

## DISCUSSION DRAFT 10 MARCH 2015

### REPORT OF ICCA-ASIL JOINT TASK FORCE

#### I. INTRODUCTION – THE ORIGINS OF THE TASK FORCE

1. This is the report of the ICCA-ASIL Joint Task Force on Issue Conflicts in Investor State Arbitration. It has been prepared by the co-chairs of the Task Force, with advice and assistance from the members of the Task Force and the invaluable support of the Task Force Reporters.
2. Arbitral institutions face a growing number of challenges to disqualify arbitrators on the ground of “issue conflict,”<sup>1</sup> an allegation that an arbitrator is biased or improperly predisposed to decide significant issues. The alleged predisposition involves an arbitrator’s purported adherence to his or her pre-existing views on legal and factual questions, developed through experience as arbitrator, as counsel, writing scholarly articles, or giving interviews or other public expressions of views.
3. The issue is not hypothetical. Several challenges alleging “issue conflict” have recently succeeded. In one, the President of the ICSID Administrative Council, World Bank President, Dr. Jim Yong Kim, upheld a challenge to an arbitrator appointed by a claimant in a case against Venezuela based on the arbitrator’s partnership in a law firm representing a different claimant in a case against Venezuela.<sup>2</sup> Dr. Jim Yong Kim upheld the challenge on a number of grounds, including the ground that the similarity of the issues likely to be discussed in one of the Venezuela cases could enable the arbitrator to be in a position to decide issues that were likely to be relevant in the case in which a branch of his firm was involved.
4. In the second challenge decision, the two unchallenged arbitrators on an ICSID panel upheld a challenge of the panel’s third member based on his earlier service as arbitrator in another case involving the same respondent and similar facts involving, inter alia, the same witness.<sup>3</sup>

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<sup>1</sup> Jan Paulsson has warned against lawyers’ tendency to use “shortcuts” instead of thinking things through. See Jan Paulsson, “Metaphors, Maxims, and Other Mischief – The Freshfields Arbitration Lecture,” 30(4) ARB. INT’L 615 (2014). As examined below, the terminology of “issue conflict” is not ideal.

<sup>2</sup> *Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Challenge to José Maria Alonso dated November 12, 2013.

<sup>3</sup> *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch dated March 20, 2014.

5. In a third challenge procedure administered by the Permanent Court of Arbitration, the President of the International Court of Justice upheld a challenge of an arbitrator on the basis of his “strongly held and articulated positions” regarding a significant legal issue thought to be presented in the current dispute.<sup>4</sup>
6. The issue is drawing increasing discussion and debate at gatherings of arbitration professionals; indeed, it was the subject of an animated mock debate at a January 2015 conference convened by the Institute for Transnational Arbitration in Houston.
7. Issue conflict may be seen to take on heightened importance at a time of increased criticism of the international investment arbitration framework.<sup>5</sup> A variety of circumstances have fueled this criticism: a lack of broad familiarity with the system prior to its dramatic 21st century growth; a series of high-profile awards against States, some following from financial crises; the interweaving of investor protections with human rights and environmental concerns; the withdrawal of some Latin American States from the ICSID Convention; and the success of certain States in attracting investment without the use of investment treaties. Today, the political dynamics of this evolving discussion are evident in the ongoing deliberations concerning the role of investment arbitration within the Transatlantic Trade and Investment Partnership. Amidst perceptions that investor-State dispute settlement is not transparent enough to assure that public interests are adequately safeguarded, the notion of issue conflict may provide further kindling for critics of the practice.
8. All relevant arbitration rules incorporate challenge rules based on the principle that no one should be a judge in her own cause (*nemo iudex in causa sua*) and the powerful notion that “justice must not only be done, but must be seen to be done.”<sup>6</sup> In the current round of challenges, the arbitrator’s viewpoint becomes the “cause” in the principle *nemo iudex in causa sua*. Because an arbitrator has expressed a view or has determined in a legal or factual issue in a particular manner, the concern is that the issue has now been predetermined, and the arbitrator can no longer impartially judge that issue.

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<sup>4</sup> *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telkom Devas Mauritius Limited v. Republic of India*, UNCITRAL, Decision on the Respondent’s Challenge to the Hon. Mark Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, dated September 30, 2013, para 53 (citing Respondent’s Request, pp. 1-2).

<sup>5</sup> See, e.g., *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (Balchin, Chung, Kaushal, Waibel, eds. 2010); see also Gus Van Harten, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (OUP 2007).

<sup>6</sup> *R v. Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256. Mark Baker and Lucy Greenwood, *Are Challenges Overused in International Arbitration?* 30 J. INT’L ARB Issue 2 (2013).

9. Mounting discussion and concern regarding “issue conflict”, led the then-President of the American Society of International Law, Donald Francis Donovan, and Jan Paulsson, President of the International Council on Commercial Arbitration, to initiate a joint task force composed of members of the two organizations to consider the issue.

## **II. THE TASK FORCE**

10. The Task Force’s mission was set out in ASIL President’s Donald Donovan’s November 2013 letter announcing its creation.

The mission of the Task Force is to evaluate and report on issue conflicts in investor-state arbitration and to make recommendations on best practices going forward. The issues we hope the Task Force will address include the impartiality of an arbitrator who has decided in a previous case an issue arising in a later arbitration; the impartiality of an arbitrator who as a scholar has previously published views on an issue arising in a case before him or her; and the impartiality of an arbitrator who is a member of or associated with a law firm representing clients facing the same or similar issues as those on which the arbitrator will rule.

There has been a rise in challenges to arbitrators based on allegations of issue conflict, but the topic remains under-examined. The topic is an especially compelling one not simply for its practical import, but because its examination will require the Task Force to consider the fundamentals of the investor-state arbitration system itself.

11. The Task Force is composed of diverse group of leading experts, assisted by three outstanding reporters. All of the members of the Task Force and the rapporteurs are actively engaged in the practice or study of international dispute settlement.

Stanimir Alexandrov  
Brooks Daly  
Joan Donoghue  
Marcelo Ferro  
Dominique Hascher  
Andrés Jana  
Jean Kalicki  
Gabrielle Kaufmann-Kohler  
Meg Kinnear  
Marc Lalonde  
Sundaresh Menon  
Hi-Taek Shin  
Christian Leathley (reporter)  
Ina Popova (reporter)  
Ruth Teitelbaum (reporter)

12. With the support of the staff of ASIL's Howard Holtzmann Center and of ICCA, the Task Force has carried out a substantial program of work since it was constituted in November 2013.
  - The Reporters undertook a thorough collection and review of existing cases and literature.
  - In November 2013, a detailed questionnaire was circulated to Task Force Members, eliciting thoughtful anonymous responses from all Members. The questionnaire and a summary of the responses received are attached.
  - The Task Force held an initial meeting and discussion of the issues at the ASIL's Headquarters at Tillar House in Washington DC in February 2014.
  - The Task Force co-chairs led briefings on the work of the Task Force and informative discussions of key issues at the ICCA Congress in Miami and at the Joint ASIL-ILA Meeting in Washington DC in April 2014.
  - The Task Force co-chairs, with important assistance from the three reporters, prepared a draft of this report to be circulated for comments and suggestions by Task Force Members.

### **III. DEFINING THE ISSUE**

#### **A. Scope**

13. The Task Force has sought to analyze the contours and significance of "issue conflict" in investment arbitration. While some in the arbitration community—and indeed, within this Task Force—are not persuaded, some Task Force members believed that this is perhaps the most significant matter affecting the credibility of investor-state arbitration.
14. Some Task Force members noted that similar issues also arise in commercial arbitration, and suggested that the Task Force's work should not be limited to investment arbitration. However, in keeping with the Task Force's assigned task, this report is focused on investment arbitration.
15. Today, investment arbitration is the subject of heightened scrutiny and controversy. By definition, it involves States in disputes that often implicate important government policies and conduct and place large sums

at issue. A relatively small number of arbitrators act in many cases.<sup>7</sup> They apply law that is often open-textured and subject to evolution. Given the relative similarity of the core legal protections among the thousands of bilateral and multilateral investment treaties currently in force, it is inevitable that the disposition of investment treaty claims will likely turn on a handful of recurring – and often unsettled – legal issues that can determine outcomes: umbrella clauses, effects of MFN clauses, definition of investment, elements of fair and equitable treatment, questions of necessity and essential security interests, and the like. These or other comparable factors may also be found in some forms of non-investment arbitration – for example, sports arbitration or high-value commercial arbitration between States and private parties. Nevertheless, both for practical reasons of time and resources, and in keeping with the Task Force’s mandate, this report is limited to investor-State arbitration.

## **B. The Challenges of Definition**

16. The term “issue conflict” has come to be widely used in international arbitration literature and, increasingly, in arbitrator challenges, but the term has no settled definition. In a recent decision upholding a challenge to an arbitrator on this basis, Judge Peter Tomka, President of the International Court of Justice, set out his understanding of the matter:

[T]he basis for ... a challenge invoking an “issue conflict” is a narrow one as it does not involve a typical situation of bias directly for or against one of the parties. The conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own view. In this respect... some challenge decisions and commentators have concluded that knowledge of the law or views expressed about the law are not per se sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.<sup>8</sup>

17. While not a definition, President Tomka’s description offers a useful starting point for unpacking the terminology of “issue conflict.” For

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<sup>7</sup> See, e.g., Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT’L L. 387, 403-406, 412 (2014).

<sup>8</sup> *CC/Devas, supra*, para 58.

several reasons, the co-authors of this report believe this terminology, while often used, is not that helpful:

- As examined in greater detail below, several distinct situations have been subsumed under the single label of “issue conflict,” contributing to confusion and imperfect analysis.
  - The term obscures what President Tomka rightly identifies as the central underlying issue: arbitrators’ impartiality.<sup>9</sup> While the notion of issue conflict is not equivalent to impartiality, it rests on concerns about impartiality. Does an arbitrator approach a significant disputed issue with the ability to decide it based on the parties’ arguments in the case, and not on the basis of some inappropriate predisposition? This aspect of issue conflict is crucial for confidence in the integrity of investment arbitration and, ultimately, for its legitimacy.
  - The term’s similarity with the familiar notion of “conflicts of interest” adds to the confusion. The analogy to conflicts of interest suggests the possibility of “bright line” rules, akin to those laid out in the IBA Guidelines on Conflicts of Interest in International Arbitration regarding disclosure and disqualification of some types of objective circumstances. In contrast, questions arising under the rubric of “issue conflict” go to the arbitrator’s state of mind, something that is often dependent on context and is not readily susceptible to measurement with mechanical rules.
18. The contributors to this report have sought, without complete success, to identify an alternative phrase that better encapsulates the varying situations where arbitrators’ impartiality might properly be subject to question on account of some predisposition regarding significant issues in a case. Early on, the phrase “doctrinal predisposition” was examined as a possible alternative, but this turned out to be unsatisfactory for reasons that illustrate the problem. Arbitrators do not approach each case with a mental *tabula rasa*; each arbitrator is the product of a body of education and experience that inevitably predisposes her to certain doctrines.

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<sup>9</sup> A recent decision by the Chairman of ICSID’s Administrative Council succinctly sums up the difference between impartiality and independence. “Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both “protect parties against arbitrators being influenced by factors other than those related to the merits of the case.” *Abaclat and Others v. Argentina Republic*, ICSID Case No. Arb/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, Feb. 4, 2014, p. 18, ¶ 75. See also *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Proposal for the Disqualification of G. Kaufmann-Kohler, Oct. 22, 2007, ¶ 29.

19. This is as it should be. “Arbitrators are expected to have open minds, not empty minds.”<sup>10</sup> Many principles are widely, indeed universally, shared throughout the legal world, and are fundamental to the operation of arbitration and, indeed, any legal system: *pacta sunt servanda*; parties should be treated with equality; arbitral tribunals’ jurisdiction derives from the consent of the parties. Such fundamental legal and procedural principles are not reasons for concern.
20. The key difficulty, then, is whether one can articulate a useful distinction between forms of predisposition that are unobjectionable, and those that may offer grounds for concern. Is it possible to define where “intellectual predilection, which typically would be non-censurable, crosses the line into a censurable inability to decide a case solely on the basis of its facts and law?”<sup>11</sup> In this report, the authors sometimes refer to “inappropriate predisposition” instead of “issue conflict”. Doing so, of course, side steps the central issue: just which predispositions may be “inappropriate”? This report does not attempt to prescribe the answers. However, as set out below, the decided challenge cases suggest some types of arbitrator behavior thought to fall on both sides of the line.

### C. The Underlying Tension: Party Autonomy and Impartiality

21. Whatever the terminology, this issue reflects a tension between two important characteristics of international arbitration: parties’ autonomy, and the expectation that decisions are to be made by impartial decision-makers. Here, as elsewhere, “there is a tension between, on the one hand, the parties’ right to disclosure of situations that may reasonably call into question an arbitrator’s impartiality or independence and their right to a fair hearing and, on the other hand, the parties’ right to select arbitrators of their choosing.”<sup>12</sup>
22. Party autonomy is a fundamental characteristic of international arbitration. “The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties.”<sup>13</sup> Either by direct agreement, or by operation of agreed rules or institutions, the parties determine the decision makers, the applicable law, the procedural rules, and other aspects of their proceeding. The ability to do so is seen as an

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<sup>10</sup> Sophie Nappert, *Bias in International Commercial Arbitration Versus Investment Arbitration: Are There Different Standards? Should There Be?*, in FORDHAM PAPERS 2009, p 146, 152 (Arthur Rovine ed., 2009)

<sup>11</sup> Nassib Ziade, *How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?*, 24 ICSID Rev.- FILJ 49, 50 (2009).

<sup>12</sup> International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2004) 3.

<sup>13</sup> Geneva Protocol on Arbitration Clauses signed at a Meeting of the Assembly of the League of Nations held on 24 September 1923, Art. 2, quoted in REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (5<sup>th</sup> ed.), p. 365, §6.08.

important characteristic of arbitration, particularly in disputes stemming from international transactions.

