Issue Conflict in ICSID Arbitrations
by M. Hwang and K. Lim

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Issue Conflict in ICSID Arbitrations*

Michael Hwang S.C.** and Kevin Lim***

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* This is an expanded version of a presentation made at the APRAG-ICSID Investment Arbitration Conference on 3
  March 2011 in Seoul, Korea. The authors would like to thank Dr Stephan Schill and Professor Catherine Rogers for
  their helpful comments on an earlier draft of this paper. However, the views expressed in this paper, as well as any
  errors and omissions, are the authors’ own.
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I. Introduction

1. It is self-evident that “[i]n order to maintain its legitimacy in the eyes of its users, and the public at large, international arbitration must ensure that its decision makers are perceived as trustworthy and independent.” The imperative to maintain the procedural fairness and legitimacy of the arbitral process applies equally (if not more so) to investment treaty arbitration—that is, arbitrations brought by foreign investors against host states for the latter’s alleged violation of investment protection standards enshrined in international investment treaties—given that their outcomes can have significant impact on matters of public interest in host states. Removal of potentially or actually biased arbitrators helps safeguard procedural fairness.

2. Nonetheless, while it is right to safeguard procedural fairness, commentators have pointed out that wily defendants may abuse the system and cry bias as a way of delaying proceedings, disrupting the claimant’s case, and pressuring the arbitrator into standing down. Sam Luttrell (“Luttrell”) describes this practice as the “Black Art” of bias challenge.

3. These issues will be discussed in the context of a proposal to disqualify an arbitrator under the ICSID Convention, where the ground (or one of the grounds) advanced by a challenging party is that the arbitrator is affected by “issue conflict”. Issue conflict may arise when an arbitrator has taken, or gives the appearance of having taken, a particular stance on an issue to be decided in the case before him. In such circumstances, concerns may be raised as to his ability to address the issue with an open mind. Issue conflict is thus a form of conflict of interest stemming from the arbitrator’s relationship to the subject matter of the dispute (as opposed to his relationship with the disputing parties). In recent years, accusations of issue conflict have become one of the more popular weapons-of-choice of parties pursuing the disqualification of allegedly biased arbitrators in investor-state arbitrations. The phenomenon of issue conflict thus merits close examination by both tribunal members and parties alike.

II. Defining Bias

4. Before further exposition of the phenomenon of issue conflict (which will follow in Section III), it is first necessary to clarify certain key principles underlying the concept of procedural fairness, and how these principles relate to the disqualification of arbitrators for issue conflict bias.

A. The Relationship Between Issue Conflict and Procedural Fairness

5. Luttrell explains the relationship between issue conflict and procedural fairness as follows:
"Modern principles of procedural fairness are derived from two maxims of law. The first is that no man shall be condemned unheard. The second is that every man has a right to an impartial and independent adjudicator, a corollary of which is that no man may be a judge in his own cause: nemo debet esse judex in propria causa. Abiding by the second will mean that only a person who has no significant interest in the cause, and no preference with respect to the parties involved, may sit in determination of it. It is this second maxim which operates in the context of issue conflict.\(^8\) (emphasis added)

B. Actual and Apparent Bias\(^9\)

6. Bias is a generic term which describes a decision maker who is not impartial or independent with respect to one of the parties to the dispute or its subject matter. This paper is concerned with apparent rather than actual bias, since actual bias will always entitle the aggrieved party to challenge the arbitrator (and indeed, any award rendered by him or her\(^{10}\)), and accordingly is uncontroversial. In addition, the rule against actual bias is distinctly factual and merely requires evidentiary proof: it does not rely on any legal test for its application, thus obviating the need for extensive discussion.

7. Most national arbitration laws (including those of all UNCITRAL Model Law jurisdictions\(^{11}\) and arbitration rules\(^{12}\) recognize an apparent lack of impartiality as a basis for challenging an arbitrator.

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\(^8\) See generally Luttrell, supra note 3 at p. 2.


