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1 The Respondent challenges the appointment of Mr. One on the ground that his non-disclosure of his involvement in the Bias Corp/Induria case ("**BCI Case**") is "*likely to give rise to justifiable doubts*" about his impartiality or independence.

2 Having considered the parties' arguments, I dismiss the challenge: Mr. One's involvement was not a circumstance he was obliged to disclose. Further, nothing in his response upon being confronted with the non-disclosure casts doubt on his impartiality or independence.

## I. Mr. One was not obliged to disclose his involvement in the BCI Case

3 The evaluation required under Articles 11 and 12 of the UNCITRAL Rules is an objective one undertaken from the perspective of the reasonable third person.[1] In assessing whether Mr. One was obliged to disclose his involvement in the BCI Case, the focus should be on the extent to which the issues in both proceedings overlap (as the parties rightly identified). The allegations against Mr. One raise the spectre of a conflict of interest arising from him "double-hatting" as counsel and arbitrator. The concern behind "double hatting" is that the arbitrator will be perceived as being inclined to decide in a manner favourable to the client in the proceedings where he acts as counsel: The arbitrator might be subconsciously affected. Or he might consciously strive to create a persuasive precedent, or actively try to avoid undermining his credibility by taking inconsistent positions.[2] But this concern does not arise where the factual and legal issues are not analogous because the arbitrator's prior position will be distinguishable and thus be of limited relevance to the reasonable third person.

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1 David D Caron & Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, 2013, 2nd Ed) at p 208.

2 See e.g., ICCA, *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, The ICCA Reports No.3* (17 March 2016) at pp 46–47.

4 I find that there is no significant overlap between the issues raised in the BCI Case and these proceedings.

5 First, even if the Respondent is correct that issues of fair and equitable treatment ("**FET**") and expropriation arise in both proceedings, this alone would not be probative of overlap because such claims are the mainstay of investor-state proceedings. According to an analysis of investor state arbitration cases filed between 1987 and 2017 published by UNCTAD, the FET provision was the most-cited violation followed by indirect expropriation, featuring in 80% and 75% of cases respectively.[3]

6 Secondly, in the eyes of the reasonable third person, the factual and legal similarities identified by the Respondent are more apparent than real. The generality of the Respondent's description of the facts glosses over the nuances that make all the difference to the outcome. In line with the approach in *KS Invest v Spain*,[4] regard must be had to differences in the parties, industries, and legal measures involved. Specificity is called for because the legal analysis is highly context dependent.

7 To elaborate, in relation to FET violations, the "*social, cultural, and economic environment of the host State*" should be considered in assessing what expectations were engendered and the reasonableness of those expectations: *South American Silver v Bolivia*.[5] A similar approach applies to expropriation insofar as the investor's legitimate expectations are a factor to distinguish indirect expropriation from acceptable regulation.[6] Further, in considering the legality of expropriation, the tribunal

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3 UNCTAD IIA Issues Note, *Special Update on Investor-State Dispute Settlement* at pp 5–6.

4 *KS Invest v Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on the Proposal to Disqualify Prof Kaj Hobér (15 May 2020) ("***KS Invest v Spain***") at [83]–[85].

5 *South American Silver Limited v Bolivia*, PCA Case No 2013-5 (Award) (22 Nov. 2018) at [648].

6 *Técnicas Medioambientales Tecmed v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) at [150].

will need to consider whether the alleged taking was for a public purpose. The different reasons cited by the governments of Induria and Indigo for not prolonging the respective permits (the investor's prior breach of regulations, as opposed to environmental concerns) will need to be analysed on their own account. It is worth recalling that "*[e]ven in cases where issues could be similar, the arguments and the manner in which they are presented by different parties could differ depending on the particularities of each case*".[7]

8 Given that there is no significant overlap of issues with the present case, any involvement of Mr. One in the BCI Case would not require disclosure as that would not be a circumstance that "*might reasonably be perceived*" as affecting his independence or impartiality (see Part 2 Rule 3 of the CIArb Code of Professional and Ethical Conduct). It follows that no adverse finding should be made based on Mr. One's non-disclosure; it would be incongruous to find that non-disclosure of a circumstance that is not disclosable can itself be evidence of bias. A similar conclusion was reached in *Canepa v Spain*, where the challenge was dismissed because (among other reasons) the applicable rules did not require disclosure of the undisclosed matters.[8]

## II. Nothing in Mr. One's response to the challenge casts doubt on his impartiality and independence

9 In assessing whether an arbitrator's non-disclosure gives rise to justifiable doubts, it will be also relevant for the decision-making authority to consider the reason(s) for non-disclosure and the arbitrator's response when challenged (see e.g.,

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7 *KS Invest v Spain*, supra note 4, at [90].

