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Pursuant Case Material Instructions, I set out below my reasoning as to the challenge raised by the Republic of Indigo (hereinafter, the 'Respondent') to Mr. One FCI Arb (hereinafter, 'Mr. One'), arbitrator appointed by International Waste Treatment Corporation Ltd. (hereinafter, the 'Claimant') pursuant the 2013 UNCITRAL Arbitration Rules.

## **I. Introduction**

1. The Respondent based its challenge to Mr. One on two separate grounds<sup>1</sup>: (A) the purported involvement of Mr. One and One, Two and Partners, as counsels of Bias Corp., in an investment arbitration against the Republic of Induria (hereinafter, the 'Bias Corp Dispute'). According to the Respondent, 'the issues in the Bias Corp/Induria case clearly overlap with the issues to be resolved in these proceedings.'<sup>2</sup>; and (B) Mr. One failed to disclose these circumstances<sup>3</sup>.
2. The legal standard applicable to the challenge is set forth in Article 12 (1) of the UNCITRAL Rules, according to which an arbitrator may be challenged if "justifiable doubts" exists as to his impartiality or independence. This sets an objective standard whereby the party who raises the challenge 'has to furnish adequate and solid grounds for its doubts'<sup>4</sup> and such grounds must be analyzed from the perspective of a reasonable and informed third party<sup>5</sup>.
3. For reasons set out below, I conclude that none of the grounds raised by the Respondent constitute a sufficient basis to uphold the challenge against Mr. One.

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<sup>1</sup> Case Material, Section I.A, ¶ 5.

<sup>2</sup> Case Material, Section I.B, ¶ 13.

<sup>3</sup> Case Material, Section I.A, ¶ 6.

<sup>4</sup> David Caron and Lee Kaplan (eds), *The UNCITRAL Arbitration Rules. A Commentary* (2nd edn, OUP, 2013), p. 773.

<sup>5</sup> *AWG Group Limited (Claimant) and The Argentine Republic (2008)*, Decision on a second proposal for the disqualification of a member of the arbitral tribunal, UNCITRAL, ¶ 22.

**II. Mr. One's involvement in the Bias Corp Dispute and the issues discussed therein.**

4. The basis of the alleged conflict of interest under this heading is the purported overlapping legal issues<sup>6</sup> and the 'very similar'<sup>7</sup> facts discussed in the Bias Corp Dispute and in these proceedings.
5. The following facts are undisputed: (A) Mr. One is a partner in One, Two and Partners; and (B) One, Two and Partners acts for Bias Corp in an investment dispute against the Republic of Induria. Neither Bias Corp nor the Republic of Induria are parties to these proceedings.
6. In turn, parties do not agree as to whether: (A) Mr. One acts for Bias Corp in the Bias Corp Dispute; and (B) the Bias Corp and these proceedings share a common factual and legal matrix. I now turn to these points.
7. First. While the arbitrator is in principle considered to bear the identity of his law firm, particular circumstances need to be considered to determine whether a potential conflict of interest exists<sup>8</sup>.
8. Mr. One has declared that he is not the leading counsel handling the Bias Corp Dispute and that he is not a member of the team on the case<sup>9</sup>. Nonetheless, Mr. One has also explained that he was consulted a 'couple of times' on certain matters related to the Bias Corp Dispute (which he has refused to disclose) and the Respondent has furnished sufficient evidence of the involvement of Mr. One. There are no reasons to consider that information provided by the Respondent, which is contained in these public sources (some of which are well-known in the

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<sup>6</sup> Case Material, Section I.B, ¶ 8.

<sup>7</sup> Case Material, Section I.E, ¶ 22.

<sup>8</sup> IBA Guidelines on Conflicts of Interest in International Arbitration of 2014 (2014), Explanation to General Standard 6.

<sup>9</sup> Case Material, Section I.C, ¶ 15.

arbitration practice) is inaccurate even more so when neither the Claimant nor Mr. One has offered evidence on the contrary. Hence, I consider information provided by the Respondent sufficient to prove that Mr. One is –at least– *indirectly* involved in the Bias Corp Dispute.