\(^10\) Articles 53 and 54 of the ICSID Convention provide that arbitral awards of ICSID Tribunals are not subject to review by national courts. However, an award may be annulled by an ad hoc Committee of three persons (appointed by the Chairman of the Administrative Council from ICSID’s Panel of Arbitrators) on a number of grounds, including the ground “that there has been a serious departure from a fundamental rule of procedure” (Article 52 ICSID Convention). The ad hoc Committee in Klockner v Cameroon, ICSID Case No. ARB/81/2, Decision on Annulment (3 May 1985) observed in relation to this ground of annulment that:

> “Impartiality of an arbitrator is a fundamental and essential requirement. Any shortcoming in this regard, that is any sign of partiality, must be considered to constitute, within the meaning of Article 52(1)(d). a "serious departure from a fundamental rule of procedure" in the broad sense of the term "procedure," i.e., a serious departure from a fundamental rule of arbitration in general, and of ICSID arbitration in particular.” (emphasis added)

Though not relevant for the purposes of this paper, it is interesting to note as a matter of contrast with the ICSID regime that, in international commercial arbitration, the test for arbitrator bias justifying the challenge and removal of arbitrators during the course of arbitral proceedings may not be the same where a party seeks (in proceedings before national courts) to set aside or resist enforcement of an award on the ground that it was rendered by an allegedly biased tribunal. This may be due to the pro-enforcement nature of the New York Convention and the national legislation of leading arbitral jurisdictions. The position in America in this regard is discussed in Catherine Rogers, “Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct”, 41 Stan. J. Int’l Law 53 (2005) at 76-81.

\(^{11}\) As Luttrell supra note 3 at p. 14-15 points out:

> “Article 12 of the Model Law reads, ‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.’ In a 1995 arbitration between two states under the UNCITRAL Arbitration Rules, the appointing authority elaborated on the standard created by Article 12(2) Model Law:

> ‘The test to be applied is that the doubts existing on the part of the Claimant here must be justifiable on some objective basis. Are they reasonable doubts as tested by the standard of a fair minded, rational, objective observer? Could that observer say, on the basis of the facts as we know them, that the Claimant has a reasonable apprehension of partiality on the part of the Respondents’ arbitrator?’

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As Lord Hewart CJ in *King, The v Sussex Justices, Ex parte McCarthy* famously declared: “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” Apparent bias in the form of issue conflict will be the focus of this paper.

C. The Concepts of Independence, Impartiality, and Neutrality

8. Many commentators see impartiality and independence as “legally synonymous”, partly because “impartiality” is often paired with “independence” in national laws and procedural rules. However, the better view is that there is a difference between the two notions. Article 3.1 of the IBA Rules of Ethics for International Arbitrators (1987) explains that:

“Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject matter of the dispute. Dependence arises from relationships between arbitrator and one of the parties, or with somebody closely connected with one of the parties.”

9. Independence is thus concerned with a decision maker’s relationships with parties, which affect his or her views or attitudes on the merits of the dispute submitted for consideration. In contrast, when a decision maker is said to lack impartiality, his or her state of mind is directly put in issue. Impartiality means “complete receptivity to the parties’ arguments”: an “impartial” arbitrator “is
one who is not biased in favour of, or prejudiced against, a particular party or its case”.\(^{19}\) “It is therefore logically sound to say that a decision maker who lacks independence will necessarily lack impartiality, but a decision maker who lacks impartiality will not necessarily lack independence.”\(^{20}\) This distinction between independence and impartiality was affirmed in *Suez v Argentina* (2007)\(^{21}\) (“*Suez (No. 1)*”) as follows:

“The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp. Generally speaking independence relates to the lack of relations with a party that might influence an arbitrator’s decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties. Thus Webster’s Unabridged Dictionary defines ‘impartiality’ as ‘freedom from favoritism, not biased in favor of one party more than another.’ Thus it is possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial.”\(^{22}\) (emphasis added)

As issue conflicts stem from the arbitrator’s views regarding the subject matter of the dispute (rather than his relationship with the parties), it raises concerns over his impartiality, rather than his independence.