8 *Canepa v Kingdom of Spai*n, ICSID Case No. ARB/19/4, Decision on the Proposal for the Disqualification of Arbitrator Peter Rees (19 Nov. 2019) at [75].

the approach taken in *Canepa v Spain* and *Halliburton v Chubb*[9]). Nothing in Mr. One's response to the challenge casts doubt on his impartiality and independence.

10 First, Mr. One candidly admitted when challenged to having forgotten about his involvement. The Respondent has not put forth any evidence to support its assertion of deliberate concealment on Mr. One's part. To the contrary, the material relied upon by the Respondent is consistent with Mr. One's position that he was involved to a very limited degree, which left little impression on him. The Jus Mundi Profile, GAR publication, and Bias Corp press release all establish the *fact* of Mr. One's involvement as a team member at some point. Mr. One has not taken any steps to distance himself from these reports.[10] But the fact of his involvement is not determinative; the reality of legal practice—which the reasonable third person would be aware of—is that practitioners often juggle numerous matters to varying degrees of exposure. What would be more important is the *extent* and *timing* of involvement. As to this, the evidence does not go so far as to support the Claimant's contention that Mr. One is one of the partners "leading" the BCI Case or even continues to be involved.

11 Secondly, and related to the above, the Sweaterland Times article cited by the Respondent does not suggest pre-judgment on Mr. One's part (in the sense that he is approaching the present proceedings with a closed mind). This article contains a quote to the effect that "*Case laws must further evolve so as to ensure that investors' legitimate expectations are rigorously protected under all circumstances*". On one view this might be read as expressing Mr. One's stance that international law should

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9 *Canepa v Spain*, *supra* note 8 at [75]; *Halliburton v Chubb* [2021] AC 1083 at [73] and [149].

10 Compare, e.g. how the arbitrator in *Fábrica de Vidrios Los Andes v Venezuela* procured a clarification that his assistant's description of her employment on her LinkedIn profile was inaccurate to dispel doubts about impartiality: ICSID Case No. ARB/12/21, Decision on the Proposal to disqualify L Yves Fortier, QC, Arbitrator (5 May 2017) at [65].

generally develop in a pro-investor direction. However, the reasonable third person would disagree. The statement was made by Mr. Two on behalf of the Firm—he refers to "partners" in the plural—in the context of explaining the Firm's stance on a specific matter. It does not purport to reflect Mr. One's personal views. In any event, the statement is a mere assertion lacking in elaboration or justification. It is a far cry from the reasoned written opinions (such as those expressed in academic commentaries or publications) that formed the subject of arbitrator challenges in other cases.[11]

12 Thirdly, the uncertainty as to the precise scope of Mr. One's involvement is not fatal. Mr. One has declined to disclose the specific matters he was consulted about, citing confidentiality. It is true that an arbitrator's inability to clarify can sometimes lead to a successful challenge. For instance, in *Sphere Drake Insurance v American Reliable Insurance Company* ("***Sphere Drake***"), a challenge was allowed because of the arbitrator's prior involvement in advising parties adverse to the applicants in related commercial litigation. Because "*what [the arbitrator] knows and what he thinks is unknown*" due to legal privilege, suspicion arose in the mind of the reasonable observer as to whether these unknowns had a bearing on the issues to be decided.[12] But Mr. One's saving grace—and the key distinction from *Sphere Drake*—is that in this case there is no significant factual or legal overlap. Whatever he might have been consulted about, that would not bear on the issues at hand.

13 Accordingly, I dismiss the Respondent's challenge.

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11 See e.g. *Urbaser v Argentine Republic*, ICSID Case No ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 Aug. 2010) at [44]–[46] (deciding authority will consider "*whether the opinions expressed … are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceeding*").

12 *Sphere Drake Insurance v American Reliable Insurance Company* [2004] EWHC 796 (Comm.).