?*, *in* 18 Legitimacy: Myths, Realities, Challenges, ICCA Congress Series 667, 668 (2015).

86. The failure of disclosure deprived a party to exercise its right to assess the arbitrators' independence and impartiality, upon which the entire international arbitration system relies, and hence decide whether to initiate a challenge of the arbitrators until after the award was issued.

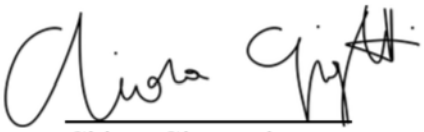
87. The lack of disclosure creates a possible impression of bias in the eyes of parties and undermines the arbitration process.

88. Moreover, the applicable standard for vacatur is the impression of bias, not proof of actual bias, which is met in the present case.

89. Nothing in Mr. Born's Opinion made me change my opinion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this September 13, 2021, in Washington, D.C., U.S.A.



Chiara Giorgetti

INDEX OF EXHIBITS
TO SECOND EXPERT REPORT OF PROFESSOR CHIARA GIORGETTI

NO.	DESCRIPTION	DATE
1.	Curriculum Vitae of Professor Chiara Giorgetti (updated)	
2.	Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Rev. Foreign Inv. L.J. 339 (2010)	2010
3.	Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, *in* FDI Perspectives: Issues in International Investment ch. 33 (2011)	2011
4.	Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 J. Int'l Disp. Settlement 553 (2013)	2013
5.	Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th ed. 2015)	2015
6.	W. Michael Reisman, W. Laurence Craig, William W. Park & Jan Paulsson, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (2d ed. 2015)	2015
7.	*Survey: Arbitral Institutions Can Do More to Foster Legitimacy. True or False?*, *in* 18 Legitimacy: Myths, Realities, Challenges, ICCA Congress Series 667 (2015)	2015
8.	Maria N. Cleis, *The Independence and Impartiality of ICSID Arbitrators* (2017)	2017
9.	Ralf Michaels, *International Arbitration as Private and Public Good*, *in* The Oxford Handbook of International Arbitration (Thomas Schultz & Federico Ortino eds., 2020)	2020
10.	Frederico Singarajah, Unconscious Bias in International Arbitration, Practical Arb. Blog (June 14, 2021)	June 14, 2021
11.	ArbitralWomen, Directory of ArbitralWomen, Search Result (Term: "Construction, Engineering")	

NO.	DESCRIPTION	DATE
12.	College of Commercial Arbitrators, Find an Arbitrator, Search Result (Term: "Construction")	
13.	Arbitration Law, Roster of International Arbitrators, Search Result (Term: "Construction Contracts")	
14.	CPR, Construction Arbitrator Search, Search Results	