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Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings

YUVAL SHANY*

The notions of judicial independence and impartiality were originally developed in light of national and international judges serving on permanent courts.¹ Two recent cases illustrate once more the inherent *problématique* of applying these notions to party-appointed adjudicators—that is, to party-appointed arbitrators and *ad hoc* judges in international courts.² These cases involved challenges to party-appointed arbitrators.³ Since party-appointed adjudicators are often expected to be sympathetic to the positions of the party designating them, the very concept of party-appointed adjudicators may be anathematic to traditional notions of judicial impartiality.⁴ This problem is further compounded by the tendency of parties to select arbitrators with whom they had

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1. See SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005, 1079-1080* (Brill Academic Pub. 2006).

2. *Ad hoc* judges are most commonly associated with the ICJ. Statute of the International Court of Justice art. 31, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993. Yet, other international courts and tribunals also allow for the appointment of *ad hoc* judges where no member of the bench holds the nationality of the litigating state. See Statute of the International Tribunal for the Law of the Sea art. 17, 1833 U.N.T.S. 561, available at http://www.itlos.org/documents_publications/documents/statute_en.pdf; European Convention on Human Rights and Fundamental Freedoms art. 27, Nov. 24, 1950, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>; American Convention on Human Rights art. 55, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

3. See *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, Case ARB/03/17, ¶ 37 (ICSID Oct. 22, 2007) [hereinafter *Suez*]; *Republic of Poland v. Eureko*, [2007] R.G. 2007/AR/70 [Court of Appeal] (Belg.) [hereinafter *Eureko*].

4. See ROSENNE, *supra* note 1.

previous professional contacts. This is because familiarity with the designated arbitrator's legal philosophy and trust in her ability to influence the views of the other members of the panel—two important attributes of designated arbitrators in the eyes of the appointing parties—are often founded upon these past contacts.

This article will argue that the institution of party-appointed adjudicator should be understood as a consensual deviation from the ordinary norms governing the operation of international adjudicatory mechanisms. This deviation represents a trade-off between two competing sets of values and interests; the first being the parties' interests in the increased control over the course of litigation facilitated by their ability to nominate adjudicators. Increased party control entails the sacrifice of some degree of judicial independence and impartiality of the appointed adjudicators in exchange for improved confidence of the parties in the adjudicative process. As a result, the parties have a greater inclination to resort to adjudication. It would, therefore, be a mistake to apply the tests of judicial independence and impartiality developed for permanent national or international judges, or even non-party-appointed arbitrators (sometimes referred to as "neutral arbitrators")⁵ to party-appointed adjudicators. Moreover, such application might be counter-productive. Trying to "square the circle" and encompass party-appointed adjudicators within the compass of traditional notions of judicial independence and impartiality might dilute these legal standards and reduce the overall impact of ethical standards governing the work of the judiciary (and non-party-appointed arbitrators).

In Part I, I will briefly introduce the recent decision of the Brussels Court of Appeals in *Eureka* concerning the challenge to the continued service of Judge Schwebel on a UNCITRAL arbitral panel, as well as the recent ICSID tribunal decision in *Suez* concerning the challenge to the service of Prof. Kaufmann-Kohler on the arbitral panel. In Part II, I will offer some observations on the *raison d'être* of the institution of party-appointed adjudicator

5. *But see* Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 (2d Cir. 1984) ("the standards for disqualification of arbitrators have been held to be less stringent than those for federal judges"). For a discussion, see W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L & COMP. L.Q. 26, 50 (1989); Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J INT'L L. 53, 56-57 (2005) ("the mirage of absolute judicial impartiality becomes more distorted when it is superimposed onto the arbitrator").

(party-appointed arbitrators and *ad hoc* judges) and explain its inherent incompatibility with the ordinary rules and principles governing the independence and impartiality of the international judiciary. In doing so, I will use the Burgh House Principles—a code of judicial ethics developed by an International Law Association (ILA) Study Group—as a useful point of reference in this regard. Finally, I will offer, in Part III, some suggestions as to what could be expected from party-appointed adjudicators in terms of judicial ethics.

I. TWO RECENT DISQUALIFICATION CASES

A. Eureko

On October 29, 2007, the Brussels Court of Appeals rendered its decision in an appeal against a lower court's decision.⁶ The decision dismissed the Polish government's request to disqualify Judge Stephen Schwebel (the former President of the ICJ) from sitting on a UNCITRAL arbitral tribunal in a case brought against Poland by a Dutch company—Eureko BV.⁷ The dispute revolved around some unilateral measures taken by Poland, measures which changed the operating terms of a recently privatized local insurance corporation acquired by Eureko.⁸