9. Second. For similar legal and factual issues to create a conflict of interest, they must prove to be relevant<sup>10</sup> to both disputes. Thus, if a challenge based on such similarities is to be upheld, the Respondent needs to prove that both cases are ‘closely connected’<sup>11</sup>.
10. Regarding the legal issues to be resolved in both cases, it is true, as argued by the Respondent, that both proceedings presumably involve a discussion on the rights of the supplier and the obligations of the client under government tender procedures, the refusal to prolong a governmental permit and the qualification of the government’s conduct as expropriation. But all these three points are no more than general issues that do not pertain necessarily to the specific legal determinations of each case.
11. At reaching such account, I have taken into consideration the particularities of the International Investment Dispute Resolution System where discussion of similar legal issues is a common treat<sup>12</sup>. In fact, as properly held by the ICSID Secretary General (deciding a challenge on a similar basis) ‘The question whether a termination of a license constitutes an expropriation is a recurring issue in investment law. It mainly depends on the facts of each case and is

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<sup>10</sup> Blue Bank International & Trust (Barbados) Ltd. and the Bolivarian Republic of Venezuela (2013), Decision on the Parties’ Proposal to Disqualify a Majority of the Tribunal, ICSID Case ARB/12/20, ¶ 68.

<sup>11</sup> Deutsche Lufthansa AG (Germany) and the Bolivarian Republic of Venezuela (2022) Decision on the Challenge to Dr. Wolfgang Peter, PCA Case No. 2022-03, ¶ 38.

<sup>12</sup> ICCA Reports No. 3: Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration (ICCA and Kluwe Law International, 2016), p. 7.

decided in a collegiate manner by each tribunal.<sup>13</sup> To uphold a challenge based on such general similarities would make unattainable the proper resolution of investment disputes.

12. On the contrary, I find that the differences between both proceedings lead to qualify the legal issues discussed therein as fundamentally different. While the applicable law in the Bias Corp Dispute would be the Sweaterland-Induria BIT<sup>14</sup> and (potentially) the domestic law of the Republic of Induria (where the investment was made)<sup>15</sup>, the law to be applied in these proceedings appears to be the Munditia-Indigo BIT<sup>16</sup> and the domestic law of the Republic of Indigo<sup>17</sup>.
13. Regarding the facts discussed in both cases, I could only find one very general similarity between both cases: the refusal of a government to renew a licence obtained resulting of a tender procedure<sup>18</sup>. Conversely, as argued by the Claimant<sup>19</sup>, licences in both cases refer to different type of projects and hence one could infer that the type of licence discussed in each case is different and is subjected to different legal rules; and reasons as to refuse the renewal of licenses are also different. Certainly, this is far from a scenario where 'very similar' issues are discussed.
14. Lacking evidence on the contrary, Mr. One 'has the assumption in his favour that he is a legal professional with the ability to keep a professional distance.'<sup>20</sup> As set out above, I do not find any circumstances that could defeat such

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<sup>13</sup> PIP Sàrl c. République Gabonaise (2009), Decision on the Proposal to Disqualify an Arbitrator, ICSID Case ARB/08/17, ¶ 33.

<sup>14</sup> Case Material, Section I.B, ¶ 9.3.

<sup>15</sup> Case Material, Section I.B, ¶ 9.

<sup>16</sup> Case Material, Section I.A, ¶ 3.

<sup>17</sup> Case Material, Section I.A, ¶ 1.

<sup>18</sup> Case Material, Section I.A, ¶ 2; Section I.B, ¶ 9.2.

<sup>19</sup> Case Material, Section I.D, ¶ 21.

<sup>20</sup> Saint-Gobain Performance Plastics Europe vs. the Bolivarian Republic of Venezuela (2013), Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, ICSID Case No. ARB/12/13, ¶ 81.

presumption. In view of the above, I do not find that a third party would find an appearance of lack of impartiality on a reasonable evaluation of the facts brought by the Respondent.

**III. Mr. One purported failure to disclose his involvement in the Bias Corp Dispute.**

15. Additionally, the Respondent argues that Mr. One failed to disclose the circumstances described above. The legal standard applicable to the duty of disclosure is set forth in Article 11 of the UNCITRAL Rules, according to which an arbitrator 'shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.' Parties have also relied on the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (hereinafter, the 'Ciarb Code'). Pursuant Rule 3 of the Ciarb Code, an arbitrator 'shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so.'
16. While wording used in both rules are different, I read them both as reflecting an objective standard for complying with the duty of disclosure. Hence, disclosure shall only be expected of information that could reasonably give rise to justifiable doubts as to the impartiality of Mr. One.
17. For the reasons explained in Section II *supra*, I do not find any of the circumstances brought by the Respond to meet the object standard previously referred. Hence, I do not consider it necessary to address further the second ground of the challenge.
18. Therefore, Respondent's proposal to disqualify Mr. One is dismissed.