23. Thus, it is a “unique principle of international arbitration that a party is entitled to appoint, as one of the three decision-makers, a person of its own choosing, who brings to the task the biases and instincts inherent in his or her particular worldly experience.”<sup>14</sup> Parties enter into arbitration wishing to prevail. It is thus a fact of professional life - indeed, of professional ethics - that they will appoint arbitrators who are believed to be receptive to their point of view.
24. Parties’ autonomy is not unlimited.<sup>15</sup> The ability to challenge an arbitrator appointed by an opposing party serves as a check on autonomy, but this is a limited check. “In general, the parties’ autonomy to select the arbitrators will be overridden only in exceptional cases.”<sup>16</sup>
25. The central role of party autonomy in the selection of decision-makers reflects fundamental differences between arbitration and litigation in national courts. Litigants in national courts do not select their judges. Unlike arbitrators, national judges’ decisions are typically subject to oversight by higher national courts. And while legislatures can clarify or revise the law if they conclude that judicial decisions are wanting, no similar system of checks and balances exists to counterbalance or otherwise guide international arbitral awards.
26. Of special relevance here, national judges typically apply more settled bodies of law, involving a narrow universe of unsettled legal questions subject to legitimate legal disputes. This contrasts with contemporary international investment law, which is often marked by diverse views on jurisdictional issues that may dispose of an entire case, and merits issues that may determine outcomes. Over time, the accumulated case law may eventually converge to establish common standards, but that day remains in the uncertain future. Until it arrives, parties will necessarily continue to be concerned about arbitrators’ possible predispositions in unsettled areas important to their cases.
27. Given the unsettled nature of important elements of the law being applied and other differences, “...each arbitrator’s personal opinion is of greater weight in a system like ICSID arbitration than in most other systems of judicial adjudication world-wide. In other judicial systems, decisions are based on precedent that all members of the judicial body have to respect

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<sup>14</sup> Charles N. Brower, *Keynote Address: The Ethics of Arbitration: Notes from a Practicing International Arbitrator*, 5 BERKELEY J. INT’L PUBLICIST 1 (2010).

<sup>15</sup> Redfern and Hunter, *supra*, pp. 366-369, §§6.10 et seq.

<sup>16</sup> Gary B. Born, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 122 (Wolters Kluwer, 2012).



- or, at least, observe within a usually small margin for possible overruling, under the control of the appellate body. In such a system, the opinion of an individual judge counts for little to the extent that previous precedents have to be followed.”<sup>17</sup>
28. Impartiality is a second key element of the arbitral process, one that is central to the arbitration’s legitimacy. “[T]he arbitral process ...is an adjudicatory process requiring a neutral and objective tribunal.”<sup>18</sup>
  29. In past international proceedings, arbitrators sometimes functioned as advocates for the positions of the parties appointing them, leaving the power of decision to be exercised by the presiding umpire. This is no longer seen as acceptable in international proceedings. As the sponsors of the ABA-AAA Code of Ethics for Arbitrators concluded “it is preferable for all arbitrators – including any party-appointed arbitrators – to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects.”<sup>19</sup> In like vein, the IBA Guidelines on Conflicts of Interest in International Arbitration (2014), direct that “[e]ach arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding ...”<sup>20</sup> Indeed, a showing of partiality is typically a statutory ground for vacating an award under national legislation.<sup>21</sup>
  30. The duty of impartiality gives rise to arbitrators’ obligations to decline certain appointments and to disclose certain matters. “If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings.”<sup>22</sup>
  31. Thus, it is generally recognized that international arbitrators must be impartial. The difficulty confounding discussions of “issue conflict” is that there is no clear consensus as to whether or when an arbitrator’s

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<sup>17</sup> *Urbaser, supra*, ¶ 49. See also Catherine Rogers, ETHICS IN INTERNATIONAL ARBITRATION ¶¶ 8.30-8.32 (OUP 2014).

<sup>18</sup> *Id.* p. 130.

<sup>19</sup> ABA-AAA Code of Ethics for Arbitrators, p. 2.

<sup>20</sup> IBA Guidelines on Conflicts of Interest in International Arbitration (2014), General Standard (1). The IBA Arbitration Committee is soon to launch a committee on Soft law, in order to regulate all the Guidelines and Rules promulgated by the IBA.

<sup>21</sup> Under the U.S. Arbitration Act, 9 U.S.C. ¶10(a)(2), “evident partiality” of an arbitrator is grounds for vacating an award. However, the drafters of the IBA Guidelines observed that the principle that arbitrators must avoid bias “is so self evident that many national laws do not explicitly say so. See e.g. Article 12, UNCITRAL Model Law.”

<sup>22</sup> IBA Guidelines on Conflicts of Interest (2014), Note (a) to General Standard 2.

predisposition regarding a substantive issue or knowledge regarding factual issues may cross a line so as to render the arbitrator no longer “impartial.”

32. A Comment to Canon 1 of the ABA-AAA Code of Ethics seeks to square this circle.

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.”<sup>23</sup>

33. As will be discussed below, decision makers have struggled to apply something like this formula in the circumstances of specific challenges.

#### **D. The Role of the Presiding Arbitrator**

34. The fact that the parties select two of the three members of a typical investment arbitration panel means that the tribunal’s presiding arbitrator plays a vital and sometimes challenging role in assuring a proper balance between autonomy and impartiality. Given that the appointment process might result in one likely “pro-investor” arbitrator and one nearly “pro-state” arbitrator, the pressure to identify a truly impartial presiding arbitrator is significant. From a practitioner’s perspective, this goes to the core of the continuing legitimacy and functioning of investor-state arbitration.
35. The relevant arbitration rules and guidelines generally draw no significant distinctions between presiding arbitrators and other members of a panel. All are subject to the same obligations of impartiality and independence.<sup>24</sup> However, given presiding arbitrators’ central roles in the arbitral process, some members of the Task Force believed that persons approached to serve in this role should exercise particular diligence in avoiding issue conflict.
36. The presiding arbitrator plays a central role in the case. From a practitioner’s perspective, the entire case may be won or lost based on presiding arbitrators’ identity and perceived orientation. The claimant and the respondent will each appoint an arbitrator whom they think best

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<sup>23</sup> ABA-AAA Code of Ethics for Arbitrators, Comment to Cannon 1.

<sup>24</sup> See Explanation to General Standard 5 of IBA Guidelines on Conflicts of Interest, p. 1.4.

equipped to understand the legal issues at stake in the case. Assuming neither is challenged and recused, the balance often rests with the presiding arbitrator. In circumstances where the institution must appoint the presiding arbitrator, this places a tremendous pressure on administrators.

37. The presiding arbitrator also may be particularly associated with the content of the resulting Award. If the views expressed in such a prior Award appear to be determinative of an issue in a future case in which the arbitrator is appointed, future scrutiny regarding issue conflict may ensue. However, the arbitrator's role in the *pending* matter—i.e., whether he or she is the presiding arbitrator or a party-appointed co-arbitrator—appears to be immaterial to this analysis.

#### **IV. EXISTING GUIDANCE**

38. This section briefly surveys three contexts – arbitration rules and principles, the practice of international courts and tribunals, and decisions in specific challenge cases, to see what they teach regarding “issue conflict” or “inappropriate predisposition.” Of these, decisions in challenge cases provide the most useful points of reference.

##### **A. Rules and Principles**

39. The notion of “issue conflict” is not squarely addressed in any international rules or guidelines concerning international arbitration or adjudication. Various guidelines touch on problems involving predisposition or bias connected with a decision maker's activities and expressions of opinion, but they typically do so at a general or abstract level.

##### **1. United Nations Basic Principles on the Independence of the Judiciary<sup>25</sup>**

40. The UN Basic Principles emphasize that judges are entitled to freedom of expression and association, so long as that freedom does not affect their ability to exercise impartial judgment or otherwise affect the dignity of their office. Paragraph 21 of the Principles addresses the tension between freedom of expression and the duty to be and to appear to be impartial in paragraph 2:

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions,

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<sup>25</sup> Adopted by the Seventh United Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> .

improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”

41. There is no mention here of predisposition based on previous experience or expressions of views, although the notion of “issue conflict” might lurk beneath the surface of the broad category of “*restrictions, improper influences, inducements ...interferences, direct or indirect, from any quarter or for any reason.*”

## **2. Burgh House Principles On The Independence Of The International Judiciary<sup>26</sup>**

42. The 2005 Burgh House Principles were developed by the International Law Association’s Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals. They address possible limits of a judge’s freedom of expression in light of the judge’s obligation to avoid bias or the appearance of bias:

7.1 Judges shall enjoy freedom of expression and association while in office. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.

7.2 Judges shall maintain the confidentiality of deliberations, and shall not comment extrajudicially upon pending cases.

7.3 Judges shall exercise appropriate restraint in commenting extrajudicially upon judgments and procedures of their own and other courts and upon any legislation, drafts, proposals or subject-matter likely to come before their court.

43. Paragraph 9 of the Burgh House Principles (captioned “Past links to a case”) comes close to discussing “issue conflict” in speaking of a relationship to a case or subject matter at issue. It indicates that exposure to certain issues in a case could create a ground for actual bias or an appearance of bias.

9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or

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<sup>26</sup> Issued by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals [http://www.ucl.ac.uk/laws/cict/docs/burgh\\_final\\_21204.pdf](http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf). See P. Sands, C. McLachlan & R. Mackenzie, *The Burgh House Principles on the Independence of the International Judiciary*, 4 LPICT 247 (2005).

other dispute settlement body which has considered the subject matter of the dispute.

9.2 Judges shall *not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence of impartiality.* (emphasis added)

### **3. The 2014 International Bar Association Guidelines on Conflict of Interest in International Arbitration<sup>27</sup>**

44. The 2004 IBA Guidelines were the product of an expert Working Group's detailed consideration of issues potentially posing actual or apparent conflicts of interest warranting disqualification of, or disclosure by, a prospective arbitrator. They were revised in 2014 to take account of experience under the 2004 Guidelines and other developments during the intervening years. As noted below, some have questioned the earlier Guidelines' utility in analyzing issue conflicts, but the revised Guidelines are likely to remain a significant reference point.
45. The 2014 revision of the Guidelines maintains the overall structure of the 2004 version. Part II sets out non-exhaustive lists of situations, designated as the Red, Orange and Green Lists, that in the authors' view do or do not warrant disclosure by or disqualification of a prospective international arbitrator. The Red List includes circumstances thought to give rise to "an objective conflict of interest from the point of view of a reasonable third person having knowledge of the relevant facts." Some Red List circumstances can be waived upon disclosure; others cannot. The Green List notes situations where there is no appearance of conflict from an objective standpoint, so there is no duty to disclose. The Orange List lists circumstances where a prospective international arbitrator has a duty to disclose; following such disclosures, the parties are said to have waived whatever rights they might have concerning the disclosed circumstance after a lapse of 30 days.
  - (a) Repeat exposure resulting from repeat appointment<sup>28</sup>
46. The very term "issue conflict" may have its origins in Section 3.1.5 of the previous version of the IBA Guidelines, part of the so-called Orange

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<sup>27</sup> The 2004 IBA Guidelines appear to have substantially superseded the 1987 IBA document on *Ethics for Arbitrators in International Conflicts*, the text of which is no longer on IBA website.

<sup>28</sup> For a general discussion of the problems arising from repeat appointment, see Fatima-Zahra Slaoui, *The Rising Issue of 'Repeat Arbitrators': A Call for Clarification*, ARBITRATION INTERNATIONAL, Volume 25 Issue (1) (2009), pp. 103 – 119; see also N. Giraldo-Carrillo, *The 'Repeat Arbitrators' Issue: A Subjective Concept*, *International Law*, REVISTA COLOMBIANA DE DERECHO INTERNACIONAL, vol. 19, 2011, pp. 75–106

List,<sup>29</sup> which provided that an arbitrator has a duty to disclose the following circumstance:

The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

47. The corresponding text in the 2014 version, however, has been revised so that disclosure of service as an arbitrator in an arbitration involving a party is no longer limited to an arbitration “on a related issue.” The change is not explained. Section 3.1.5 now reads:

The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration involving one of the parties, or an affiliate of one of the parties.

(b) Expressions of legal views

48. As discussed *infra*, some challenges have contended that an arbitrator’s expression of opinion in a scholarly article or interview indicates a closed mind. The IBA Green List, sets out to identify circumstances that do not warrant disclosure by an arbitrator. Article 4.1.1 of the 2004 version of the Green List indicated that disclosure was not required with respect to publication of “a general opinion” concerning an issue that also arises in an arbitration.

The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).

This provision was revised in 2014, to provide for nondisclosure of *expressions* (vice publication) of a *legal* (vice general) opinion:

The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case).

49. The Guidelines do not give such a green light to an arbitrator who publishes regarding the particular case in which he or she is involved. Article 3.5.2 previously required that an arbitrator, under the Orange List, disclose that:

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<sup>29</sup> The Orange List’s title in section 3.1 is “Previous services for one of the parties or other involvement in the case.”

The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.

As revised in 2014, the provision now reads:

The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise.

50. The IBA Guidelines currently do not address a problem that has occurred in one situation examined *infra*, where an arbitrator publishes a scholarly opinion discussing legal issues in *prior* cases in which he or she has served.

(c) Perceptions of the IBA Guidelines

51. Some have found the 2004 version of the IBA Guidelines not to be particularly useful in assessing alleged issue conflicts. In the view of one experienced commentator, they “offer little help in dealing with issue conflict challenges.”<sup>30</sup> The unchallenged arbitrators in *Tidewater* downplayed the Guidelines’ significance;<sup>31</sup> the *Caratube* panel cited them as “merely indicative.”<sup>32</sup> In *Urbaser*, the unchallenged arbitrators recalled the parties’ references to various texts, including the IBA Guidelines, but concluded that “while these texts certainly constitute a most valuable source of inspiration, they are not part of the legal basis on which the decision rendered in respect of Claimants’ Proposal is based.”<sup>33</sup>

**4. Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals**

52. The Preamble to the 2010 Hague Principles notes that they indicate “general principles for counsel [which] are a useful and necessary complement to the Burgh House Principles”. However, the Hague Principles’ fairly narrow focus on the role of counsel provides only limited insights into the manner in which issue conflict may affect members of an arbitral tribunal.
53. One relevant aspect of the Hague Principles appears in Article 4, which concerns the removal of counsel on the basis of conflicts of interest.

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<sup>30</sup> Sophie Nappert, *Bias in Commercial Versus Investment Arbitration*, in 2009 FORDHAM PAPERS, p. 146 at 151.

<sup>31</sup> *Tidewater Inc. v. Bolivia*, ICSID Case No. ARB/10/5. Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern Arbitrator, ¶ 43 (Dec. 23, 101).

<sup>32</sup> *Caratube, supra*, ¶ 59.

<sup>33</sup> *Urbaser S.A. v. Argentina*, ICSID Case No. ARB/07/26. Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator ¶ 37 (Aug. 12, 2010).

Article 4 establishes a general presumption of conflict in the event that counsel “represent[s] a new client in proceedings where a former client is party to the same or closely related proceedings and there exists a material risk of breach of confidentiality.”<sup>34</sup> Additionally, Article 5 indicates that counsel should avoid any contacts with tribunal members except for those “compatible with the exercise of an independent judicial function and that may not affect or reasonably appear to affect independence or impartiality.”<sup>35</sup> These emphases on, respectively, the relevance of “closely related proceedings” to pending cases and the importance of subjective perceptions of judicial impartiality, may find some analogy to the Task Force’s consideration of issue conflict.