On August 19, 2005, the UNCITRAL tribunal published its partial award on the matter, holding that Poland's acts were expropriatory in nature, violated its bilateral investment treaty (BIT) obligations to treat investments in a fair and equitable manner, and breached specific undertakings of the government *vis-à-vis* Eureko.⁹ Shortly thereafter, on October 27, 2005, Poland instituted proceedings before a Belgian Court of First Instance (Belgium being the seat of the arbitration, and thus the procedural forum authorized to supervise the conduct of the arbitration proceedings). These proceedings were aimed at disqualifying Judge Schwebel from participating in the second stage of the proceedings in which the quantum of remedies was to be assessed.¹⁰ Specifically, Poland alleged that in the summer of 2005,

6. *Eureko*, *supra* note 3.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

around the time in which the partial award was issued, it learned that Judge Schwebel had joined the international litigation department of Sidley, Austin, Brown and Wood (SABW). There he would serve as co-counsel representing the law firm in an investment claim brought by Cargill, Inc. (a U.S. Corporation) against Poland on the basis of the U.S.-Polish BIT (a treaty whose content is generally similar to the Dutch-Polish BIT discussed in *Eureko*).¹¹ Although vehemently denied by Judge Schwebel, Poland argued that these facts raised certain doubt over the precise nature of the relations between Judge Schwebel and SABW.¹²

In addition, Poland argued before the Court of Appeals that Judge Schwebel's service as a co-counsel in the case of *Vivendi v. Argentina* (together with SABW) put him in a "vertical conflict" in the *Eureko* proceedings.¹³ This was because the decision in *Eureko* might serve as useful authority that Judge Schwebel could then use in the course of the *Vivendi* proceedings.¹⁴

The Court of Appeals dismissed the Polish motion and affirmed the lower court's decision to reject the challenge to Judge Schwebel's membership in the UNCITRAL tribunal.¹⁵ Although the Court of Appeals accepted that Judge Schwebel may have had some professional associations with SABW, it held that he clearly maintained his independence from the firm and that there was no reason to believe he was influenced in the exercise of his arbitral functions by the firm's litigation interests.¹⁶ The fact that Judge Schwebel and SABW had worked in the past for the same clients did not create relations of dependence; nor should one attribute any significance to the proximity of the offices of Judge Schwebel and SABW.¹⁷ As for the allegations concerning the "vertical

11. *Id.* In its brief, Poland cited a press release by SABW announcing their collaboration with Judge Schwebel in high profile international cases and a website mentioning the involvement of Judge Schwebel in the *Cargill* case; it also produced witness testimony to the effect that Judge Schwebel shares the same office space with SABW. Finally, Poland alluded to Schwebel's conduct during the proceedings, and alleged that it was unfavorable to Poland's litigation interests.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* For a similar holding on the limited significance of shared office arrangements, see *Amco Asia Corp. v. Indon.*, ICSID Case ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator, at 8 (June 24, 1982) (unreported), reprinted in W. Michael

conflict” created by the participation of Judge Schwebel in the UNCITRAL tribunal and the litigation team in *Vivendi*, they were rejected by the Court of Appeals as devoid of merit.¹⁸ Moreover, the Court noted that these allegations, which were not raised at all during the proceedings before the Court of First Instance, were thus raised in an untimely fashion.¹⁹

B. Suez

On October 22, 2007, another disqualification decision was issued, this time by an ICSID tribunal.²⁰ The case—*Suez v. Argentina*—involved a dispute over the fate of a foreign investment project in Argentina (a water distribution and waste water treatment concession).²¹ On October 12, 2007, Argentina requested that the tribunal disqualify the claimant’s party-appointed arbitrator, Prof. Gabrielle Kaufmann-Kohler, because of her past service as an arbitrator in *CAA & Vivendi v. Argentina*. Decided on August 20, 2007, that case dealt with another water related investment in Argentina.²² According to Argentina, the CAA award was seriously flawed, especially with regard to the treatment of factual matters.²³ This gave rise to concerns over the impartiality of Prof. Kaufmann-Kohler, who supported the earlier decision.²⁴

The two remaining arbitrators adjudicating the disqualification motion held that Argentina’s motion was not

Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT’L & COMP. L.Q. 26, 44-45 (1989) [hereinafter *Amco Asia Corp.*].

18. *Eureko*, *supra* note 3.

19. *Id.* It is interesting to note that the Swedish Supreme Court decided on Nov. 19, 2007 to nullify an award rendered in favor of an Ericsson subsidiary by a panel chaired by Mr. Lind—the former Chief of the Swedish Supreme Court. After retiring, Mr. Lind provided some consultancy services to the biggest law firm in Sweden, whose largest client was Ericsson, and took office in that law firm’s building. According to the Court, this situation fell short of the requirements of independence under Swedish law. Although this is a domestic arbitration case—not an international arbitration case—it may be suggestive of higher standards applied with regard to the independence and impartiality of the “neutral arbitrator,” as opposed to party-appointed arbitrators. See *Judgment by the Swedish Supreme Court in Case No. T 2448-06, Rendered in November 2007: “The Lind Case”*, THE SCC INSTITUTE, available at http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/siar_2007_3_the_lind_case.pdf.

