CHAPTER 10

Repeat Arbitrator Appointments in International Investment Disputes

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1 Introduction

Party autonomy is fundamental to arbitration, which requires the voluntary agreement of both sides. The power to choose the terms and procedures of the arbitration is precisely what attracts and retains its users. Yet when transposed into international investment arbitration—where the issues often have broader public significance and transcend the interests of the parties—the concept of party autonomy has given rise to skepticism and even criticism.¹ Some question the legitimacy of party-appointed arbitrators deciding important issues bearing upon sovereign prerogatives and potentially creating a significant charge on the public fisc. Whether sound or unsound, these types of criticisms at the very least underscore the need for scrupulous impartiality and independence.

With the growth of investor-state arbitration, it has become more common for arbitrators to face disqualification proposals on a variety of grounds, including personal circumstances that may reflect a predisposition toward one party or its positions. This chapter explores a specific ground for challenge to a party-appointed arbitrator: repeat appointments by the same party or law firm. After reviewing the somewhat inconsistent approach to such disqualification proposals in recent International Centre for Settlement and Investment Disputes (“ICSID”) decisions, this chapter suggests that the issue of repeat appointments be analyzed under an objective standard that focuses upon the appearance of bias rather than actual bias. Although one might be prepared to accept that repeat appointments do not necessarily (or even often) result in actual bias, perceptions are especially important in investor-state arbitration; doubts about the effect of repeat appointments are pervasive, irrespective of the personal qualities and individual circumstances of the arbitrators.

in question. An objective standard would offer greater clarity in appointments, facilitate prompt resolution of disqualification proposals (or obviate them entirely), and promote the integrity of international investment dispute resolution as a whole.

1.1 The Issue with Repeat Arbitrator Appointments

Some consider that repeat appointments are “neutral” because in each successive case the arbitrator exercises “the same independent arbitral function.” Arbitrators indeed owe a duty to both parties, and are bound to maintain neutrality and independence while resolving the dispute in accordance with the applicable law and admissible evidence. Arbitrators faithfully discharging their duty should be unaffected by the fact that they were previously appointed by the same party or counsel in another case. Nor can it be presumed, many argue, that a repeat appointment derives from the appointing party’s perception that the arbitrator may be biased in its favor. Selecting an arbitrator is an important, complex, and difficult decision for both states and investors, and they rationally may aim to select arbitrators who not only possess requisite skills and experience, but also credibility and integrity. The identification of such attributes is easiest with respect to arbitrators who have a demonstrated track record, whether through scholarship or prior awards.

It is quite natural that a party and its counsel will wish to appoint the ‘best’ arbitrator available for a given case and that prior experiences with that potential arbitrator are of course adequate to give that assurance.

From this vantage, a repeat appointment may be understood as a positive reflection upon the arbitrator’s expertise or fairness: “Repeat appointments

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2 Tidewater Inc. v. Venezuela, ICSID Case No. ARB/10/5, Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator, ¶ 60 (Dec. 23, 2010). (“Tidewater”).
4 Id. at 200–01.
5 Id.