54. Nevertheless, Philippe Sands has noted that the drafters of the Hague Principles found “especially challenging [the] scope of ‘conflicts of interest’, particularly in the context of international investment arbitration.”<sup>36</sup> As such, the application of the Principles to arbitrator ethics is generally limited to the identification of “minimum and common ethical principles and standards that could contribute to ensuring the integrity and legitimacy of international judicial and arbitral procedure.”<sup>37</sup>

#### **5. AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes**

55. As noted above, Canon 1(B) of the 2004 AAA/ABA Code provides that “[o]ne should accept appointment as an arbitrator only if fully satisfied: (1) that he or she can serve impartially...” The Comment then explains:

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

#### **B. International Courts and Tribunals**

56. While the International Court of Justice seems to have been reluctant to compel recusal of judges on account of their prior involvement in matters

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<sup>34</sup> Article 4.2 of the Hague Principles.

<sup>35</sup> Article 5.5 of the Hague Principles.

<sup>36</sup> Philippe Sands, *Conflict and Conflicts in Investment Treaty Arbitration*, THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 10, 4 (2011).

<sup>37</sup> *Id.*, p. 2.



connected with those currently pending, some international criminal tribunals have wrestled more directly with issues of prejudicial pre-judgment in addressing appeals of criminal convictions.

### **1. The International Court of Justice**

57. The International Court of Justice has occasionally dealt with issues posing or analogous to “issue conflict. “The Court typically has been reluctant to view a judge’s prior activities or statements as requiring recusal, at least where the judge is not so disposed.<sup>38</sup>
58. The Court’s Statute and Rules contains several relevant provisions. Article 2 of the Court’s Statute requires “independent judges.” Article 17 bars judges from acting for a party in a case, or from participating in deciding any case in which the judge has previously served as a party’s agent, counsel or advocate, or as a member of a national or international court or commission of inquiry. Article 24 of the Statute then delphically provides:
  1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.
  2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.
  3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.
59. Article 34 of the Rules of Court adds:
  1. In case of any doubt arising as to the application of Article 17, paragraph 2, of the Statute or in case of a disagreement as to the application of Article 24 of the Statute, the President shall inform the Members of the Court, with whom the decision lies.
  2. If a party desires to bring to the attention of the Court facts which it considers to be of possible relevance to the application of the provisions of the Statute mentioned in the previous paragraph, but which it believes may not be known to

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<sup>38</sup> In several instances, judges have voluntarily absented themselves from the bench in particular cases, sometimes with explanations referring to their prior involvement with the texts or issues under consideration, but frequently without explanation. *See* Shabtai Rosenne, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 (III)* pp. 1062-65.

the Court, that party shall communicate confidentially such facts to the President in writing.

60. The Court and its Members have generally given a narrow reading to Article 17's provisions relating to judges' prior involvement in specific matters as grounds for recusal. Judges have participated in cases involving interpretation of treaty and other legal texts they helped to create, or involving disputes that were active during their time as legal advisers to their national foreign ministries.<sup>39</sup>
61. The fifteen-member Court has dealt with three situations involving formal requests that it find a judge ineligible.<sup>40</sup> The first request, which was rejected by a vote of eight to six, involved South Africa's request to remove Judge Padilla Nervo in the *South West Africa* cases.<sup>41</sup> Although South Africa's application was not disclosed at the time, it became known that the objection was based upon the judge's prior role as a member of his national delegation to the UN General Assembly for many years and his service as General Assembly President in 1951. In the subsequent *Namibia* advisory opinion proceedings, South Africa again sought unsuccessfully to have three members of the Court removed on account of "statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South Africa."<sup>42</sup>
62. The Court's most recent examination of the interplay between a judge's past statements and actions and a pending matter involved the General Assembly's request for an advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>43</sup> On 15 January 2004, Israel addressed a confidential letter to the President of the Court referring to Article 17 of the Statute and Article 34(2) of the Rules of Court.<sup>44</sup> The letter alleged that Judge Elaraby had

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<sup>39</sup> Rosenne, *supra*, pp. 1062-63.

<sup>40</sup> *Id.*, p. 1059.

<sup>41</sup> Order on court composition of 18 March 1965 (South West Africa cases (*Ethiopia v. South Africa, Liberia v. South Africa*), ICJ Rep 1965, p. 3.

<sup>42</sup> *Legal Consequences for State of the Continued Presence of South Africa in Namibia* (South West Africa) (Advisory Opinion) [1971] ICJ Rep, 16, 18 (para 9).

<sup>43</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Rep 3 (Order of Jan. 30).

<sup>44</sup> Article 34 of the Rules of Court set forth a procedure when there are doubts as to the application of Article 17, paragraph 2 of the Statute:

1. In case of any doubt arising as to the application of Article 17, paragraph 2, of the Statute or in case of a disagreement as to the application of Article 24 of the Statute, the President shall inform the Members of the Court, with whom the decision lies.

2. If a party desires to bring to the attention of the Court facts which it considers to be of possible relevance to the application of the provisions of the Statute mentioned in the previous

been involved in the subject matter in dispute and that his activities were incompatible with Article 17, in that he had participated in the emergency session of the General Assembly that adopted the request for Advisory Opinion before the Court. Israel also cited Judge Elaraby's previous activities as principal Legal Adviser to the Egyptian Ministry of Foreign Affairs and to Egypt's delegation to the 1978 Camp David Peace Conference, and his involvement in various initiatives following the 1979 Israel-Egypt Peace Treaty. Israel also referred to an interview given by Judge Elaraby to an Egyptian newspaper in August 2001 in which he expressed critical views on questions concerning Israel.

63. The Court rejected the objection, observing that Judge Elaraby's activities cited in Israel's letter largely involved his activities years before as an Egyptian diplomat. As to the 2001 newspaper interview, the Court took a narrow view of any potential conflict arising from Judge Elaraby's published views, finding that he had "expressed no opinion on the question put in the present case; whereas consequently Judge Elaraby could not be regarded as having 'previously taken part' in the case in any capacity."<sup>45</sup>
64. Judge Buergenthal's dissent criticized this narrow view. While he agreed that Judge Elaraby's activities as a diplomat could not be said to render him biased, Judge Buergenthal viewed the newspaper interview as creating an appearance of bias. He observed in this regard that Judge Elaraby reportedly stated in the interview, *inter alia*, that Israel was in grave violation of international law for its illegal occupation of Palestinian territory and for atrocities perpetrated on Palestinian civilian populations. Taking a holistic approach to the role of a judge's published views, Judge Buergenthal noted that Article 17 of the Court's Statute:

reflects much broader conceptions of justice and fairness that must be observed by courts of law than this Court appears to acknowledge. Judicial ethics are not matters strictly of hard and fast rules—I doubt that they can ever be exhaustively defined—they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy. A court of law must be free and, in my opinion, is required to consider whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues raised in a case or advisory opinion in a fair and impartial manner, that is, that he may be

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paragraph, but which it believes may not be known to the Court, that party shall communicate confidentially such facts to the President in writing.

<sup>45</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Composition of the Court, ICJ Order (30 January 2004), ICJ Rep 2004, p. 3, ¶ 8.

deemed to have prejudged one or more of the issues bearing on the subject-matter of the dispute before the court. That is what is meant by the dictum that the fair and proper administration of justice requires that justice not only be done, but that it also be seen to be done. In my view, all courts of law must be guided by this principle, whether or not their statutes or other constitutive documents expressly require them to do so.<sup>46</sup>

65. Thus, for the ICJ, prior diplomatic service on behalf of a government or international organization, including serving a government's senior representative at the United Nations, is not a basis for disqualification. Further, and despite Judge Buergenthal's vigorous dissent from the Court's Order in the *Wall* case, prior statements made in a personal capacity, even statements highly critical of a party having a substantial interest in a proceeding, are not disqualifying unless they directly address the specific matter at issue.<sup>47</sup> As Rosenne concludes, "these cases suggest a marked reluctance on the part of the Court to regard any duly elected member of the Court as ineligible to sit in a particular case in the absence of clear evidence of previous direct involvement in the specific matter before the Court."<sup>48</sup>

## 2. The International Court for the Former Yugoslavia (ICTY)

### *Prosecutor v. Furundzija*

66. *Prosecutor v. Furundzija*<sup>49</sup> involved an unsuccessful challenge to a conviction for aiding and abetting rape, torture and other offenses. The Appellant argued in the ICTY's Appeals Chamber that because of Judge Mumba's past membership in the United Nations Commission on the Status of Women (UNCSW), her involvement with efforts to implement the UN Platform for Action, and her association with three authors of an amicus curiae brief in the case and a member of the Prosecution, she should have been disqualified from hearing his case under Rule 15 of the ICTY's Rules.

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<sup>46</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Composition of the Court, Dissenting Opinion of Judge Buergenthal (30 January 2004), ICJ Rep 2004, p. 3, ¶¶ 10-11.

<sup>47</sup> See Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 Berkeley J. Int'l Law. 111, 117-119 (2008).

<sup>48</sup> Rosenne, *supra*, p. 1060 n. 10.

<sup>49</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/I-A, Appeals Chamber Judgment, 189 (July 21, 2000). Cited in Seibert-Fohr, *International Judicial Ethics*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 757, 770. See substantial discussion in Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L LAW. 111, 120-123 (2008).

67. The UNCSW was involved in preparations for the UN Fourth World Conference on Women held in Beijing in September 1995, and participated in drafting the “Platform for Action,” a document identifying twelve “critical areas of concern” affecting women’s rights and containing a five-year action plan. Three of the critical areas of concern were particularly relevant to the former Yugoslavia. An Expert Group Meeting was held following the Beijing conference to work towards achieving certain of the goals in the Platform for Action, including reaffirmation of rape as a war crime. Three authors of one of the amicus curiae briefs later filed in the case and one of the Prosecutors attended this Expert Group meeting, which proposed a definition of rape under international law.<sup>50</sup>
68. The Appellant argued that the test in ascertaining whether disqualification was appropriate was whether “a reasonable member of the public, knowing all of the facts [would] come to the conclusion that Judge Mumba has or had any associations, which might affect her impartiality.” Based on that test, he submitted that Judge Mumba should have been disqualified, as an appearance was created that she had sat in judgment in a case that advanced a legal and political agenda that she helped to create whilst a member of the UNCSW.<sup>51</sup> In addition, the Appellant alleged that Judge Mumba continued to promote the goals and interests of the UNCSW and Platform for Action after she left the commission, contending that this was reflected directly in his trial.
69. The Appeals Chamber rejected the Appellant’s arguments, finding that Judge Mumba had acted as a representative of her country, and therefore was expressing the view as a government official, not in her personal capacity. This was borne out by the fact that Resolution 11(II) of the UN Economic and Social Council that established the UNCSW provides that this body shall consist of “one representative from each of the fifteen Members of the United Nations selected by the Council.”<sup>52</sup>
70. The Appeals Chamber further concluded that even if it were established that Judge Mumba shared the goals and objectives of the UNCSW and the Platform for Action in promoting and protecting the human rights of women, that inclination was of a general nature and was distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. As a result, the Appeals Chamber concluded that Judge

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<sup>50</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Appeals Chamber Judgment, 189 (July 21, 2000), ¶. 167.

<sup>51</sup> *Id.* ¶. 169.

<sup>52</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Appeals Chamber Judgment (July 21, 2000), ¶. 199.

Mumba would be able to decide issues impartially affecting women.<sup>53</sup>  
The Appeals Chamber further held:

Consequently, the Appeals Chamber can see no reason why the fact that Judge Mumba may have shared these objectives should constitute a circumstance which would lead a reasonable and informed observer to reasonably apprehend bias. The Appeals Chamber agrees with the Prosecutor's submission that "[c]oncern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of pre-judgement in any future trial for rape." To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.<sup>54</sup>

71. The Appeals Chamber recognized that Judges have personal convictions and that "[a]bsolute neutrality on the part of a judicial officer can hardly if ever be achieved." In this context, it noted that the European Commission of Human Rights considered that "political sympathies, at least insofar as they are of different shades, do not in themselves imply a lack of impartiality towards the parties before the court."<sup>55</sup>
72. The Appeals Chamber also observed that judges should not be disqualified due to qualifications that play "an integral role in satisfying the eligibility requirements" of serving as a judge on the ICTY. In this case,

Judge Mumba's membership of the UNCSW and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias.<sup>56</sup>

### ***Prosecutor v. Stanislav Galic***

73. In appealing his 2003 conviction for murder, crimes against humanity and other offenses, Galic challenged the impartiality and the appearance of impartiality of Judge Orić, the Presiding Judge in his trial. Galic

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<sup>53</sup> *Id.* ¶ 200.

<sup>54</sup> *Idem.*

<sup>55</sup> *Id.* ¶ 203 (referring to *Crociani et al. v. Italy*, Decisions and Reports, European Commission of Human Rights, vol. 22 (1981) 147, 222).

<sup>56</sup> *Id.* ¶ 205. Similarly, in the framework of Article 14 of the ICSID Convention, "[c]ompetence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators." "Manifest lack of the qualities required by paragraph (1) of Article 14" is in turn a ground for disqualification.

contended that Judge Orić's impartiality was compromised by his confirmation of an indictment against Ratko Mladic ("Mladic Indictment"). Galic argued that the factual allegations of the Mladic case overlapped with the factual allegations of his case, and that the fact that he was named in the Mladic Indictment as a participant in a joint criminal enterprise to commit genocide rendered Judge Orić unable to assess his case impartially. Galic also argued that because the Mladic Indictment alleged his participation in crimes for which he was not charged, Judge Orić's perception would be unfavorably biased.<sup>57</sup>

74. The Appeals Chamber rejected Galic's claim of bias, concluding that Galic failed to appreciate the fundamental difference between the functions of a Judge who confirms an indictment and one who sits at trial. It observed that when confirming an indictment, the Judge does not determine the accused's guilt or innocence; nor is he or she engaged in fully verifying the evidence or the alleged facts. Because the task of confirming an indictment and assessing evidence at trial involved different assessments of the evidence and different standards of review, the confirmation of an indictment could not involve any improper pre-judgment of an accused's guilt.<sup>58</sup> In particular, the Appeals Chamber observed:

[A] a hypothetical fair-minded observer, properly informed, would recognise that Judge Orić's confirmation of the Mladic Indictment neither represented a pre-judgment of Galic's guilt nor prevented him from assessing the evidence presented at Galic's trial with an open mind. In particular, a fair-minded observer would know that Judges' training and professional experience engrain in them the capacity to put out of their mind evidence other than that presented at trial in rendering a verdict. Judges who serve as fact-finders are often exposed to information about cases before them either through the media or from connected prosecutions. Accordingly, the Appeals Chamber considers that the allegation of apprehension of bias against Judge Orić, based on his prior confirmation of the Mladic Indictment, is unfounded.<sup>59</sup>

### **3. International Criminal Tribunal for Rwanda**

***Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze***

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<sup>57</sup> *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-A, Appeals Chamber Judgment, 30 November 2006, ¶ 27.