20. *Suez*, *supra* note 3, ¶ 37.

21. *Id.* ¶ 2.

22. *Id.* ¶ 12.

23. *Id.* ¶ 13.

24. *Id.*

presented with a sufficient degree of promptness and that, in all events, it was lacking in substance:

[D]oes the fact that an arbitrator or a judge has made a decision that a party in one case interprets as against its interests mean that such judge or arbitrator cannot be impartial to that party in another case? Further, does the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case mean that such judge cannot decide the law and the facts impartially in another case? We believe that the answer to all [both] questions is no. A finding of an arbitrator's or a judge's lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.²⁵

In other words, the tribunal was not persuaded that the participation of an arbitrator in a past arbitral decision unfavorable to the litigation interests of one of the parties to the subsequent case created an objective appearance of bias against that party.²⁶

II. THE UNIQUE ROLE OF PARTY-APPOINTED ARBITRATORS

The two aforementioned decisions are hardly exceptional and resemble other decisions issued in the course of disqualification proceedings.²⁷ Still, they do underline some of the unique problems

25. *Id.* ¶ 36.

26. The tribunal also noted that the cases are different in their factual and legal bases—in particular *Suez*, unlike *CAA*, involved necessity-type arguments relating to the Argentinean financial crisis. *Id.* ¶ 37.

27. The most prominent ICSID case to date, where a similar issue had arisen is *Amco Asia v. Indonesia*, where a challenge was made to the service of a party-appointed arbitrator, on the grounds that in the past he consulted with the appointing party and worked in a law firm that used to share office space with the claimant's law firm. According to the two remaining (and unchallenged) arbitrators, although the same standards of independence and impartiality apply to all arbitrators, an arbitrator ought not to be disqualified "for the only reason that some relationship existed between that person and a party, whatever the character—even professional—or the extent of said relations." *Amco Asia Corp.*, *supra* note 17. For an example of an unsuccessful attempt to challenge an arbitral award on the ground that a party-appointed arbitrator was embroiled in a "vertical conflict" (direct involvement of the arbitrator in a company that filed a related claim against the same respondent party), see *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G.*, 480 F. Supp. 352 (S.D.N.Y. 1979). *But see* *Telekom Malay Berhad v. Ghana, Rechtbank's-Gravenhage* [District Court], The Hague, Oct. 18, 2004 (Neth.),

related to the institution of the party-appointed adjudicator. Specifically, these cases highlight the inherent tension between the principle of judicial independence and impartiality, and notions of personal trust and professional predisposition underlying the selection of party-appointed adjudicators. Although often hard to prove, it is possible that a specific party-appointed arbitrator (or *ad hoc* judge) was selected precisely because she argued in other past or pending cases in favor of specific legal theories. It is also possible that an arbitrator in one case was appointed in a subsequent case by reason of the factual and legal conclusions she reached in the first-in-time decision that may be conducive to the litigation interests of the designating party. Furthermore, the parties' personal acquaintances and past associations with the designated arbitrators can be instrumental in creating the necessary degree of trust in her capabilities. That trust may generate, in turn, the comfort level that the parties need in order to submit their disputes to international arbitration.²⁸ Moreover, in cases involving close-knit professional communities, it is almost impossible to completely avoid appointing prior acquaintances or associates unless the parties are willing to appoint arbitrators with no relevant experience or prior knowledge of the topics at hand.²⁹

reprinted in 2 TRANSNAT'L DISP. MGMT (a "vertical conflict" between an arbitrator's duty to impartially decide the case before it and his role as counsel in another pending case involving similar issues should lead to disqualification).

28. See Andreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 62 (1995) ("If, as elaborated below, one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel, some basis for that confidence needs to be established. Sometimes that confidence can be based on mutual acquaintances, without direct personal contact; some potential arbitrators become well-known through published writings, lectures, committee work, or public office. Others are not so well-known, and I understand that lawyers or clients or both want to have a firsthand look. I think, however, some restraint should be shown by both sides.").

29. For a similar argument, see *Morelite Constr. Corp.*, 748 F.2d at 84 ("[T]he small size and population of an industry might require a relaxation of judicial scrutiny [of arbitrator impartiality]."); *Transmarine Seaways Corp. of Monrovia*, 480 F. Supp. at 358 ("The maritime community in New York is relatively small, and closely knit. There are not many experienced maritime arbitrators. Commercial relationships in the industry interweave and overlap; the leaders of the industry come in constant contact with each other; on occasion disputes, arbitration, and litigation result. It would be disruptive of the resolution of maritime disputes by arbitration in this City to disqualify an arbitrator simply because a party to an arbitration proclaims, in circumstances such as these, 'the appearance of bias.'").

A. *The Raison d'Être of the Institution of Party-Appointed Adjudicator*

In order to further analyze the two aforementioned decisions, one ought to spend more time considering the unique role of party-appointed adjudicators. If, as I believe is the case, their functions are significantly different than those of permanent judges or non-party-appointed adjudicators, then the application of international rules and principles of judicial independence and impartiality to them may differ as well. In other words, a need may arise to adapt to the principle of judicial independence and impartiality so as to meet the particular needs associated with the institution of the party-appointed adjudicator.