10. It should be noted that the challenge and conflict disclosure provisions in the ICSID Convention and Arbitration Rules only refer to the arbitrator’s capacity for “independent judgment”, without reference to impartiality.\(^{23}\) This however does not mean that a challenge cannot be mounted on the basis of issue conflicts (which do not call into question the independence of the arbitrator). Professor Schreuer in his commentary on the ICSID Convention notes that the debates “show that the delegates were actually concerned with the impartiality of members of... arbitral tribunals.”\(^{24}\) (emphasis added). To put the matter beyond doubt, recent decisions on arbitrator challenges, such as *Urbaser S.A. v Argentina* (2010)\(^{25}\) (“*Urbaser*”), have held that “both notions of independence and impartiality are to be considered as equally pertinent” in arbitrator challenges under ICSID.\(^{26}\) This is

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20 Luttrell, *supra* note 3 at p. 22.
21 ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007).
22 *Ibid.* at [29].
23 Article 14 of the Convention refers only to the arbitrator’s “capacity to exercise independent judgment”, whilst Rule 6(2) of the ICSID Arbitration Rules, which was recently amended in 2006, requires an arbitrator to sign a declaration which includes, inter alia, a disclosure of his “(a) past and professional, business and other relationships (if any) with the parties and (b) any other circumstance which might cause [the arbitrator’s] reliability for independent judgment to be questioned by a party.” (emphasis added)
25 ICSID Case No. ARB/07/26, Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (August 12, 2010).
26 *Urbaser* at [36]. See also *Universal Compression International 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) at [70] and *OPIC Karimum Corporation v Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) at [44].
because the Spanish version of the ICSID Convention, which has “equally authentic” status as the English and French versions, refers to the “notion of impartiality instead of independence”.

11. Impartiality must also be distinguished from the concept of neutrality. Luttrell explains that “neutrality” is “a term derived from the Public International Law of Armed Conflict, connoting the status of a sovereign entity that refrains from participation in an armed conflict and neither materially assists nor obstructs the belligerents involved in it”. An arbitrator may start off much like a neutral state in a time of war, but he ultimately ends up taking a side. As Sir Robert Jennings observed in Re Judge Broms: “[a]ny judge, though he ought to begin in an impartial stance, is required as a matter of judicial duty eventually and on the basis of the presented arguments to become partial to one side or the other. To remain neutral to the end would be a dereliction of duty...” (emphasis added) In the same vein, Jan Paulsson points out that neutrality cannot be the litmus test for impartiality, for a “litigant will be certain to address perfectly open minds only if he is prepared to be judged by very young children.”

D. Common Tests for Apparent Bias- the Gough, Sussex Justices, and Porter v Magill Tests

12. Luttrell has distilled from the leading arbitral seats of the world three competing tests for apparent bias. They provide useful reference points and conceptual tools to formulate a test for when issue conflict becomes actionable under the ICSID challenge regime. It is suggested that a tribunal called to decide an arbitrator challenge should ask itself: (i) from whose perspective it ought to view the circumstances giving rise to the issue conflict (whether it is from the point of view of the tribunal, or that of the public); and (ii) the evidentiary threshold of proof required for the challenge to be sustainable.

13. The three competing tests, which can be found in English common law, illustrate different approaches to these two issues:

(a) The “reasonable apprehension” test formulated in the judgment of Lord Hewart CJ in King, The v Sussex Justices, Ex parte McCarthy (“Sussex Justices test”). This test requires that “a reasonable observer” have a “reasonable apprehension” that the arbitrator was biased. It can be broken down into two arms: (i) assessment of the impugned conduct from the vantage of a “reasonable observer” (“First Arm”); and (ii) a “reasonable apprehension” or “reasonable suspicion” threshold (“Second Arm”). The majority of common law states follow the

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27 Urbaser at [36]. The Spanish version of Article 14 refers to a person who: “inspirer plena confianza en su imparcialidad de juicio”, i.e. inspires full confidence in his impartiality of judgment. See also Suez v Argentina (No. 1) (2007) at [28]-[30]; Tidewater v Venezuela (2010) ICSID Case No. ARB/10/5, Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010) at [37]; and OPIC Karimum Corporation v Venezuela, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) at [44]
28 Luttrell, supra note 3 at p. 24.
29 Luttrell, ibid. at p. 24.
30 Decision of Appointing Authority to the Iran-United Stats Claims Tribunal (7 May 2001) at pp. 5-6.
32 See generally Luttrell, supra note 3 at pp. 8, 36-37.
33 Luttrell, supra note 3 at pp. 36.
Sussex Justices test (Singapore is one example, as the case of Re Shankar Alan34 and its progeny demonstrate).35

(b) The “real danger” test formulated by the House of Lords in Regina v Gough36 (“Gough test”). The Gough test’s two arms are: (i) assessment of the impugned conduct through the eyes of the court (First Arm); and (ii) a “real danger” threshold (Second Arm).37 The Gough test has a higher evidentiary threshold in its Second Arm, and a different First Arm from the Sussex Justices test (Gough does not use a “reasonable third person” vantage point; it uses the court’s). Gough no longer binds English courts after Porter v Magill38,39 which supplies the third competing test for apparent bias.