<sup>58</sup> *Id.* ¶ 42.

<sup>59</sup> *Id.* ¶ 44.

75. In *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*,<sup>60</sup> the Appellants alleged that Judge Navi Pillay lacked independence and impartiality based, inter alia, on Judge Pillay's participation in a previous case, *Akayesu*. According to the defendants, her exposure to, and participation in, factual findings in *Akayesu* compromised her ability to rule impartially in their case.
76. The Appellants Barayagwiza and Ngeze alleged, inter alia, that Judge Pillay should have withdrawn from their case because in *Akayesu*, she "had made specific disparaging comments about Kangura, the Appellant's newspaper" in determining that Radio RTLM and Kangura had broadcast "anti-Tutsi propaganda" aimed at exterminating the Tutsi population.<sup>61</sup>
77. The Appeals Chamber observed that judges of the ICTR and those of the ICTY are sometimes involved in several trials that, by their very nature, covered overlapping issues. The Appeals Chamber agreed with the ICTY Bureau that "a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases."<sup>62</sup> Moreover, the Appeals Chamber concluded that "mere reference to paragraphs in the *Akayesu* Trial Judgement" was insufficient to prove an unacceptable appearance of bias on the part of Judge Pillay.<sup>63</sup>

#### 4. Special Court for Sierra Leone

##### *Prosecutor v. Issa Hassan Sesay*

78. The Special Court of Sierra Leone disqualified one of its members from deciding disputes involving alleged members of the Revolutionary United Front, based on the justice's writings alleging that the group engaged in mutilation and "pillage, rape and diamond heisting." Issa Hassan Sesay's successful disqualification motion was based on views expressed by Justice Geoffrey's Robertson in his 2002 book *Crimes Against Humanity – The Struggle for Global Justice*. The defense contended that the book demonstrated the "clearest and most grave bias, or in the alternative, the same objectively give rise to the appearance of bias."<sup>64</sup>

<sup>60</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, Judgment on Appeal, November 28, 2007.

<sup>61</sup> *Id.* ¶¶ 76-77.

<sup>62</sup> *Id.* ¶ 78.

<sup>63</sup> *Id.* ¶ 79.

<sup>64</sup> *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-2004-15-AR15, Decision on the Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, March 13, 2004, ¶ 2. See also Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L L. 111, 123 (2008).



79. The prosecution conceded in its response to the motion that “there could be a valid argument that there is an appearance of bias on the part of Judge Robertson. The material could lead a reasonable observer, properly informed, to apprehend bias.”<sup>65</sup>

80. The Court held, after reviewing the passages of the book cited by the defense, that:

It is irrelevant for the purposes of this Ruling whether or not the passages hereinbefore referred to are true or not. The learned Justice is certainly entitled to his opinion. That is one of his fundamental human rights. The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words, whether one can apprehend bias. I have no doubt that a reasonable man will apprehend bias, let alone an accused person and I so hold.<sup>66</sup>

81. The cited passages in Justice Robertson’s book included one in which he stated that the UN made a dreadful decision when it granted amnesty to Foday Sankoh and expressed his opinions on the brutality of the acts ordered by Charles Taylor, whom he describes as a “vicious warlord.”<sup>67</sup>

***Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao***

82. A second effort to disqualify a justice was less successful. The defendants filed a joint motion to disqualify Justice Bankole Thompson on account of a separate opinion in in which he used terms such as tyranny, anarchy, rebellion and evil, which were alleged to “raise reasonable doubts as to his impartiality in ruling on the RUF case.”<sup>68</sup> The Court denied the motion, concluding:

The Appeals Chamber finds that no objective appearance of bias can reasonably be ascertained from Justice Thompson’s Separate Opinion. The Separate Opinion was issued in the exercise of Justice Thompson’s function as a Judge in a separate case. It contains no explicit or implied reference to the Appellants or any reference to the RUF as a group. The Appellants cite no legal authority nor have they demonstrated that suggesting that a Judge’s legal and factual analysis in a case to which they are not a party could be considered to give rise to an appearance of

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<sup>65</sup> *Id.* ¶ 7.

<sup>66</sup> *Id.* ¶ 15.

<sup>67</sup> *Id.* ¶ 2.

<sup>68</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, January 24, 2008, ¶ 1.

bias. This is even more so when the party in question is neither mentioned nor alluded to by the Judge.

It is inevitable that some connection can be made between judicial opinions in cases before the Special Court because each case ultimately relates to the same period of conflict. But a judicial opinion that merely has some connection to a case cannot raise a question of bias nor can it raise a substantive claim for disqualification.<sup>69</sup>

## 5. The International Criminal Court (ICC)<sup>70</sup>

### *Prosecutor v. Thomas Lubanga Dyilo*

83. Lubanga was the first person convicted by the International Criminal Court. On appeal, his defense sought to disqualify Judge Sang-Hyun Song, a member of the ICC's Appeals Division, contending, inter alia, that the judge's remarks at the tenth anniversary celebration of the ICC and other events revealed that he was biased against Lubanga. In those remarks, Judge Song, inter alia, described the ICC's first verdict and judgment in Lubanga's case as "a crucial precedent in the fight against impunity and reinforce[d] the Rome Statute's growing deterrent effect against perpetrators of heinous crimes against children". The defense argued that the judge's public statements expressed his personal opinions on the judgments currently under appeal, depicting them as 'crucial precedents' that served as an example to the international community in the fight against impunity, and as having imposed the proper penalties for the crimes prosecuted.
84. Furthermore, the defense submitted that "a reasonably informed observer would understand that the Judge unreservedly endorses the judgment, and is personally convinced of their merits, including on the essential issues to be determination by the Appeals Chamber..."<sup>71</sup>
85. The Court unanimously rejected the defense's application to remove the judge. After determining the standard to assess impartiality ("the objective perspective of whether a fair-minded and informed observer, having considered all the facts and all the circumstances, would reasonably apprehend bias in the judge")<sup>72</sup> and emphasizing the need to take the

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<sup>69</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Decision on Sesay, Kallon and Gbao Appeal Against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, January 24, 2008, ¶¶ 14-15.

<sup>70</sup> Under Article 41.2 of the Rome Statute, an ICC judges shall not participate in any case in which impartiality may reasonably be questioned.

<sup>71</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Defense's Application for the disqualification of Judge Sang-Hyun Song, June 11, 2013, ¶ 17.

<sup>72</sup> *Id.* ¶ 34.

context of the case into account, the Court held that “a reasonable observer, noting the entire content and context of the statements made by the Judge, would neither have considered them to have been comments regarding the merits of the decisions under appeal, nor related to any of the particular legal issues to be decided on appeal.”<sup>73</sup> (The defense also unsuccessfully sought Judge Song’s removal on conflict of interest grounds, based on his involvement in UNICEF/Korea, which took part in the reparations proceedings in Lubanga’s case.)

***Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus***

86. The accused allegedly attacked forces of the African Union Mission in Sudan. The defense sought to have Judge Chile Eboe-Osuji removed from their case based on three grounds: (i) the judge’s nationality (some victims of the alleged attack were Nigerian, like the judge), (ii) “the endorsement of the candidacy as a judge by a regional body and by his state of nationality” and (iii) “the comments made in a blog written by him prior to his election as a judge”.<sup>74</sup> The defense alleged that a 2010 blog commentary by the judge demonstrated that he held pre-conceived views regarding the African Union (AU) and the Government of Sudan. The defense submitted that such views were relevant because it was in the defense’s interest for the Trial Chamber to make highly critical findings concerning the role of the AU in Sudan. In particular, the defense submitted that that requests for co-operation had been made to both the AU and Nigeria without response, as such co-operation was a “live issue” in the case.”<sup>75</sup>
87. The Court by majority rejected the challenge, noting that the blog post described developments in a separate ICC case, and finding no “genuine link between the blog commentary and the case” and therefore no reason to doubt the judge’s impartiality.<sup>76</sup> Moreover, “The majority also considered that merely having expressed an opinion on an issue generally concerned with the AU and the situation in the Sudan ... could not lead to a reasonable view that the respondent would be unable to impartially determine the case” and that “it was evident that formations or expressions of opinion tangentially connected to a case did not necessarily give rise to disqualification.”<sup>77</sup>

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<sup>73</sup> *Id.* ¶ 39.

<sup>74</sup> *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the Defence Request for the Disqualification of a Judge, June 5, 2012, ¶ 2.

<sup>75</sup> *Id.* ¶ 5.

<sup>76</sup> *Id.* ¶ 17.

<sup>77</sup> *Id.* ¶ 19.

88. Two judges dissented, considering that the blog commentary, taken with the other factors cited by the defense, provided sufficient reason to disqualify the Judge.

## **6. WTO Dispute Settlement**

89. WTO Rules permit disputing parties to select the WTO panel members to decide their disputes based on proposals put forward by the Secretariat. Parties may object to a proposed panelist "for compelling reasons", including an actual or perceived conflict of interest. Disputing parties will often object to proposed panelists because they are known to have certain views on the issue in question (based on their publications) or because of the public views of their governments on the issues in dispute (based for example on the existence of similar legislation to that being challenged, for example).
90. The WTO Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1) provide that panelists shall be independent and impartial, and shall avoid direct or indirect conflicts of interest. In addition, the Rules of Conduct require panelists to disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality.
91. Annex 2 of the Rules of Conduct (Illustrative list of information to be disclosed) indicates that a person called upon to serve in a dispute should, inter alia, disclose: (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements).
92. Panelists are not prevented from sitting on disputes that are related to matters on which they have previously served as adjudicator. In fact, the DSU (Article 21.5) provides that disputes regarding whether measures taken to comply with a previous ruling are WTO consistent (so called compliance panels) "shall ... wherever possible" be referred to the original three panelists. In compliance cases, the measure at issue will not be exactly the same as in the original dispute because the measure will have been replaced or amended in order to try to come into compliance with the previous rulings, but the legal issues will be similar.
93. The logic of this approach is that the panelists in the original dispute will be familiar with the facts and issues and will be in a better position to determine promptly whether WTO compliance has been achieved. A similar logic is followed in Article 10.4 of the DSU, which provides that if a Member was a third party in a dispute and it decides to initiate its own dispute against the same measure challenged in the dispute where it was a

third party, the new dispute "shall be referred to the original panel wherever possible."

94. There have been a few cases where a disputing party has challenged a panelist following appointment. (See the procedure under Rule VIII of the Rules of Conduct.) As these challenges are confidential and often settled informally, records of such challenges are not available. Anecdotal evidence suggests that this has arisen where it was considered that the panelist was not impartial given past academic writings, or because of an alleged financial relationship with a party, and on one occasion because the panelist had served on an earlier panel that considered a dispute involving similar facts and legal issues.

### C. Challenge Decisions in Investor-State Cases

95. Decisions on challenges alleging various sorts of inappropriate predisposition offer an important data set for examining the parameters of issue conflict. Challenges are serious matters, and tend to give rise to intensive examination of the issues posed. As Caron, Caplan, and Pellonpää observe:

[t]he challenge is a device to maintain minimal standards of independence and impartiality in arbitrators. Challenge is an exceptional and serious mechanism; it is a process that has been rarely initiated and even more rarely has resulted in a decision.<sup>78</sup>

96. There is a growing – albeit still modest – body of publicly available decisions addressing challenges alleging some form of inappropriate predisposition by an arbitrator. The limited number of publicly available decisions partly reflects the reluctance of many arbitral institutions to issue and publish reasoned decisions.<sup>79</sup> Analysis is also complicated by a substantial variation in applicable standards and procedures for assessing challenge under different arbitration rules.
97. This section examines publicly known challenge decisions in the context of international investment arbitration where the challenging party alleges some form of inappropriate predisposition by an arbitrator. The reasons for the resulting decision are not always explained; indeed, some challenge decisions seem unreasoned and peremptory. Some challenges involve allegations going to both the challenged arbitrator's impartiality and independence, and the ensuing decisions do not always untangle the

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<sup>78</sup> David D. Caron, et al., *THE UNCITRAL ARBITRATION RULES* 7 (2006), p. 187.

<sup>79</sup> Brower, *supra* (Arbitrator Ethics) at 19.

two concepts.<sup>80</sup> Further, challenges claiming partiality can involve matters other than an arbitrator's views on substantive issues, such as perceptions of possible bias for or against a party<sup>81</sup> or its counsel.<sup>82</sup>

98. Despite these difficulties, the outcomes in publicly available decisions suggest patterns regarding some types of arbitrator behaviors that are thought to indicate the possibility of inappropriate predisposition. In this regard, it seems significant that most known challenges alleging inappropriate predisposition have been rejected. This seems to reflect decision makers' frequent perception "that lawyers, judges and arbitrators inevitably encounter and form views on particular issues in the course of their work,"<sup>83</sup> and that this is not legitimate reason for challenge.
99. The known decisions indicate that in three areas arbitrator connections with a material issue generally have not been thought to undermine current impartiality: scholarly or professional writing and speech, prior service as counsel or advocate addressing similar issues, and - perhaps most controversially - concurring in prior opinions addressing issues presented in the current case.

### **1. Scholarly and Professional Writing and Speech**

100. The Task Force included experienced experts from academia, practice, and arbitral institutions. Members of all perspectives urged that international arbitration benefits significantly from vigorous and open discussion of contemporary legal issues by knowledgeable persons. In their view, scholarly or professional publications addressing issues at a general level (but not discussing details of the particular dispute in which they have been named) should not be seen as impairing impartiality. It would be a significant loss for such informed commentary to be chilled by fear of a possible future challenge to the author on account of the views expressed. Opinion in the Task Force thus mirrored the approach of the 2014 IBA Guidelines on Conflicts of Interest. (As noted above, Item 4.1.1 of the IBA "Green List" sees no duty of disclosure where the arbitrator

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<sup>80</sup> See, e.g., *Urbaser*, p. 12, ¶ 38 ("...efforts to discover a manner to divide these notions [of independence and impartiality] cannot overcome their inherent redundancy.")

<sup>81</sup> See, e.g., *Perenco v. Ecuador*, Matter of A Challenge to be Decided by the Secretary-General of the Permanent Court of Arbitration Pursuant to An Agreement Concluded on October 2, 2008, ICSID Case No. ARB/08/6, Decision on Challenge Concerning Judge Charles Brower, dated December 8, 2009.

<sup>82</sup> See, e.g., *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña. (Arbitrator's written criticism of conduct by respondent's counsel in disclosing information regarding a prior case "manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel".)

<sup>83</sup> Born, *supra*, p. 135.