The limited scope of this article does not permit a comprehensive historical survey of the evolution of the party-appointed adjudicator within international dispute settlements. Hence, it is limited to a few rudimentary observations on the development of international arbitration.

Before the nineteenth century, inter-state arbitration tended to be political in nature.³⁰ This meant that disputes were submitted to resolution before a neutral ruler or another senior functionary, who typically settled the dispute through issuing an unreasoned award.³¹ Throughout the nineteenth century, international arbitration became more and more legalized,³² yet this transformation was gradual in nature.³³ Initially, arbitrations were typically conducted through a two-stage process.³⁴ In the first stage, party-appointed arbitrators or commissioners would aim to find a mutually acceptable solution to the dispute on the basis of legal and extra-legal considerations.³⁵ If they failed to reach agreement, an umpire would be summoned for the second stage of the proceedings and asked to decide the case.³⁶

30. See J.L. SIMPSON & HAZEL FOX, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 3 (1959); J.G. MERRILS, *INTERNATIONAL DISPUTE SETTLEMENT* 89 (3d ed. 1998).

31. MERRILS, *supra* note 30, at 89.

32. WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 100, 520 (Michael Byers trans., Walter de Gruyter GmbH & Co. 2000) (1984).

33. *Id.*

34. MERRILS, *supra* note 30, at 88-89.

35. *Id.*

36. *Id.*

Later on, partly for reasons of procedural expediency and partly for reasons of judicial propriety,³⁷ single panels comprised of a mixture of party and non-party-appointed arbitrators were created.³⁸ Party-appointed arbitrators originated as part agents, part adjudicators.³⁹ They essentially served as the “long arm” of the parties to which broad dispute resolution powers were delegated, and under this new configuration, the role of party-appointed arbitrators underwent a transformation to relatively independent dispute-settlers.⁴⁰ The institution of the *ad hoc* judge grew out of this early twentieth century configuration of international arbitration,⁴¹ and the *ad hoc* judge serves as a constant reminder of the influence of international arbitration on the evolution of adjudication.

What is the modern role of party-appointed adjudicators then? In a way, they preserve some delegated functions on behalf of the appointing party. They no longer serve as “seconds” or “partisans once removed from the controversy”⁴² authorized to formulate a settlement on behalf of the parties. Nor do they serve as party representatives who act for and on behalf of their appointing parties.⁴³ Nonetheless, they still serve the parties’ interests in two important ways. First, they monitor the proper and

37. See, e.g., Theodore Marburg, *The Washington Meeting of the American Society for the Judicial Settlement of International Disputes*, 5 AM. POL. SCI. REV. 181, 188 (1911) (commissioners, unlike agents, are bound by no ethical codes in their dealings with the umpire).

38. MERRILLS, *supra* note 30, at 88-89.

39. *Id.*

40. *Id.* Marburg, *supra* note 37, at 182.

41. MERRILLS, *supra* note 30, at 88-89.

42. *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962).

43. See Application of the Genocide Convention (*Bosnia v. Yugoslavia*), 1993 I.C.J. 325, 409 (Sept. 13) (Separate Opinion of Judge Lauterpacht) (“[The right of parties to appoint *ad hoc* judges] has led many to assume that an *ad hoc* judge must be regarded as a representative of the State that appoints him and, therefore, as necessarily precommitted to the position that that State may adopt. That assumption is, in my opinion, contrary to principle and cannot be accepted.”). Judge Schwebel points out, however, that non-national judges may also be influenced by the positions of litigant states who belong to the same region or political grouping as her state of nationality. Stephen M. Schwebel, *National Judges and Judges Ad Hoc of the International Court of Justice*, 48 INT’L & COMP. L.Q. 889, 893-94 (1999). The research on this point is inconclusive. See Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 123, 129-33 (Lori F. Damrosch ed., 1987); Adam M. Smith, “Judicial Nationalism” in *International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT’L L.J. 197, 220-21 (2005) (both researchers finding no clear link between voting records and national groupings).

fair conduct of the adjudicative process.⁴⁴ Second, they ensure that the appointing parties' positions and interests are properly understood and considered by the tribunal.⁴⁵ On a more abstract level, they also help to maintain the confidence of the parties in the adjudicative process and preserve some, albeit modest, degree of control over the process.⁴⁶

This, however, is not the complete picture. In reality, parties afforded the power to appoint an adjudicator do hope to impact the final outcome of the adjudicatory process through appointing a person sympathetic to them or their case.⁴⁷ To think otherwise would be absurd. If nothing else, classic "prisoner dilemma" dynamics, the fear that the other party would appoint a favorable adjudicator, would lead to such an outcome.⁴⁸

Even when viewed from this perspective, judicial independence and impartiality may still have a certain strategic value. A party-appointed adjudicator may be more effective in terms of impacting the outcome of the adjudicatory process if she is perceived as independent and impartial.⁴⁹ This explains the increasing tendency of parties to designate distinguished jurists who do not share their nationality as party-appointed adjudicators.⁵⁰ This trend undermines, however, the traditional role

44. Lowenfeld, *supra* note 28, at 65.

45. *Id.* See also Procès-verbaux of the Proceedings of the Advisory Committee of Jurists 528-29 (July 14, 1920); Application of the Genocide Convention, 1993 I.C.J. at 409 (Separate Opinion of Judge Lauterpacht).