(c) The “real possibility” test formulated by the House of Lords in Porter v Magill (“Porter v Magill test”). This test was formulated by Lord Hope as “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”. Porter v. Magill is a “middle ground or ‘compromise’ test between Gough and Sussex Justices”40: its First Arm (reasonable observer vantage point) comes from Sussex Justices, while its Second Arm (“real possibility”) comes from Gough. Luttrell notes that “nearly all of the common law states that followed Gough now follow Porter v Magill.”41

These 3 tests are summarized in table form below:

<table>
<thead>
<tr>
<th>Test</th>
<th>First Arm (Vantage Point)</th>
<th>Second Arm (Threshold)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sussex Justices- The reasonable apprehension test.</td>
<td>Assessment of the impugned conduct from the vantage of a “fair minded and informed observer”</td>
<td>A “reasonable apprehension” (or “reasonable suspicion”) threshold</td>
</tr>
<tr>
<td>Gough- The real danger test.</td>
<td>Assessment of the impugned conduct through the eyes of the court</td>
<td>A “real danger” threshold</td>
</tr>
<tr>
<td>Porter v Magill- The real possibility test.</td>
<td>Assessment of the impugned conduct from the vantage of a “fair-minded and informed observer, having considered the facts”</td>
<td>A “real possibility” threshold</td>
</tr>
</tbody>
</table>

34 [2007] 1 SLR 85. It now appears that the contrary Singapore decision in Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board [2005] 4 SLR 604, which suggested that the Gough and Sussex Justices tests were the same, is no longer followed by the Singapore courts. See Ng Chee Tiong Tony v Public Prosecutor [2008] 1 SLR(R) 900 at [14]-[21]; Mohammed Ali bin Johari v Public Prosecutor [2008] 4 SLR(R) 1058 at [160]-[163] (CA); and Yong Vui Kong v Attorney-General [2011] 1 SLR 1 at [74], [77].
35 Luttrell, supra note 3 at pp. 184-185.
36 [1993] AC 646.
37 Luttrell, supra note 3 at p. 36.
38 [2002] 2 AC 357.
39 Luttrell, supra note 3 at p. 38.
40 Luttrell, ibid. at p. 8.
41 Luttrell, ibid. at p. 8.
14. These tests for apparent bias are by no means exclusive to English common law. European Human Rights Law on bias is for all intents and purposes the same as the Sussex Justices test. The French courts have at one time applied the Gough test, but have now moved on to the Sussex Justices test. In America, despite the confusion caused by the individual judgments issued in Commonwealth Coatings Corp. v Continental Casualty Co., it appears that a test akin to the Porter v Magill test has emerged. Of course, not all jurisdictions’ tests for bias will fall neatly under, or can be approximated to, one of the three English common law tests. For instance, the German courts evaluate bias challenges against a “grave and obvious partiality or dependence” standard, which appears to be an even higher threshold than the “real danger” standard in Gough. Nonetheless, the English common law tests address the crucial issues of vantage point and evidentiary threshold, and they have (as just discussed) substantial similarities with other jurisdictions’ tests for bias, which allows them to operate as meaningful points of reference to analyse the test for actionable issue conflict in ICSID arbitrations. For ease of reference (and not with the intention of disregarding the fact that non-common law jurisdictions may apply the same or similar tests), these tests for bias shall be referred to in their English common law manifestations.

E. What Are the Differences Between Sussex Justices, Porter v Magill, and Gough?

(i) What are the Differences Between the First Arms (vantage point) of the Three Tests?