- “has previously published a legal opinion (such as a law review article or public lecture) concerning an issue that also arises in the arbitration....”<sup>84</sup>)
101. With one possible recent exception discussed below, decision makers have shared the view expressed in the Task Force. Challenges involving arbitrators’ past expressions of *general* views on substantive legal issues, either in scholarly or professional writings or in lectures or remarks at professional meetings, have not been accepted. (Writings taking positions regarding the specific case at issue are another matter; such writings seem likely to be found disqualifying.<sup>85</sup>)
102. Probably the best known such challenge occurred in *Urbaser SA v. Argentine Republic*,<sup>86</sup> an ICSID case. In a 2010 decision, the two unchallenged arbitrators<sup>87</sup> rejected a challenge by claimants based on two of Professor Campbell McLachlan’s scholarly writings claimed to favor the respondent’s positions on important issues in the pending case, application of most-favored-nation (MFN) clauses and the defense of necessity. In a 2007 treatise, Professor McLachlan strongly criticized what he characterized as the “heretical” earlier decision in *Maffezini v. Spain*, holding that the MFN provision in the bilateral investment treaty between Argentina and Spain served to import the more liberal dispute settlement provisions of the corresponding treaty between Chile and Spain.<sup>88</sup> The second challenged writing, an article in the *International and Comparative Law Quarterly*,<sup>89</sup> involved the necessity defense. Professor McLachlan there applauded the CMS Annulment Committee’s discussion of the necessity defense,<sup>90</sup> writing that “the eminent experience in public international law of the [Annulment] Committee, suggest that *great weight*

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<sup>84</sup> The IBA’s Green List’s dispensation for “general opinions” has detractors. The deciding arbitrators in *Urbaser* were “not convinced that distinctions like the one based on the notion of “general opinion” as it is used to define the attitudes to be put on the “green list” according to the IBA Guidelines make much sense.” *Urbaser, supra*, 52.

<sup>85</sup> Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitrations*, 14 ARB. INT’L 395, 411 (1998).

<sup>86</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (August 12, 2010).

<sup>87</sup> Under ICSID Arbitration Rule 9(4), when an arbitrator is challenged, “the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned.”

<sup>88</sup> *Urbaser, supra*, at 5 (¶ 21).

<sup>89</sup> *International and Comparative Law Quarterly*, 2008, p. 361-401 (385-391) at 390.

<sup>90</sup> As characterized in *Urbaser*, the Annulment Committee found fault with the CMS decision for “taking the customary doctrine first, and then conflating its test with that of the Treaty, without close consideration of the differences, which contributed to the errors of the CMS Tribunal, and those which followed it” (¶53).

*should be given to the Committee's categorical views on the central issues confronted in these cases.”*<sup>91</sup>

103. The unchallenged arbitrators rejected the contention that their colleague “lacks the freedom to give his opinion and to make a decision with respect to the facts and circumstances of this case because he already had prejudged those facts and circumstances, issued his opinion, and made it known.”<sup>92</sup> Instead:

44. What matters is whether the opinions expressed by Prof. McLachlan on the two issues qualified as crucial by Claimants 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...

45. ... [T]he mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. For such a challenge to succeed there must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or arbitrator.”

104. Thus, for the *Urbaser* panel, scholarly writings - even writings taking a vigorous position on significant legal issues presented by a case - cannot sustain a challenge, absent a showing that the position expressed has some substantial connection to a party in the case or are otherwise connected to it. This erects a high bar to a successful challenge; in one observer's view, “the reasoning used to get [to the panel's conclusion] comes close to holding that a successful challenge can never be based solely on the expression of a prior opinion alone.”<sup>93</sup>
105. The two unchallenged arbitrators mirrored concerns expressed in the Task Force regarding the need to avoid chilling scholarly writing and debate.

If ... any opinion previously expressed on certain aspects of the ICSID Convention be considered as elements of prejudgment in a particular case because they might become relevant or are merely argued by one party, the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter, whether it may

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<sup>91</sup> *Id.*, p. 7 (¶24) (emphasis added).

<sup>92</sup> *Id.*, p. 8 (¶26).

<sup>93</sup> Daniel Kalderimis, *Challenging the Arbitrator*, NZ Lawyer, Sept. 2010, available at [http://www.aminz.org.nz/Story?Action=View&Story\\_id=1376](http://www.aminz.org.nz/Story?Action=View&Story_id=1376).



be procedural, jurisdictional, or touching upon the substantive rights deriving from BITs. ... It goes without saying that ... debate [on matters of international investment law] would be fruitless if it did not include an exchange of opinions given by those who are actually involved in the ICSID arbitration process....<sup>94</sup>

106. In *Repsol v. Argentina*,<sup>95</sup> Dr. Jim Yong Kim, President of the World Bank and of the ICSID Administrative Council, was also unwilling to accept a challenge based upon an arbitrator's scholarly publications. The respondent challenged Professor Orrego Vicuña on the ground that, inter alia, he had published a 2010 article defending the *CMS* award following its annulment, and that in the article Prof. Orrego Vicuña had "adopted" the views of a second author who expressed negative views of Argentina, and had suggested that Argentina should not be entitled to invoke the necessity defense.<sup>96</sup>

107. Dr. Kim rejected the challenge:

Regarding Professor Orrego Vicuña's 2010 publication, the President notes that this publication considers an opinion on a legal provision that is not present in the legal instrument relied on in this case. Similarly, references by Professor Orrego Vicuña to a publication by a third party do not constitute evidence of the manifest lack of impartiality against Argentina, as required by Article 57 of the Convention.<sup>97</sup>

108. Early in 2014, an arbitration newsletter reported yet another case in which a decision maker court in Germany rejected claims that an arbitrator's scholarly publications showed inappropriate predisposition. The issue arose in a German court hearing a successful motion by Bulgaria to enforce an award of fees and costs against a claimant under the New York Convention. The claimant reportedly lodged a battery of arguments against enforcement, including, inter alia, a claim that the presiding arbitrator was biased on a key issue, as reflected in her past writings and opinions on MFN clauses. The court rejected this claim:

That a judge has expressed a certain legal view on a particular legal question in several [previous] proceeding, and possibly also publicly, such as in publications, does not affect his [or her] impartiality with

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<sup>94</sup> *Urbaser, supra*, p. 15, ¶48.

<sup>95</sup> *Repsol v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Request for Disqualification of the Majority of the Tribunal dated 13 December 2013.

<sup>96</sup> *Id.* ¶¶ 26-30.

<sup>97</sup> *Id.* ¶ 79 (informal translation).

respect to the concrete case to be decided – even if this particular legal view is crucial to the result.<sup>98</sup>

109. In an unpublished challenge to Christoph Schreuer in *Saipem S.p.A. v. People's Republic of Bangladesh*<sup>99</sup> the unchallenged arbitrators similarly found prior publication of scholarly views unexceptionable. According to Prof. Schreuer's book, one of the grounds for the challenge "was the fact that the arbitrator had expressed opinions in his writings which, in the Respondent's view, showed preconceived positions with regard to some of the central issues of the arbitration."<sup>100</sup> In that case, the unchallenged members of the panel found:

[I]t is well established by national case law on the removal of arbitrators as well as in the practice of arbitration institutions that an arbitrator's doctrinal opinions expressed in the abstract without reference to any particular case do not affect that arbitrator's impartiality and independence, even though the issue on which the opinion is expressed may arise in the arbitration. It is not because a scholar has expressed general and abstract opinion that he or she will not consider the specificities of a given case and may not on such basis, form an opinion different from the one previously expressed.<sup>101</sup>

110. Such decisions lend substantial support for the proposition that scholarly expressions of views that do not address a specific case, standing alone, are not normally cause for removal. Nevertheless, a recent decision by the President of the International Court of Justice also cautions that in some circumstances, scholarly publication can be weighed, along with other factors, in assessing a challenge alleging inappropriate prejudgment.
111. In *CC/Devas (Mauritius) Ltd. et al. v. India*,<sup>102</sup> the respondent challenged two members of an arbitral panel constituted to hear a large telecommunications-related claim against India. Judge Peter Tomka, President of the International Court of Justice and the appointing authority

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<sup>98</sup> *ST-AD GmbH v. Republic of Bulgaria*, Enforcement of Arbitral Award, Higher Regional Court of Thüringen, Jena, Nov. 21, 2013. See Luke Eric Peterson and Katherine Simpson, *Bulgaria Obtains Enforcement of Costs Award; Court Dismisses Investor's Belated Allegations of Arbitrator Bias Due to Issue-Conflict*, Int'l Arb. Reporter, Feb. 14, 2014, at 3 (unofficial translation).

<sup>99</sup> *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007.

<sup>100</sup> Christoph H. Schreuer et al., *THE ICSID CONVENTION: A COMMENTARY* 1205, 1206 (Cambridge University Press, 2<sup>nd</sup> ed. 2009).

<sup>101</sup> See Ziade, *supra*, at 52; Schreuer et al., *op. cit. supra*, at 1206.

<sup>102</sup> *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, UNCITRAL, Decision on the Respondent's Challenge to the Hon. Mark Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator, Sept. 30, 2013.

under the India-Mauritius bilateral investment treaty, decided the challenge. India challenged both the presiding arbitrator, Hon. Marc Lalonde, and the arbitrator appointed by the claimants, Professor Orrego Vicuña, because they had served together on two tribunals (*CMS* and *Sempra*) that took a position on a legal issue (“essential security interests”) expected to arise in the current proceedings. The respondent also cited Professor Orrego Vicuña’s participation in a third award addressing the same issue and in a later article defending his views on the issue. The respondent emphasized that all three arbitral decisions were later annulled or annulled in part.<sup>103</sup>

112. India expressly framed its challenge as based on issue conflict.

The Respondent challenges the appointments of the Hon. Marc Lalonde and Prof. Orrego Vicuña on the basis of a “lack of the requisite impartiality under Article 10(1) of the 1976 UNCITRAL Arbitration Rules due to an ‘issue conflict.’” The Respondent believes that “strongly held and articulated positions by two of three arbitrators in this case on a controversial legal standard of relevance here ‘give rise to justifiable doubts’ as to their impartiality and constitute a valid reason for concern on the part of the Government of India.”<sup>104</sup>

113. Judge Tomka accepted the challenge of to Prof. Orrego Vicuña, but rejected the challenge to Mr. Lalonde, although he had joined with Orrego Vicuña on two of the three Argentine cases involving the “necessity” issue cited in the challenge. In doing so, Judge Tomka recalled that prior decisions had not found scholarly publication to be reason for disqualification. However, in his view, published views, together with other relevant circumstances, could indicate unacceptable pre-judgment.

The conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view. In this respect ... some challenge decisions and commentators have concluded that knowledge of the law or views expressed about the law are not per se sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue

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<sup>103</sup> *Id.* ¶ 3.

<sup>104</sup> *Id.* ¶ 17 (footnotes omitted).

likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.<sup>105</sup>

114. Judge Tomka clearly saw Prof. Orrego Vicuña's vigorous published defense of his views as a contributing factor in allowing the challenge.

In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to Professor Orrego Vicuña's ability to approach the question with an open mind. The later article in particular suggests that, despite having reviewed the analyses of three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept? Professor Orrego Vicuña is certainly entitled to his views, including to his academic freedom. But equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail.<sup>106</sup>

115. It may be that the *Devas* challenge decision found prejudgment by Professor Orrego Vicuña on an issue not clearly presented in the case. The decision emphasized Orrego Vicuña's vigorous defense of his views on *necessity* under the US-Argentine treaty in three prior cases.<sup>107</sup> However, the relevant provision of the India-Mauritius BIT<sup>108</sup> does not contain a necessity requirement; the two treaties' terms differ in this significant respect.<sup>109</sup> The challenge decision appears to equate "necessity" with "essential security interests," the key concept in paragraph 11(3) of the India-Mauritius treaty, but the two concepts are arguably different.
116. Other challenge cases also indicate that arbitrators may put themselves at risk with public comments that move from generalities to the specifics of a case. Prior to being appointed by the claimant, an arbitrator in *Canfor*

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<sup>105</sup> *Devas*, *supra* ¶ 58.

<sup>106</sup> *Id.* ¶ 64.

<sup>107</sup> *Id.* ¶ 53.

<sup>108</sup> *Id.* ¶ 54.

<sup>109</sup> Article 11(3) of the India-Mauritius BIT states: "The provisions of this Agreement shall not in any way limit the right of either Contracting party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests [sic] and animals or plants." Article XI of the Argentina-United States BIT states: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests."

*Corp. v. United States*<sup>110</sup> spoke to a Canadian government council criticizing U.S. conduct in relation to softwood lumber cases, reportedly stating that the United States brought cases challenging Canada's practices relating to softwood lumber exports "because they know the harassment is just as bad as the process." The subsequent challenge proceedings before the ICSID Secretary-General (the Appointing Authority) focused on whether the reported comments were in some way generic, or went to the particular case. The challenged arbitrator reportedly resigned after learning that ICSID would uphold the challenge if he did not do so, so there was no decision by the Appointing Authority. However, in the view of a well-informed observer, the case shows that "a prior, public statement by an arbitrator characterizing a measure at issue in an investment-treaty arbitration can disqualify the arbitrator from serving in that capacity."<sup>111</sup>

## 2. Past or Present Service as Counsel or Advocate

117. Some challenges have alleged forms of inappropriate predisposition in connection with an arbitrator's service as counsel or advocate, either at an earlier time or concurrently with the appointment being challenged.<sup>112</sup>
118. Decision makers generally have not seen *prior* professional advocacy as an indication of inappropriate partiality. In their recent decision in *St. Gobain Performance Plastics v. Venezuela*, the two unchallenged members of an ICSID panel vigorously rejected a challenge based on the third member's prior professional advocacy.

77. ... Claimant's concerns are entirely based on the issue of so-called abstract "issue conflict", i.e. on the assumption that there is a danger that Mr. Bottini will decide a certain issue in favor of Venezuela because he has argued the same, or similar, issues in favor of Argentina in the past and potentially in the future, and in doing so, that he will not have sufficient regard to the merits of this case.

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<sup>110</sup> *Canfor Corp. v. U.S.A.* (consolidated with *Tembec, Inc. v. U.S.A.* and *Terminal Forest Prods. v. U.S.A.* by Order dated Sept. 7, 2005), at <http://www.naftaclaims.com/disputes/us/canfor.htm>.

<sup>111</sup> Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 ARB. INT'L 241, 244 (2005).

<sup>112</sup> The discussion here involves situations in which a counsel's past or present advocacy regarding an issue is alleged to create an inappropriate predisposition regarding that issue. In the author's view, questions involving impartiality regarding specific issues should in general be distinguished from concerns regarding "dual hatting" – lawyers serving both as counsel and arbitrators – which typically involve challenges to impartiality and independence based on other grounds. See *Decision of the Court of Appeals of Brussels in the Eureko case (Judge Schwebel challenge)*, TDM 1 (2009), at [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com); *Challenge to Arbitrator Schwebel Rejected by Belgian Court, Poland Seeks Appeal*, INVESTMENT TREATY NEWS (ITN), January 17, 2007, at [http://www.iisd.org/pdf/2007/itn\\_jan17\\_2007.pdf](http://www.iisd.org/pdf/2007/itn_jan17_2007.pdf).