46. See Report of the Informal Allied Committee cited in ROSENNE, *supra* note 1, at 1081; Schwebel, *supra* note 43. For an argument positing that control is more conducive to compliance with adjudicatory decisions than independence, see Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2005).

47. *Cf.* In the Matter of the Arbitration between Astoria Medical Group and Health Ins. Plan of Greater New York, 182 N.E.2d 85, 87-88 (N.Y. 1962) ("The right to appoint one's own arbitrator . . . would be of little moment were it to comprehend solely the choice of a neutral. It becomes a valued right, which parties will bargain for and litigate over, only if it involves a choice of one believed to be sympathetic to his position or favorably disposed to him"); Johnson v. Jahncke Service, Inc., 147 So. 2d 247, 248 (La. Ct. App. 1962) ("It would be strange indeed if an interested party, with the right to select an arbitrator, would select one antagonistic to it"); Rogers, *supra* note 5, at 74.

48. For a comparable dilemma—i.e., how is one party-appointed arbitrator to behave when the other party-appointed arbitrator behaves in a partisan fashion—see Richard M. Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-U.S. Claims Tribunal*, 1 TRANSNAT'L LAW 253, 262 (1988).

49. Lowenfeld, *supra* note 28, at 60 (over-zealous party-appointed arbitrators lose credibility with the other members of the tribunal).

50. Note that, until 1936, the PCIJ Rules required states to nominate nationals for service as *ad hoc* judges (although this rule had not always been observed in the practice prior to the elimination of this requirement). Schwebel, *supra* note 43, at 896. Only in the

of party-appointed arbitrators as the best-situated member of the tribunal to elucidate the appointing party's arguments and their factual and legal contexts.⁵¹ But this surely provides a weak basis for promoting judicial independence and impartiality: the parties will respect those principles only if they appear to serve their particular litigation interests in a specific case. Even when the parties acknowledge the utility of perceived independence and impartiality, they are unlikely to select adjudicators whose dispositions towards the parties and issues are completely unpredictable.⁵² Indeed, current statistical analysis of ICJ judgments shows that in some ninety percent of the cases *ad hoc* judges vote with the party that appointed them (at the same time, the other judges on the bench vote with their country of nationality "only" some seventy to eighty-five percent of the time).⁵³ These figures confirm our intuition that party-appointed adjudicators are pre-disposed to vote in favor of their appointing party.

So the fundamental dilemma remains unresolved—certainly, judicial propriety and even utilitarian considerations would support subjecting party-appointed adjudicators to the same high ethical standards to which permanent judges and non-party-

1978 ICJ Rules was the practice of appointing non-national as *ad hoc* judges explicitly acknowledged. Rules of Court (1978) art. 35(1), 2007 I.C.J. Acts & Docs. 91, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>.

51. Lowenfeld, *supra* note 28, at 65 (party-appointed arbitrators serve as "translators" and explain the legal culture of the appointing party to the other arbitrators).

52. See Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624-25 (2005).

53. For two recent statistical analyses, see *id.* at 615; Smith, *supra* note 43, at 218. For an earlier study, see Il Ro Suh, *Voting Behavior of National Judges in International Courts*, 63 AM. J. INT'L L. 224 (1969). The link between nationality and voting record is hardly surprising. Already in 1927, the drafters of the revised PCIJ Rules were acutely aware of the likelihood that national judges would lean towards their state of nationality. Permanent Court of Int'l Justice, *Fourth Annual Report of the Permanent Court of International Justice, 1927-1928 P.C.I.J. ANN. REP. (ser. E) No. 4*, at 75 (1928) ("Of all influences to which men are subject, none is more powerful, more pervasive, or more subtle, than the tie of allegiance that binds them to the land of their homes and kindred and to the great sources of the honours and preferments for which they are so ready to spend their fortunes and to risk their lives. This fact, known to all the world, the [Court's] Statute frankly recognizes and deals with."). See also HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 215 (1933); but see Schwebel, *supra* note 43, at 893, 895-96 (noting that national and *ad hoc* judges in the PCIJ and ICJ have sometimes voted against the interests of their state of nationality or appointing state).