80. Even if one assumes *arguendo* that Mr. Bottini did in fact vigorously advocate Argentina's positions in other investment treaty arbitrations, the Arbitral Tribunal cannot see why Mr. Bottini would be locked into the views he presented at the time. It is at the core of the job description of legal counsel—whether acting in private practice, in-house for a company, or in government—that they present the views which are favorable to their instructor and highlight the advantageous facts of their instructor's case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case.

81. There is no indication in the file, or otherwise, why this should be any different for Mr. Bottini or why he should not be in a position to freely form a view on the merits presented to him in this arbitration. Absent any specific facts which indicate that Mr. Bottini is not able to distance himself in a professional manner from the cases in which he was acting as counsel, Mr. Bottini has the assumption in his favor that he is a legal professional with the ability to keep a professional distance. The same assumption is granted in favor of many arbitrators who today sit as arbitrators in ICSID but who started their career as counsel or who still act as counsel in such cases.<sup>113</sup>

119. The Hague District Court took a similar view in rejecting a second challenge to Professor Emmanuel Gaillard by Ghana in *Telekom Malaysia Berhad v. Ghana*. In Ghana's first challenge, discussed below, the court called for Professor Gaillard to cease representing a party seeking annulment of an ICSID award addressing indirect expropriation under the Ghana-Malaysia BIT while he was *concurrently* serving as arbitrator in another case where Ghana relied on that award. Professor Gaillard did step aside as advocate in the first case and remained as arbitrator in the second, whereupon Ghana challenged again. The Hague District Court concluded that positions previously taken by Professor Gaillard as advocate in the first case were not reason for his removal as arbitrator in the second.

[W]e see no more ground for challenge... in the fact that *prof.* Gaillard, until recently, was actually involved as an attorney in the said annulment action and, thereby, adopted a position as a lawyer that was contrary to that of petitioner in the pending arbitration. After all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore, it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has

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<sup>113</sup> *St. Gobain Performance Plastics v. Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, Feb. 27, 2013.

previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had *not* defended such a point of view before.<sup>114</sup>

120. Concurrent service as advocate and arbitrator has been more problematic.<sup>115</sup> In the first appearance of *Ghana v. Telekom Malaysia Berhad*<sup>116</sup> in Dutch courts, Ghana challenged the claimant's appointment of Professor Gaillard, based on his simultaneous service as both counsel for a party seeking to annul an ICSID award, and as arbitrator in a second case in which Ghana relied on that award. Applying Dutch law, the Hague District Court ruled that the challenge would be allowed if Professor Gaillard did not withdraw as counsel.

Account should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the RFCC/Moroccan award. This attitude is incompatible with the stance Prof. Gaillard has to take as an arbitrator in the present case, i.e., to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators.<sup>117</sup>

121. A recent decision by Dr. Jim Yong Kim, President of the ICSID Administrative Council, upheld another challenge involving concurrent overlapping roles as arbitrator and advocate in cases involving similar issues and the same respondent State.<sup>118</sup> In *Blue Bank v. Venezuela*, the

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<sup>114</sup> District Court, The Hague, Challenge No. 17/2004, Petition No. HA/RK 2004, ¶ 11 (Nov. 5, 2004) (“Second Telekom Malaysia”). Both *Telekom* cases discussed in Judith Levine, 61 Dis. Res. J. (Feb. 2006).

<sup>115</sup> The Court for Arbitration for Sport has barred the practice. Professor Philippe Sands and others have urged that persons should not serve as both counsel and as arbitrator. See, e.g., Philippe Sands, *Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, (Chester Brown and Kate Miles eds.); See also Dennis H. Hranitzky and Eduardo Silva Romero, *The ‘Double Hat’ Debate in International Arbitration*, NEW YORK LAW JOURNAL, June 14, 2010; Marc Veit, *Investment Treaty Arbitration* in IBA Arbitration Newsletter, Vol. 15, No. 1, March 2010, pp. 22-23, reporting about a panel at the IBA conference concerning “issue conflicts” arising between counsel and arbitrators. But see *Vito Gallo v. Canada*, Challenge Decision of 14 October 2009, ¶ 29 (“As things stand today, and irrespective of the advisability of such a situation, one may, as a general matter, be simultaneously an arbitrator in one case and a counsel in another. There is no need to disavow the possibility of assuming either role.”).

<sup>116</sup> *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, civil law section, provisional measures judge, Challenge No. 13/2004, Petition No. HA/ RK 2004.667, Decision of Oct. 18, 2004, reprinted at ASA Bulletin 186, 192 (2005).

<sup>117</sup> *Id.*

<sup>118</sup> *Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Challenge to José Maria Alonso dated November 12, 2013.

claimants appointed as arbitrator a partner in Baker & McKenzie's Madrid office who also was a member of the firm's international dispute resolution steering committee. Other partners from other Baker & McKenzie offices in New York and Caracas concurrently represented parties in claims against Venezuela said to be similar to those to be considered by the Madrid lawyer.

122. Dr. Kim's decision allowing the challenge is brief, and the reasoning is not clearly explained. However, the decision finds "a degree of connection or overall coordination between the different firms comprising Baker & McKenzie international,"<sup>119</sup> and places weight upon the concurrent involvement of the challenged arbitrators and his partners with similar issues in claims against Venezuela:

In addition, given the similarity of issues likely to be discussed in *Longreef v. Venezuela* and the present case and the fact that both cases are ongoing, it is highly probable that Mr. Alonso would be in a position to decide issues that are relevant in *Longreef v. Venezuela* if he remained an arbitrator in this case.

In view of the above, the Chairman concludes that it has been demonstrated that a third party would find an evident or obvious appearance of lack of impartiality...<sup>120</sup>

123. *Grand River Enterprises v. United States*, a NAFTA case, also involved concurrent service as advocate and arbitrator in matters involving related subject matters. The United States challenged Professor James Anaya, inter alia, on account of his simultaneous service on the arbitral tribunal and "representing or assisting parties in procedures before the Inter-American Commission on Human Rights and before the United Nations Committee on the Elimination of Racial Discrimination." ICSID's Secretary-General concluded that both activities involved "evaluating compliance by the Respondent with its international commitments," and that continued representation of parties in the two international human rights procedures "would be incompatible with simultaneous service" as arbitrator.<sup>121</sup> Professor Anaya subsequently informed ICSID that he was ceasing or had ceased to represent or advise parties in the two human rights bodies, and the challenge was then denied.<sup>122</sup>
124. The panel in *Saint Gobain v. Venezuela* (discussed above) rejected the challenge before it, but agreed that concurrent service as advocate and arbitrator could be problematic.

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<sup>119</sup> *Id.* ¶ 67.

<sup>120</sup> *Id.* ¶¶ 68-69.

<sup>121</sup> Letter from ICSID Secretary-General Ana Palacio to Professor James Anaya, Oct. 23, 2007.

<sup>122</sup> Letter from ICSID Secretary-General Ana Palacio to Professor James Anaya, Nov. 28, 2007.



The Arbitral Tribunal agrees that this constellation can potentially raise doubts as to the impartiality and independence of the concerned individual in his role as arbitrator. It seems possible that the arbitrator in such a case could take a certain position on a certain issue, having in mind that if he took a different position as arbitrator, he could undermine his credibility as counsel as which he is arguing on the same, or very similar, issue.<sup>123</sup>

### 3. Prior Exposure to Similar Facts

125. An arbitrator may learn of significant facts not known to others on the panel, and this may lead to challenges. In *Caratube v. Kazakhstan*,<sup>124</sup> the unchallenged members of an ICSID panel recently accepted a challenge of their colleague on this basis. Their decision indicates concern that the challenged arbitrator may have prejudged issues based on special knowledge gained through prior service as an arbitrator in a related case.
126. In *Caratube*, Kazakhstan appointed an arbitrator in a first case in which the claimant alleged significant misconduct by the State against a company owned by Mr. Kassem Omar, a relative of the Hourani family; the claimants alleged the Hourani family were the subject of a “campaign of persecution” by the government.<sup>125</sup> The tribunal unanimously found no jurisdiction. Kazakhstan then appointed the same arbitrator in a second case involving a different economic sector, but similar allegations of government misconduct directed against the Hourani family’s interests. Following careful review of the two cases’ factual similarities, the unchallenged arbitrators allowed the challenge.

Mr. Boesch “cannot reasonably be asked to maintain a ‘Chinese wall’ in his own mind: his understanding of the situation may well be affected by information acquired in the [prior] arbitration”. That Mr. Boesch would consider it improper to form any opinion based upon external knowledge is not to be doubted and neither is his intention not to do so: it remains that Mr. Boesch is privy to information that would possibly permit a judgment based on elements not in the record in the present arbitration and hence there is an evident or obvious appearance of lack of impartiality as this concept is understood without any moral appraisal: a reasonable and informed third party observer would hold that Mr. Boesch, even unwittingly, may make a determination in favor of one or as a matter of fact the other party that could be based on such external knowledge.

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<sup>123</sup> *Saint Gobain Performance Plastics v. Venezuela*, ICSID Case No. ARB/12/13, *Decision on Claimant’s Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention*, Feb. 27, 2013, ¶84.

<sup>124</sup> *Caratube supra*,

<sup>125</sup> *Ruby Roz Agricol LLP v. Kazakhstan*, UNCITRAL, 1 Aug. 2013, ¶¶ 45-16.

[I]n the light of the significant overlap in the underlying facts between the [prior] case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that – independently of Mr. Boesch’s intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case, Mr. Boesch’s objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that Mr. Boesch would pre-judge legal issues in the present arbitration based on the facts underlying the Ruby Roz case.<sup>126</sup>

127. Somewhat similar issues were raised, if not so decisively resolved, in *EnCana Corporation v. Ecuador*. The respondent there appointed the same arbitrator in two parallel arbitrations involving similar claims under the same bilateral investment treaty, a circumstance that the tribunal thought “would not, in and of itself, be grounds for challenge under Article 10(1) [of the UNCITRAL Arbitration Rules].”<sup>127</sup> However, the common arbitrator would receive all of the pleadings and evidence of all three parties in both arbitrations. This concerned the tribunal:

[A]s soon as Dr. Barrera uses information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties. Furthermore Dr. Barrera cannot reasonably be asked to maintain a “Chinese wall” in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration. The most he can be asked to do is to disclose facts so derived whenever they appear to be relevant to any issue before this Tribunal.<sup>128</sup>

128. Challenges citing an arbitrator’s exposure to relevant facts in a prior case have been rejected when decision makers found sufficient differences between the two situations. In *Participaciones Inversiones Portuarias v. Gabon*,<sup>129</sup> the respondent challenged an arbitrator because of his role presiding in another case against Gabon claimed to involve similar factual and legal issues. In its challenge, Gabon contended:

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<sup>126</sup> *Caratube Int’l Oil Co. v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, Mar. 20, 2014, ¶¶ 89-90.

<sup>127</sup> *EnCana Corporation v. Republic of Ecuador*, Partial Award on Jurisdiction, Feb. 27, 2004, ¶43.

<sup>128</sup> *Id.* ¶ 45.

<sup>129</sup> ICSID Case No. ARB/08/17, Decision on proposal to disqualify an arbitrator, Nov. 12, 2009, 23 ICSID Rev.-FILJ 418 (2009).

[T]he present case and the *Transgabonais* case both have their origin in government decisions in the context of concessions, occurred in the same time and in the same political context, and address similar legal issues. Because of his involvement in the *Transgabonais* case, particularly as Chairman, Professor Fadlallah was able to acquire knowledge of matters of fact and law that other members of the Tribunal do not have, a situation contrary to the principle of due process and equality of the parties. In addition, the respondent contends that Professor Fadlallah has already taken a position on the issues to be decided, in this instance, whether the withdrawal of a concession constitutes an expropriation, creating a conflict of interest warranting recusal, according to the Orange List of the IBA Guidelines on Conflicts in International Arbitration.<sup>130</sup>

129. The two unchallenged members of the Tribunal came to an impasse, so the matter fell to the Secretary General of ICSID as President of ICSID's Administrative Council. The Secretary General was not convinced, finding insufficient evidence that the two cases involved common facts, except insofar as both arose in the broad context of 1990s privatizations.<sup>131</sup> (The decision's wording leaves open the possibility that greater congruence between the two cases' facts might have been cause for concern.) The President also rejected the respondent's contention that the similarity of legal issues in the two cases gave rise to the possibility of partiality.

The fact that in the *Transgabonais* case Professor Fadlallah was potentially exposed as an arbitrator to legal questions similar to those in this case – even if proved – is not in this case a ground for challenge under the Washington Convention. The question whether the 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 decided in a collegiate manner by each tribunal.<sup>132</sup>

130. The decision makers' perception of significant factual differences between past and current cases also figured in a rejected challenge in *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentina*. Argentina contended that an arbitrator's participation in an earlier unanimous award against Argentina showed lack of independence and impartiality. The unchallenged arbitrators rejected the challenge, stressing significant differences between the earlier case and the joined cases before them:

It is also important to underscore that although the Aguas del Aconquija case and the cases being heard by the present Tribunal all involve

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<sup>130</sup> *Id.*, ¶ 15 (unofficial translation).

<sup>131</sup> *Id.*, ¶ 32.

<sup>132</sup> *Id.*, ¶ 33 (unofficial translation).

Argentina as a respondent and arose out of the privatization of water and sewage systems in that country, the two situations are distinctly different. For one thing, the cases being heard by the present Tribunal are linked to the measures and actions taken by the Argentine government to deal with the serious crisis that struck the country in 2001. Those measures and actions were not in any way involved in the Aguas del Aconquija case, which arose out of events some five years earlier. Secondly, the present Tribunal will be required to apply Argentina's bilateral investment treaties with Spain and the United Kingdom, neither of which was applicable in the Aguas del Aconquija. And finally, the application of general international legal principles, as well as the determination of damages (if any), are highly fact-specific, and the facts in the cases being heard by the present Tribunal are far different from those found in the Aguas del Aconquija case.<sup>133</sup>

131. The distinction between special knowledge of facts relevant to the merits and those relevant to the interpretation of a legal provision was key in dismissing a recent challenge to an arbitrator in *İçkale İnşaat Limited Şirketi v. Turkmenistan*.<sup>134</sup> In that case, the claimant challenged Philippe Sands, Turkmenistan's appointed arbitrator, on the grounds that his concurrence in the award against Turkmenistan issued in *Kılıç*<sup>135</sup> meant that he had pre-judged an issue material to the case and had acquired special knowledge of the facts relevant to make a decision on jurisdiction. Claimant relied on the challenge decisions in *CC/Devas* and *Caratube* in this respect.
132. In *Kılıç*, a majority of the tribunal (including Prof. Sands) dismissed all claims for lack of jurisdiction, concluding that Article VII.2 of the Turkey-Turkmenistan BIT on exhaustion of local remedies "constitutes a precondition to the existence of the Tribunal's jurisdiction"<sup>136</sup> and, consequently, that claimant's "failure to give effect to that requirement means that the Tribunal does not have jurisdiction".<sup>137</sup> İçkale submitted that the same provision of the BIT would need to be interpreted by the Tribunal to determine its jurisdiction, a decision that would involve the same facts and issues decided by the *Kılıç* tribunal. The unchallenged members of the tribunal dismissed the challenge on the following grounds:

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<sup>133</sup> *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Proposal for the Disqualification of G. Kaufmann-Kohler, October 22, 2007.