appointed arbitrators are subject;⁵⁴ however, such standards are likely to be systematically bypassed by sophisticated parties and adjudicators.⁵⁵ Moreover, such efforts might prove to be counter-productive. Attempts to bring party-appointed adjudicators within the purview of the traditional tests of judicial independence and impartiality could result in diluting these standards altogether.⁵⁶

As the *Eureko* and *Suez* cases may illustrate, such concerns are not unfounded.⁵⁷ In both cases, the court held that arbitrators, whose substantive positions on key aspects of the pending disputes could have been reasonably surmised from their past and concurrent involvement in comparable proceedings, should not be disqualified.⁵⁸ While one can agree with the conclusions of the Court of Appeals and the ICSID tribunal in regard to party-appointed adjudicators, it would have been less appropriate to designate as non-party-appointed adjudicators individuals whose position on specific issues can be accurately predicted from their past professional records. Unless the institution of the party-appointed adjudicator is abolished or radically changed⁵⁹—a feat that presently seems unrealistic and probably undesirable (at least from a perspective which respects party autonomy)⁶⁰—ethical

54. See, e.g., *Amco Asia Corp.*, *supra* note 17, at 6 (“[A]n absolute impartiality of the sole arbitrator or, as the case may be, of all the members of an arbitral tribunal, is required, and it is right to say that no distinction can and should be made, as to the standard of impartiality, between members of an arbitral tribunal, whatever the method of their appointment.”); *Tupman*, *supra* note 5, at 45.

55. See, e.g., *Mosk*, *supra* note 48, at 260-61.

56. See, e.g., *id.* at 263 (advocating flexibility in the application of ethical standards in arbitration, without distinguishing between party-appointed and non-party-appointed arbitrators).

57. See generally *Suez*, *supra* note 3; *Eureko*, *supra* note 3.

58. *Suez*, *supra* note 3, ¶ 36; see Damon Vis-Dunbar and Luke Eric Peterson, Arbitration Watch, Investment Treaty News, November 15, 2007, available at <http://www.investmenttreatynews.com>.

59. For a call to abolish the institution of party-appointed arbitrators, see Seth H. Lieberman, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is "Nonneutral Neutrals"*, 5 CARDOZO J. CONFLICT RESOL. 215, 241-45 (2004).

60. For a comparable analysis, see *Davis v. Forshee*, 34 Ala. 107, 109 (1859) (“Arbitration, in this State, is never compulsory. Parties voluntarily elect this mode of adjustment, and appoint their own arbitrators. We know no reason why persons related to suitors within the fourth degree, may not, if chosen, act as arbitrators, and make a binding award. *Volenti non fit injuria.*”).

standards specially tailored for party-appointed adjudicators might need to be developed.⁶¹

B. Application of the Burgh House Principles to Party-Appointed Adjudicators

The Burgh House Principles—a recent ILA-supported initiative to lay down some non-binding ethical principles that could govern the conduct of international judges—have explicitly refrained from tackling head-on the problems presented by the institution of the party-appointed adjudicator. The initiative stated that the principles elaborated there would apply to *ad hoc* judges and arbitrators only “as appropriate.”⁶² Indeed, even a cursory look at the Burgh House Principles reveals their apparent incompatibility with a number of the features characterizing the status of a party-appointed adjudicator.

- Security of tenure⁶³—This entire notion, which is one of the hallmarks of judicial independence, is inapplicable to *ad hoc* judges and party-appointed arbitrators. As a result, party-appointed adjudicators are far more dependent on their appointing parties for future appointments than permanent judges.⁶⁴
- Extra-judicial activity⁶⁵—The limited temporal duration of service of *ad hoc* judges or arbitrators renders it probable that such individuals would also be actively engaged, as practitioners or academics, in work related to the topics they may address as adjudicators. Hence, the potential for their finding themselves in what Argentina referred to in *Eureka* as “vertical conflicts” is considerable. The uneasiness

61. This was implicitly accepted by the ICSID tribunal in *Amco Asia Corp.*, where it was held that although the same standards of independence and impartiality apply, in principle, to all arbitrators, the possibility of party-appointments presumes some acquaintance between the arbitrator and appointing party. *Amco Asia Corp.*, *supra* note 17, at 7.

62. INT’L LAW ASS’N [ILA], BURGH HOUSE PRINCIPLES ON INDEPENDENCE OF THE INTERNATIONAL JUDICIARY (2005), pmb., available at www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf.

63. *Id.* at princ. 3.

64. This predicament also affects the independence of non-party-appointed arbitrators, but to a lesser degree: whereas all arbitrators are measured by the quality of their work, party-appointed arbitrators are also expected to satisfy, to some degree or other, the specific interests of the appointing party, if they seek to be re-appointed.