<sup>134</sup> *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, July 11, 2014.

<sup>135</sup> *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, July 2, 2013.

<sup>136</sup> *Id.*, ¶ 10.1.1(a).

<sup>137</sup> *Id.*, ¶ 10.1.1(b).

[T]here is no overlap of facts relevant to the merits of the earlier (*Kılıç*) arbitration and those relevant to the merits of the present case; the overlap merely concerns facts relevant to the interpretation of Article VII(2) of the BIT and related legal issues such as the scope of application of the MFN clause. ... Neither Party however has identified any missing facts [submitted to the *Kılıç* tribunal] that are not available to this Tribunal.

Moreover, even if the interpretation of Article VII(2) of the BIT in the present case will involve review of relevant supporting evidence, the task of the Tribunal will be fundamentally a legal one of interpreting the Treaty; this is the case even when it requires review of the relevant supporting evidence. In the words of the *Caratube* decision, such a task involves the determination of facts that are ‘of a general and impersonal character’ and not specific to the Parties to this particular case, and is therefore unrelated to facts relevant to the merits. Consequently, Professor Sands’ exposure to evidence relevant to the interpretation of Article VII(2) of the BIT cannot constitute a fact indicating a manifest lack of impartiality.<sup>138</sup>

133. Challenges to arbitrators based on concurrent appointments in allegedly related cases were also rejected in *Saba Fakes v. Turkey* and *Electrabel v. Hungary*, although the challenge decisions in those cases are not publicly available. In *Electrabel*, the claimant unsuccessfully challenged Hungary’s party-appointed arbitrator on the grounds that she had concurrently been appointed by Hungary in another ICSID case arising out of similar factual circumstances, the same governmental decree, involved similar power purchase agreements and was also related to the Energy Charter Treaty.<sup>139</sup> In *Saba Fakes*, the claimant unsuccessfully challenged Turkey’s appointed arbitrator on the grounds that he was sitting on another ICSID tribunal involving claims against Turkey. The unchallenged arbitrators rejected the challenge, holding:

The fact that an arbitrator sits in two different cases brought against the same respondent State does not qualify – absent any other objective circumstances demonstrating that the two cases are related in such a manner that the arbitrator’s determination in one case would manifestly affect the challenged arbitrator’s reliability to exercise independent judgment in the other case – as a situation that falls within the scope of

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<sup>138</sup> *İçkale, supra*, ¶¶ 119-120.

<sup>139</sup> Daele (ed.), *supra*, ¶ 7-060 (citing Audley Sheppard, *Arbitrator Independence in ICSID Arbitration*, in Binder et al. (eds.) INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (2010)).

Article 57 of the ICSID Convention and warrants the disqualification of the arbitrator.<sup>140</sup>

#### 4. Prior Opinion Deciding Legal Issues Presented in the Current Case<sup>141</sup>

134. For some critics, the most conspicuous example of inappropriate prejudgment lies in the appointment – sometimes multiple appointments – of arbitrators in cases involving significant legal issues that the arbitrator has decided in a prior case, or that appear in another case in which the arbitrator currently sits.<sup>142</sup> Challenges in such cases rest on the belief that in such circumstances, the arbitrator necessarily will have prejudged that issue, to the possible prejudice of the challenging party.<sup>143</sup>
135. Not surprisingly, some persons who sit regularly on investment treaty panels dispute such arguments. Other knowledgeable observers, including the Chairman of the ICSID Administrative Council and several members of the Task Force, have warned that viewing participation in an earlier award on a legal issue as disqualifying could have adverse consequences for the international arbitration system. In their view, allowing such challenges would eliminate many of the arbitrators with expertise necessary to address complex cases, and, in the view of one writer, would “encourage a race to the lowest common denominator.”<sup>144</sup>
136. As indicated above, in one widely noted recent case, such a challenge was upheld. In *Devas*, Judge Tomka concluded, in light of the particular facts of the case, that Prof. Orrego Vicuña’s commitment to a particular legal position adopted in his prior cases was so deep as to cross the threshold of “inappropriate predisposition.”

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<sup>140</sup> *Id.*, ¶ 7-061 (quoting Challenge Decision of 26 April 2008, ¶ 27).

<sup>141</sup> See Caline Mouawad, *Issue Conflicts in Investment Arbitration*, Transnational Dispute Settlement, Special Edition on Arbitrator Bias edited by Sophie Nappert, Vol. 5, Issue 4, October 2009, p. 13.

<sup>142</sup> See, e.g., THE BACKLASH AGAINST INVESTMENT ARBITRATION, *supra*, p. 209. See also, *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, an on-line report by Corporate Europe Observatory (CEO), available at <http://corporateeurope.org/trade/2012/11/profitting-injustice>.

<sup>143</sup> In an ironic reversal of arguments alleging issue conflict arising from an arbitrator’s prior decisions, Argentina unsuccessfully sought in U.S. courts to set aside an award rendered by a prominent arbitrator on the ground that the arbitrator had previously rendered awards taking different positions regarding Argentina’s necessity defense. The set-aside action thus in effect contended that the arbitrator was bound to follow the same position in each case, and that failure to do so demonstrated arbitrariness, and not open mindedness and lack of bias. *Petition to Vacate or Modify Arbitration Award at ¶ 76, Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108 (D.D.C. 2010) (No. 08-0485 (RBW)), 2008 WL 6047403.

<sup>144</sup> Nappert, *supra*, p. 152.

137. Other decision makers have not accepted such challenges. In *Tidewater Inc. et al. v. Venezuela*,<sup>145</sup> the unchallenged ICSID arbitrators vigorously rejected such a challenge to Professor Brigitte Stern. The claimant moved to disqualify Professor Stern in part because she was sitting in another case involving both the same respondent and interpretation of its investment law, a significant issue in both cases. The unchallenged arbitrators were not persuaded.

In the opinion of the Two Members, the rationale behind the potential for the conflict of interest identified in Section 3.1.5 [of the IBA Rules] relates to cases where, by reason of the close interrelationship between the facts and the parties in the two cases, the arbitrator has in effect prejudged the liability of one of the parties in the context of the specific factual matrix. They agree with the formulation of the French court, cited with approval in Poudret and Besson, that there is ‘neither bias nor partiality where the arbitrator is called upon to decide circumstances of fact close to those examined previously, but between different parties, and even less so when he is called upon to determine a question of law upon which he has previously made a decision.’

The Two Members note that this view has also been adopted in decisions on recent proposals for disqualification within ICSID, in which the outcome and some of the reasons are available on the public record, but the full text of which is available neither publicly nor to the Two Members. [NOTE: *Electrabel SA v. Hungary* and *Saba Fakes v. Turkey*.] The Two Members agree with the observation made in one such case, and reported in an official ICSID publication, that: ‘[i]nvestment and even commercial arbitration would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations. [Citing *Suez* n 18, [36]].<sup>146</sup>

138. In *Universal Compression Int’l Holdings, S.L.U. v. Venezuela*, the Chairman of the ICSID Administrative Council rejected another challenge to the same arbitrator based in part on her participation in several cases claimed to involve similar facts and legal issues:

The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations. As was stated in

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<sup>145</sup> *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/ 10/5), Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010), ¶ 37.

<sup>146</sup> *Id.* ¶¶ 67-,68.

*Suez Sociedad General de Aguas de Barcelona S.A. et al., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case Nos. ARB/03/17 and ARB/03/18 (“Suez”), the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially in another case.

Moreover, to the extent to which similarities among the arguments may exist, Professor Stern’s statement that “the fact of whether I am convinced or not convinced by a pleading depends on the intrinsic value of the legal arguments and not on the number of times I hear the pleading.” It is evident that neither Professor Stern nor her co-arbitrators will be bound in this case by any factual or legal decision reached in any of the three other cases.<sup>147</sup>

139. As noted above, in the *Devas* challenge, ICJ President Peter Tomka, while upholding India’s challenge of Professor Orrego Vicuña, rejected its challenge of Hon. Marc Lalonde, even though he had joined with Orrego Vicuña in two of four earlier decisions cited as by India as indicating likely partiality. Judge Tomka concluded that joining in these opinions, even on an issue thought likely to feature in the current case, was insufficient evidence of partiality.

The Respondent argues that Mr. Lalonde’s participation on the two panels with Professor Orrego Vicuna, both of which discussed the ‘essential security interests’ provision in their decisions, is sufficient to disqualify him from participating on this Tribunal. I, however, find that Mr. Lalonde’s more limited pronouncements on the relevant text are not sufficient to give rise to justifiable doubts regarding his impartiality. Mr. Lalonde has not taken a position on the legal concept in issue subsequent to the decisions of the three annulment committees and thus I can accept his statement that ‘[his] intention is to approach the matter with an open mind and to give it full consideration’ and that ‘[he] would certainly not feel bound by the CMS or the Sempra awards.’ In my view, there is no appearance of his prejudgment on the issue of ‘essential security interests’ which will have to be considered by the Tribunal in the ongoing arbitration.<sup>148</sup>

140. Most recently, the unchallenged members of the *İçkale* tribunal rejected a challenge to Philippe Sands on this ground. As noted above, claimant

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<sup>147</sup> *Universal Compression Int’l Holdings, S.L.U. v. Venezuela*, ICSID Case No ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, May 20, 2011, ¶¶ 83-84.

<sup>148</sup> *Devas, supra*, ¶ 66.



challenged Prof. Sands on the grounds that he had concurred in the majority award in a prior case against Turkmenistan interpreting the exhaustion of remedies requirement of the same treaty at issue in *İçkale*. The unchallenged tribunal members held:

Similarly, unlike *CC/Devas* ... there is no appearance in the present case of ‘pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.’ ... Professor Sands has not been shown to have expressed any views subsequent to the *Kılıç* decision that would raise doubts as to his ability to approach the interpretation of Article VII(2) of the BIT, and the related legal issues, with an open mind.<sup>149</sup>

## 5. Signposts from the Decisions

141. The decisions reviewed above indicate reluctance on the part of decision makers to sustain challenges involving claims of three types of alleged inappropriate predisposition, absent unusual circumstances. Challenges predicated upon past publications, past advocacy as counsel, and participation in prior awards have typically failed.
142. In addressing these three types of challenges, some decision makers and commentators have explained the outcomes, in part at least, by reference to threats to the investment arbitration system that might follow from allowing them. The decision in *Urbaser* stressed the value of continued scholarly publication by arbitrators, implying that allowing that challenge, or others like it, would discourage such writing. Challenges involving prior advocacy have been rejected with admonitions that the way should be open for junior counsel to progress to become senior arbitrators.<sup>150</sup> Decisions rejecting challenges based on prior awards record comparable concerns: the Chairman of the ICSID Administrative Council warned that “the international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations.”<sup>151</sup>
143. These arguments may be correct, but they do not answer the fundamental question underlying concerns about inappropriate predisposition: how to distinguish between unobjectionable forms of predisposition and those triggering reasonable concerns about bias? It may indeed be that allowing challenges alleging issue conflict can chill useful publication or professional development, or dry up the supply of arbitrators with necessary knowledge and experience, all to the detriment of the investment arbitration system. However, these values relate to the welfare

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<sup>149</sup> *İçkale*, *supra*, ¶ 121.

<sup>150</sup> *St. Gobain*, *supra*, ¶ 81.

<sup>151</sup> *Universal Compression*, *supra*, ¶ 83.

of the system; they operate in a different sphere from a party's right to have a claim decided by an impartial arbitrator. A party rightly cares about having her claim fairly decided by an unbiased arbitrator, not about the system's future welfare.

144. Accordingly, it is necessary to consider what the decided cases may indicate about the elusive state of mind called impartiality. Indeed, they offer tentative indications regarding forms of possible predisposition that seem unobjectionable, and others that offer grounds for concern.
145. *The Degree of Commitment.* In two types of challenges discussed above – those involving scholarly writing and past legal representation – the character or depth of arbitrators' commitment to their prior views seems to have played a significant role in decision makers' findings of no inappropriate predisposition. This comes through clearly in unsuccessful challenges involving prior service as legal advocate or adviser. In both the *St. Gobain* challenge and the second *Telecom Malaysia* judicial proceeding, decision makers gave much weight to the professional context – legal advocacy – in which the challenged statements were made. Both decision makers in essence concluded that positions previously urged by advocates on behalf of their clients were not evidence of the speakers' inner convictions, and did not indicate potential bias.
146. A similar thought appears in cases involving professional presentations and scholarly publications, even those – as in *Urbaser* – addressing legal issues presented in the current case. Professional and scholarly writers are not seen as so committed to their prior views as to be immune to contrary argument and evidence. In the view of the *Urbaser* panel:
- [T]he opinions referred to by Claimants have been expressed by Prof. McLachlan in his capacity as a scholar and not in a decision that could have some kind of a binding effect upon him. One of the main qualities of an academic is the ability to change his/her opinion as required in light of the current state of academic knowledge.<sup>152</sup>
147. In the one successful challenge in which a scholarly publication played a role – *Devas* – the arbitrator's article defending his views was considered as one element of a complex set of facts that collectively led the appointing authority to find unacceptable potential for inappropriate predisposition.
148. *Concurrency, Propinquity.* While prior professional advocacy has not been seen to pose unacceptable risks of bias, both the first *Telecom Malaysia* case and *Blue Bank* indicate that concurrently serving as both counsel and arbitrator in matters involving the same party or that are

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<sup>152</sup> *Id.* pp. 16-17, ¶ 51.

otherwise related in some way are problematic. In this context, the IBA Guidelines distinguish whether “facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”<sup>153</sup> This focus on issues coming to light within the timeframe of the proceedings is echoed in the Guidelines’ official commentary, which states that “each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceedings.”<sup>154</sup>

149. The 2004 Guidelines were expressly applied, pursuant to the parties’ agreement, as the standard for determining the challenge to the claimant’s appointed arbitrator in *Perenco v. Ecuador*.<sup>155</sup> In that case, after the tribunal had issued a decision on provisional measures, the arbitrator sat for a published interview. Asked to identify “the most pressing issues in international arbitration,” he observed that Ecuador had declined to comply with the provisional measures orders of two ICSID tribunals, referring in the same answer to “recalcitrant host countries” and to Libya’s expropriations that led to the “hot oil” litigation.<sup>156</sup> The Secretary-General of the Permanent Court of Arbitration upheld the challenge, concluding that an informed third person could reasonably find the arbitrator’s comments to give rise to substantial doubts about his impartiality, even if the comments were not subjectively intended to convey partiality.<sup>157</sup>
150. In setting out the applicable standards under the IBA Guidelines, the Secretary-General’s decision underscored the provisions requiring that an arbitrator remain impartial and independent during the entire arbitration proceeding.<sup>158</sup>
151. This link between the timing of the issue and the appearance of bias has been suggested in other decisions. As the Hague court in the second *Telecom Malaysia* proceeding gently observed:

[A]ccount should be taken of the appearance of *prof.* Gaillard not being able to distance himself to the fullest extent from the part played by him in the annulment action against the arbitral award in the RFCC / Morocco case. This appearance is not altered by the fact that from a legal point of view the grounds for an annulment of an arbitral award are as a

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<sup>153</sup> IBA Guidelines, General Standard 2(b).

<sup>154</sup> IBA Guidelines, Explanation to General Standard 1.

<sup>155</sup> *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Challenge Concerning Judge Charles Brower dated December 8, 2009.

<sup>156</sup> *Id.* ¶ 27.

<sup>157</sup> *Id.* ¶¶ 50-53.

<sup>158</sup> *Id.* ¶¶ 39-41, 44.

rule limited. Moreover, also - or perhaps particularly - in international arbitrations, avoiding such appearances is an important prerequisite for the confidence in, and thereby the authority and effectiveness of, such arbitral jurisdiction.<sup>159</sup>

152. *Specificity/ Proximity to the Current Case.* The likelihood that a challenge will be upheld increases as an arbitrator's comments or experience draw closer to the specific case at hand. Thus, in *Canfor*, the challenge proceedings reportedly centered on whether the arbitrator's public statement criticizing the respondent was somehow generic or addressed the specific dispute. ICSID, the decision maker, reportedly concluded that it was indeed specific to the case, leading to the arbitrator's resignation. Thus, "a prior public statement by an arbitrator characterizing a measure at issue in an investment arbitration" can be disqualifying.<sup>160</sup>

153. In *Caratube*, the unchallenged arbitrators clearly were concerned that their colleague's prior service in a closely related case provided him with information and insight that they did not have, potentially enabling him to make judgments based on elements not in the record.<sup>161</sup> The arbitrator's prior experience made him too close to the current case. He was:

privity to information that would possibly permit a judgment based on elements not in the record in the present arbitration and hence there is an evident or obvious appearance of lack of impartiality as this concept is understood without any moral appraisal: a reasonable and informed third party observer would hold that Mr. Boesch, even unwittingly, may make a determination in favor of one or as a matter of fact the other party that could be based on such external knowledge.<sup>162</sup>

154. By contrast, the *Participaciones Inversiones Portuarias v. Gabon*, the President of the ICSID Administrative Council concluded that the factual differences between the current case and an earlier in which the challenged arbitrator presided were sufficient to overcome the suggestion of prejudgment of the facts.

## V. CONCLUSIONS

155. This report began by asking whether one can or should attempt to define distinctions between forms of predisposition that are unobjectionable, and those offering reasonable grounds for concern. Is there a point at which an arbitrator's views or intellectual predilection cross a line to become

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<sup>159</sup> Second Telecom Malaysia, *supra*, ¶ 7.

<sup>160</sup> Legum, *supra*, p. 244.

<sup>161</sup> *Caratube*, *supra*, ¶ 89.

<sup>162</sup> *Id.* ¶ 89.

“censurable inability to decide a case solely on the basis of its facts and law.”<sup>163</sup> Or is the whole issue unimportant, or the crossing point too difficult to locate?

156. The issue is not one that seems to bedevil national court systems, which – as described above – differ in important respects from investment arbitration. The U.S. Supreme Court saw little reason to fear judicial prejudice of legal issues in a 2002 case.

It is perhaps possible to use the term “impartiality” in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. ... A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. ... Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”<sup>164</sup>

157. In the context of investment arbitration, there is not yet consensus, in the Task Force, among practitioners, or among scholars and commentators, regarding the definition or significance of “issue conflict.” However, discussion in the Task Force revealed consensus, or at least broad agreement, on several important points.

- There is general agreement on the value of continued discussion and analysis, subject to concerns that undue emphasis may encourage unwarranted challenges.
- Several participants believed that “issue conflict” is not helpful terminology, because it assumes a “conflict”. The issue is not whether there is a “conflict” in the familiar sense of “conflicts of interest.” It is whether an arbitrator’s writings, rulings or statements, in the totality of the circumstances, are such as to cause disqualifying<sup>165</sup> doubts about

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<sup>163</sup> Ziade, *supra*, pp. 49-50.

<sup>164</sup> *Repub. Party of Maine v. White*, 536 U.S. 765, 777 (2002).

<sup>165</sup> The requirements for disqualification of course vary under different rules. UNCITRAL Rules Article 10 provides for challenge if circumstances “give rise to justifiable doubts as to the arbitrator’s impartiality...” Under Article 57 of the ICSID Convention, disqualification may be proposed “on account of any fact indicating a manifest lack of the qualities required by paragraph

the arbitrator's impartiality. (The authors endorse this view, which has led to the frequent use of alternative terminology - "inappropriate predisposition" - in this report.)

- Some participants observed that certain issues sometimes brought into discussions of issue conflict (in particular, an arbitrator's recent appointments) might primarily affect the arbitrator's independence, rather than impartiality. The Task Force reached consensus that the core concern in this area is the possibility of bias, not lack of independence. This consensus regarding the central role of bias is reflected throughout this report.
  - Some participants observed that overstating concerns in this area risks creating a "chilling effect" potentially inhibiting the most experienced arbitrators (i.e., those whose professional activities consist largely or entirely of serving as arbitrators) from expressing their views on important disputed legal issues in investment arbitration. It was broadly agreed that the arbitral community must avoid a chilling effect on scholarship and informed commentary, both integral to academic freedom.<sup>166</sup>
  - The arbitral community must also avoid the situation wherein the most experienced arbitrators are most vulnerable to challenge on account of their experience.
  - Assessing any possibility of inappropriate predisposition is highly fact-dependent; the application of key provisions such as "fair and equitable treatment" is very fact-specific. Conversely, academic articles may often be insufficiently fact-specific to give rise to a problem.
158. On some other issues, a wider range of views was expressed. To the extent that inappropriate predisposition is a legitimate problem warranting concern, there was no consensus as to whether the Task Force should simply record the status of the problem or attempt guidelines or other measures to address it. While there was little - if any - support for attempting to devise formal guidelines, some felt that deeper analysis of the issue might assist arbitrators in making appropriate disclosures and counsel and decision-makers in assessing possible challenges.
159. In this regard, it was suggested that the issue could most usefully be framed as an inquiry into the appearance of improper predisposition - how

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(1) of Article 14," that is, "high moral character and recognized competence in [specified fields, including law]... who may be relied upon to exercise independent judgment."

<sup>166</sup> See Stephan Schill, 'Editorial: Arbitrator Independence and Academic Freedom', 15 J. WORLD INVESTMENT & TRADE (2014) 3-8.

would a fair-minded and well-informed outside observer view the situation? An “appearances” standard could indeed relieve decision-makers of the perplexing task of trying to assess an arbitrator’s state of mind. However, this type of analysis may not mesh well with the standards for disqualification under potentially applicable arbitration rules. Notably, while the ICSID challenge decision in *Blue Bank* concerned whether “a third party would find an evidence or obvious appearance of lack of impartiality,”<sup>167</sup> the standard under Article 57 of the ICSID Convention remains the existence “of any fact indicating a manifest lack of the qualities required” by Article 14 of the Convention. However, an assessment of appearances may fit more neatly with the standard under Art. 10 of the (1976) UNCITRAL Rules: whether “circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality of independence.” ICDR Rule 14 tracks this formulation verbatim. LCIA Rule 10 likewise provides for removal where “circumstances exist that give rise to justifiable doubts as to [an] arbitrator’s impartiality or independence.”

160. The analysis of particular cases above bears out views expressed in the Task Force, to the effect that it is not likely to be fruitful to try to articulate “bright line” principles to identify inappropriate predisposition, akin to those in the IBA Guidelines - time periods triggering disclosures, blanket endorsements or preclusions of certain types of activities, and the like. The difficulty of doing so substantially reflects that, as the specific challenge cases illustrate, outcomes in specific situations can be highly fact dependent.
161. In this regard, the cases discussed in this report suggests a small set of factual considerations that seem to have influenced decision makers in assessing claims of inappropriate predisposition in particular cases. The following points attempt to distill these factual considerations; they are descriptive and not prescriptive.
  - Is the context one in which participants can and do change their positions in light of evolving circumstances, new information, or further reflection, as with prior advocacy or scholarship? This factor is in play in cases such as *Urbaser S.A. v. Argentina* that reject challenges based on arbitrators’ prior scholarly writings.
  - Is the context one that may require participants to take at the same time inconsistent positions in related situations involving the interests of a single party or closely related parties? This is the situation of

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<sup>167</sup> *Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Challenge to José Maria Alonso dated November 12, 2013, ¶¶ 68-69.

concurrent service as counsel and arbitrator in related disputes, which clearly troubled decision makers in cases like *Blue Bank*, the first *Telecom Malaysia* case, and the challenge to Professor Anaya.

- Does an arbitrator have some sort of direct personal involvement with a disputed issue affecting his or her ability to address the case on the basis of the parties' arguments, without preconceptions directly relating to the dispute? This last distinction is more elastic and difficult to define. However, decision makers clearly are concerned if circumstances suggest settled predisposition regarding matters at issue in the particular case, as with the challenged arbitrator in the *Canfor* case. Something like this apparently was at work in *Devas*, where a scholarly publication – something not problematic in other contexts – was taken together with other circumstances as indicating inappropriate predisposition regarding a potentially important issue. And, in *Caratube*, the unchallenged arbitrators were clearly concerned that their colleague had learned too much about the matters at issue, knowledge that they did not share.
162. There are two significant obstacles facing further analysis of the many issues involved in assessing “inappropriate predisposition.” The first is the limited number of reasoned challenge decisions publicly available. For understandable reasons, parties and arbitral institutions may be reluctant to allow publication of relevant decisions. The result, however, is that the line defining “inappropriate predisposition” remains elusive in important respects. Only if the results and reasoning of challenge decisions are known can the arbitration community sort out and clarify where the line lies.
163. The Task Force thus sees great value in the increased publication of reasoned challenge decisions. The publication of these decisions by arbitral institutions would benefit arbitrators, future decision makers in challenge cases, and national judges who may be called upon to review a challenge decision. Publication might also help to “counter the impression that disclosure too readily leads to disqualification, and that, contrary to popular belief, the purpose of disclosure is not to facilitate challenges, but rather to *forestall* them.”<sup>168</sup>
164. Such publication would also belie the notion that “administrative” decisions regarding challenges can offer little in terms of useful precedent. One can look in this respect to the challenge to Sir Christopher Greenwood in the arbitration between Mauritius and the United Kingdom regarding the Chagos Islands, in which the dismissal of the challenge was

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<sup>168</sup> Charles N. Brower, *The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator*, BERKELEY J. INT'L L. PUBLICIST, p. 20 (emphasis in original).



- notified to the parties immediately following a hearing on the challenge, but a reasoned decision was later drafted and published.<sup>169</sup> And, as the London Court of International Arbitration's successful publication of detailed summaries of its challenge decisions shows,<sup>170</sup> redaction of sensitive information relevant to challenges may serve to quell otherwise legitimate party-based concerns over publication.
165. These efforts would also fit the larger trend of increased transparency in investor-State dispute settlement. As Judge Gilbert Guillaume has noted, the quasi-precedential value of published decisions in international arbitration makes it “indispensable to rely on it in new branches of law where the norm is yet uncertain.”<sup>171</sup> This sensible step would reduce the current unpredictability of challenge decisions in general (and the resolution of issue conflict challenges, in particular) and contribute toward the timely goal of improving perceptions of the investment arbitration framework. Just as the appearance of bias—not objective bias—is the standard commonly applied in challenge decisions, so too does the Task Force consider that the appearance of legitimacy would follow from the publication of reasoned challenge decisions, to the benefit of the international investment system.
166. The second obstacle involves the contents of challenge decisions themselves. As noted earlier, these decisions sometimes lack clear explanations of the reasoning that has led to the decision. Just as arbitrators are typically required to give reasons for their awards, decision makers in challenges should make every effort to explain the factors that led to their conclusions. At present, some challenge decisions appear to rest upon unarticulated assumptions about arbitrators' states of mind or the manner in which they make decisions. These assumptions may or may not be valid, but fuller explanation of them will enhance the clarity and persuasiveness of the challenge process.
167. As the boundary marking the contours of inappropriate predisposition becomes clearer over time, difficulties will remain in practice stemming from the timing of both disclosures and challenges. Arbitrators generally cannot know, at the time of their appointment, which particular questions will be framed for decision as the case evolves, other than at the most basic level (e.g., that the BIT invoked contains certain provisions). At most the arbitrators may have the benefit of a Request for Arbitration at

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<sup>169</sup> *Arbitral Decision under Annex VII of UNCLOS between the Republic of Mauritius and the United Kingdom*, Reasoned Decision on the Challenge of Christopher Greenwood dated November 30, 2011.

<sup>170</sup> Ruth Teitelbaum, Thomas W. Walsh, “*The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*” (2011) 27 *Arbitration International*, Issue 3, pp. 283–313.

<sup>171</sup> G. Guillaume, *The Use of Precedent by International Judges and Arbitrators*, *J INT. DISP. SETTLEMENT* (2011) 2 (1): 5-23.

the time of their appointment, and sometimes not even that. By the time the submissions are sufficiently well-developed that it is clear how certain doctrinal debates have been framed (and against the backdrop of which case-specific facts), the proceedings are generally well-advanced, making challenges potentially more problematic both in terms of the risk of tactical motivation by a party and, even if not tactically motivated, the more serious consequences of the attendant procedural delay. A requirement of earlier challenges (or earlier fuller disclosures of prior expressed views) may be impracticable given the limited information available to both arbitrators and counsel early in a case.

168. The Task Force hopes that this report makes a useful contribution to the ongoing discussion of these challenging issues among all interested stakeholders.

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