65. BURGH HOUSE PRINCIPLES, *supra* note 62, at princ. 8.

about the dual role of party-appointed adjudicators has led the ICJ to introduce a Practice Direction that encourages the parties not to select judges *ad hoc* from among counsels who have appeared before the court in the previous three years, and not to appoint judges (including judges *ad hoc*) as counsels before the expiration of three years.⁶⁶ While this may help alleviate perceived impropriety in the ICJ, it does not fully resolve the larger problems of the “vertical conflicts” of party-appointed adjudicators. The Practice Directions place no limits on representation of the parties before any judicial forum other than the ICJ.⁶⁷

- Past links to a party⁶⁸—Since the nomination and/or appointment of adjudicators (including permanent judges) is often based on previous acquaintances, it may be futile to insist on the complete absence of past links between the parties and their designated adjudicators. Even the Burgh House Principles suggest a mere cooling-off period of three years in which the judges do not work for the parties.⁶⁹ But given the unique degree of trust placed in party-appointed adjudicators and the greater flexibility of arbitral proceedings, it may be questionable as to whether this three-year period provides a realistic standard in many cases.
- Post-service limitations⁷⁰—Here too, the limited duration of service of *ad hoc* adjudicators renders these types of limitations largely unrealistic or irrelevant for most party-appointed adjudicators.

Here, it already appears that many of the basic rules and principles that sustain judicial independence and impartiality are either unrealistic or irrelevant for party-appointed adjudicators. In the next and final part of the article, I propose to develop a

66. Practice Direction VII, 2007 I.C.J. Acts & Docs 165, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>.

67. See *id.*

68. See *id.*

69. *Id.*

70. *Id.* at princ. 13.

different set of standards to govern the conduct of such adjudicators.

III. DIFFERENT STANDARDS?

The short aforementioned survey suggests that the ordinary rules and principles governing judicial independence and impartiality might be inadequate to govern the conduct of party-appointed adjudicators. Applying the same norms to party-appointed adjudicators may create a system of legal ethics divorced from reality, and have the potential to dilute the more robust rules and principles that could, and should, govern the conduct of non-party-appointed adjudicators.

A compromise formula should be sought. While judicial independence is an indispensable element of the judicial function, its application to party-appointed adjudicators necessitates some degree of flexibility. The personal trust underlying many appointments of party-appointed adjudicators presumes some form of past relations or acquaintances. Hence, I would support the "manifest lack of independence" standard proposed by the *Amco Asia* ICSID tribunal as the appropriate standard to govern the disqualification of party-appointed adjudicators.⁷¹ Under this standard, neither past relations, nor peripheral or indirect ongoing relations between the party and the adjudicator appointed should, as a rule, lead to disqualification.⁷² This is particularly so because the appointment to serve on an arbitration tribunal or court constitutes a strong form of relationship that eclipses older or less significant forms of relations (and creates in itself some degree of dependency relating to possible future appointments, which eclipses weaker forms of dependency). At the same time, strong and direct ongoing relations between the adjudicator and the appointing party (including the existence of *ex parte* communications between the two), should, as a rule, lead to disqualification unless the opposing party waives its objections to the continued service of the party-appointed adjudicator.⁷³

71. *Amco Asia Corp.*, *supra* note 17, at 8.

72. *Id.*

73. For an example of a successful motion for disqualification on the basis of the appointed arbitrator active service as a lobbyist on issues relating to the relations between the states involved in the dispute, see *S.D. Myers Inc. v. Canada*, 40 I.L.M. 1408, at paras. 25-29 (Nov. 13, 2000).

The application of the principle of judicial impartiality to party-appointed adjudicators may prove to be an even more delicate matter. Since party-appointed adjudicators are often nominated because of their presumed dispositions⁷⁴ (which render them, at least, somewhat partial), the application of stringent standards of judicial impartiality to party-appointed adjudicators may be a hopeless task. The actual dynamics of the appointment process are such that they are likely to give rise to chronic partiality concerns. Unfortunately, the ability of external bodies to monitor such “internal” dispositions—unlike external manifestations of dependence—is limited.⁷⁵ In addition, the costs—both in terms of material costs and interference with party autonomy and level of comfort in the process—might be prohibitively high.⁷⁶ So, arguably, the development of looser standards of impartiality for party-appointed adjudicators (e.g., lack of serious bias and good faith) would be more appropriate here too.

Significantly, the idea that different rules of ethics should apply to party-appointed and non-party-appointed adjudicators has considerable support in domestic U.S. law and practice.⁷⁷ Courts and commentators in the United States have been willing to acknowledge that party-appointed arbitrators may be “sympathetic” to the case of the party that appointed them—a euphemism for a permissible degree of “partiality.”⁷⁸ Indeed, the 1977 ABA/AAA Code of Ethics explicitly stated that party-appointed arbitrators “may be predisposed toward the party who appointed them, but in all other respects are obligated to act in good faith and with integrity and fairness”⁷⁹ and are expected to

74. See Posner & de Figueiredo, *supra* note 52, at 624-25.

75. Tupman, *supra* note 5 at 49.

76. *Id.* at 49-50.

77. See generally David J. Branson, *American Party-Appointed Arbitrators—Not the Three Monkeys*, 30 DAYTON L. REV. 1 (2004).

78. *Id.* at 51.

79. AM. BAR ASS'N, AMERICAN ARBITRATION ASSOCIATION CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Cannon VII(A) (1977). Note that the same rule also relaxed the party-appointed arbitrators' disclosure obligations, limited the ability to disqualify them and tolerated most past relationships between the arbitrator and her appointing party. Some U.S. State arbitration codes also distinguish between party-appointed and non-party-appointed arbitrators. See, e.g., N.Y.C.P.L.R. § 7511(b)(1)(ii) (2008). For a discussion of the differences between State law and Federal law on this issue, see Tupman, *supra* note 5, 29-30.

pass “independent judgment.”⁸⁰ Yet, it should be noted that the provisions on “non-neutral” arbitrators have been strongly criticized by influential members of the bar as “embarrassing,”⁸¹ and such provisions have been omitted from the more recent 2004 version of the Code.⁸² The distinction between party-appointed and non-party-appointed arbitrators is also missing from the AAA and CPR International Arbitration Rules,⁸³ and from the UNCITRAL and ICC Rules of Arbitration.⁸⁴

Ultimately, the policy decision that needs to be made is which standard to choose. High, utopian, ethical standards will set laudable ethical goals but may have little impact on the actual conduct of adjudicatory proceedings and may inevitably result in either diluted interpretations of the standards or ineffective implementation of those standards.⁸⁵ A more nuanced approach, however, will acknowledge the functional distinctions between different types of adjudicators and set varying ethical standards for differently situated individuals.⁸⁶ Since party-appointed adjudicators have a unique role in adjudication processes, a certain relaxation of the requirements of judicial independence and judicial impartiality with respect to such adjudicators is justified. Such a move would not undercut judicial propriety; to the contrary, it would prevent the liberal standards applied in decisions such as *Eureko* and *Suez*, from being used in cases

80. 1977 AAA CODE OF ETHICS, *supra* note 79, at Cannon VII(E) (leaving unhindered the general rule of independence in Cannon V(B)).

81. Branson, *supra* note 77, at 44; James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for “Nonneutrals”*, 11 AM. REV. INT’L ARB. 295, 304-05 (2000).

82. AM. ARB. ASS’N, COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION (2004).

83. AM. ARB. ASS’N, INT’L CENTRE FOR DISPUTE RESOLUTION [ICDR], INTERNATIONAL DISPUTE RESOLUTION PROCEDURES R-2, art. 7 (2007), available at <http://www.adr.org/sp.asp?id=33994>; INT’L INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES, Rule 7.1 (2007). See also David J. Branson, *Commentary: Ethics for International Arbitrators*, 3 ARB. INT’L 72 (1987). For a discussion of the distinction between the perceived role of party-appointed arbitrators in domestic U.S. arbitrations and international arbitrations, see Mosk, *supra* note 48, at 256-63.

84. United Nations Commission on International Trade Law, Arbitration Rules, G.A. Res. 31/98 (1978), at arts. 9-10, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

85. For an analogous juxtaposition between “perfectionism” and “practicality” offered by the former PCIJ judge, Prof. Manley Hudson, see *Session d’Aix-en-Provence*, 45 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 459, 465 (1954).

86. *Id.*

dealing with the independence and impartiality of non-party-appointed adjudicators. Since party-appointed adjudicators ultimately neutralize one another,⁸⁷ defending the integrity and legitimacy of the adjudicatory process by focusing on non-party-appointed members and applying the strictest ethical standards to those members, is arguably more crucial than striving in vain to raise the ethical standards governing the service of party-appointed adjudicators.

IV. CONCLUSION

To expect party-appointed adjudicators to comply with the same standards of non-party-appointed adjudicators, namely those of judicial independence and impartiality, is both unrealistic and counter-productive. Disputing parties may elect to create a special procedure which responds to higher ethical standards. In this situation, the parties may accept some limitations on their autonomy and freedom of selection of adjudicators.⁸⁸ But, in the absence of such conscious choice, it would be far more sensible to strive for more flexible standards (some degree of independence and impartiality) than to overreach and set the threshold too high. Such flexibility would not violate judicial ethics; it would simply acknowledge the different functions of different adjudicative processes while also respecting the choice of the parties to engage in such processes.

Given the voluntary nature of international dispute settlements, ethical standards that are flexible enough to accommodate the parties' interests in maintaining some control over the adjudicatory process is preferable to an ethical straitjacket that might alienate the parties from the process and limit, in effect, their choice of dispute settlement procedures. Thus, as noted by Catherine Rogers, the debate is not really about judicial ethics; it is about the different adjudicative functions between party-appointed and non-party-appointed adjudicators.⁸⁹

87. ROSENNE, *supra* note 1, at 1081.

88. For an analogous rule, see 1977 AAA CODE OF ETHICS, *supra* note 79, at Canon VII ("the two party-appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral").

89. See Rogers, *supra* note 5, at 113-17.