15. The vantage points from which the impugned decision maker is to be assessed differ as between the Sussex Justices and Porter v Magill tests on the one hand, and the Gough test on the other. The Sussex Justices and Porter v Magill tests use the vantage point of “a notional, reasonable person

42 Luttrell, supra note 3 at pp. 68-73.
43 See the decisions of the Paris Court of Appeal of 2 June 1989 in T.A.I. v S.I.A.P.E. [1991] and the Cour de Cassation in Qatar v Creighton, as explained in Luttrell ibid. at pp. 82-83 and 86-87.
44 393 US 145 (1968).
45 The Restatement Third, The U.S. Law of International Commercial Arbitration, Tentative Draft No. 5 (2011) (forthcoming) states at §4-13 that:

“In light of the confusion over [Commonwealth Coatings Corp. v Continental Casualty Co. 393 US 145 (1968)], and in the absence of more recent guidance, lower federal courts have diverged significantly in attempting to define “evident impartiality.”... [However,][t]he definition of evident partiality adopted by a majority of courts, and by the Restatement, requires an objective, disinterested observer who is fully informed of the facts relevant to the arbitrator’s conduct or alleged conflicts to develop a serious doubt regarding the fundamental fairness of the arbitral proceedings.” (emphasis added)

See also Luttrell supra note 3 at pp. 130-162 (in particular 145 and 162).
46 Bundesgerichtshof decision dated 4 March 1999, ZIP 859 (1999). See also Luttrell, ibid. at pp. 103-104.
47 It is also interesting to speculate where the evidentiary threshold specified by General Standard (2)(b) of the IBA Guidelines on Conflicts of Interest in International Arbitration is pegged at. General Standard 2(b) provides that an arbitrator will not be considered independent or impartial “if facts or circumstances exist... 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...” (emphasis added). General Standard 2(c) in turn explains that “[d]oubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case...” (emphasis added) Since the existence of “justifiable doubts” of the arbitrator’s impartiality or independence on the part of the third party appears to be equated to circumstances which would cause a third party to conclude “that there was a likelihood” of arbitrator bias, one may arguably draw the conclusion (as is implied by the literal meaning of the term “likelihood”) that the tribunal must be satisfied that the third party would regard it to be more likely than not that the arbitrator may succumb to bias. Cf. supra note 11.
48 See generally Luttrell, supra note 3 at pp. 37-39.
with knowledge of the material facts.” Under the Gough test, the vantage point is that of the court itself.50

16. Re Shankar Alan (citing with approval the High Court of Australia’s decisions in Webb v The Queen51 (“Webb”) and Johnson v Johnson52) pointed out that these vantage points differ, since the court does not personify the reasonable observer, who is generally more sensitive to the possibility of bias:

“... the interposition of the fictitious bystander ... lays emphasis on the need to consider the complaint ... not by what adjudicators and lawyers know, but by how matters might reasonably appear to the parties and to the public...

... in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public... The public includes groups of people who are sensitive to the possibility of judicial bias...

... emphas[i]s [on] the court’s view of the facts... place[s] inadequate emphasis on the public perception of the irregular incident.”53

(ii) What are the Differences Between the Second Arms (Threshold) of the Three Tests?

17. Apart from their vantage points, the Gough and Porter v Magill tests are the same. As Luttrell points out, “[t]here is no difference between a ‘real danger’ and a ‘real possibility’; a ‘danger’ is just a possibility of a bad thing – both ratios contain the imperative word ‘real’.”54

18. However, the Second Arms in Gough and Porter v Magill on the one hand (real possibility/real danger), and Sussex Justices on the other (reasonable apprehension), were expressed rather differently. There are conflicting opinions on whether these two tests produce different results.

19. Superior courts in common law states that have rejected Gough in favour of Sussex Justices (and Luttrell) are of the view that the Second Arms of the two tests “diverge considerably”.55 In Webb, the High Court of Australia expressed the opinion that applying the “real danger” and “real possibility” standards may come dangerously close to replacing the doctrine of disqualification for apparent bias with that of actual bias, as those standards are focused on the possibility (rather than the appearance) of bias. The Sussex Justices test of “reasonable apprehension” (or reasonable suspicion) avoids this pitfall as it connotes a stronger focus on perception (as opposed to the possibility) of bias. Similar opinions were shared by South African and Singaporean courts (see Re Shankar Alan at [71]-[75]).
20. For our purposes, the more important distinction between the real possibility/real danger standard, and the reasonable apprehension/suspicion standard, is the standard of proof. Luttrell explains this well:

“While a suspicion (or apprehension) may be reasonably founded insofar as it has been formed in the mind of a person as a result of his or her exercise of the faculty of reason, the facts upon which the suspicion is based may not necessarily interact to produce the result that the apprehended outcome is a real possibility/danger... the word ‘real’ is an adjective that draws on a parent concept of ‘reality’, a term we use to describe a state of affairs arising out of the observable interplay of material elements that are actual and true. Without the word ‘real’, there is harmony between ‘possibility’/‘danger’ and ‘reasonable apprehension’. This is because the coming into fruition of a state of affairs that has been suspected or apprehended by a person as a result of his or her use of logic and reason will necessarily be possible – if it were not possible, then no logical suspicion or apprehension of it could have been formed ab initio. However, the [Gough/Porter v. Magill attachment of the word ‘real’ to the word ‘possibility’/‘danger’] renders this interaction imperfect because the possibility/‘danger’ must then satisfy the requirements of reality, which exceed those of logic and reason, and include external component circumstances. The evidentiary burden imposed by the ‘real possibility’ test is, therefore, markedly higher than that which an applicant must discharge to make out a reasonable apprehension under Sussex Justices.” (emphasis in original)

21. Accordingly, the reasonable suspicion standard is a lower standard of proof than that of the real possibility/real danger standard. As held by various judicial authorities, the latter standard is itself lower than a standard of proof on a balance of probabilities.56

F. The Challenge Procedure and Test for Bias under ICSID

22. Whilst the Stockholm Chamber of Commerce, ICC, and UNCITRAL rules are frequently used in investment arbitration,57 these instances are set aside to focus this paper on ICSID Convention arbitration under the ICSID Arbitration Rules, as they are the most important governing rules in investment arbitration.

(i) ICSID Convention and Arbitration Rules58

23. ICSID proceedings are a “special case” because, “when an ICSID tribunal is convened, it does not take a municipal seat”.59 The specific result of the exclusion of the procedural law of the seat is that

56 See Re Shankar Alan citing Webb approvingly at [74]. See also Re Shankar Alan at [49]-[51].
57 See Luttrell, supra note 3 at pp. 221-222:
   “In ICSID arbitration, the parties are afforded considerable autonomy in the selection of procedural rules – the Washington Convention allows the parties to use rules other than the ICSID Rules (the most common alternative being the UNCITRAL Rules). It is important to note, therefore, that ICSID Rules do not necessarily apply to proceedings conducted at ICSID. The UNCITRAL Rules, for example, are often selected in arbitration provisions within BITs, with the outcome that the Article 10(1) “justifiable doubts” standard for challenge applies in resulting ICSID proceedings. Similarly, the ICSID Arbitration Rules do not apply to NAFTA Chapter 11 claims arbitrated at ICSID under the Additional Facility. When the UNCITRAL Rules/Model Law standard is applicable, an ICSID tribunal may consider the doctrine and case law of Model Law states.”
58 See generally Luttrell, ibid. at pp. 214-215, 218, 220-221, 224.
59 Luttrell, ibid. at p. 214. See Articles 52 and 53 of the ICSID Convention.
the fundamental rules of procedural fairness that apply to ICSID proceedings are not derived from municipal law, but rather from non-national sources. These sources are the following (in order of priority):

(a) the ICSID Convention;

(b) the ICSID Arbitration Rules; and

(c) ICSID jurisprudence.

24. Article 57 of the ICSID Convention (read with Rule 9(1) ICSID Arbitration Rules) governs the substantive grounds for challenging an arbitrator. It provides that a party may propose disqualification of an arbitrator on the basis “of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14”. Article 14(1) in turn requires that appointed arbitrators be “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment” (emphasis added). Thus, “[t]he inter-operation of Articles 14(1) and 57 produces a rule that an ICSID arbitrator may only be challenged for bias where he or she manifestly lacks the capacity to exercise independent judgment.” The key word is manifest, which appears to set an “extremely high bar for challenging an arbitrator” (this will be discussed further below at [28]-[33] and [65]-[70]). No other arbitral institution or law uses the same test (they usually merely require an applicant to show that there are “justifiable doubts” as to the arbitrator’s impartiality and independence).

25. The procedure for challenge is as follows. Article 58 of the ICSID Convention provides that the co-arbitrators, in the first instance, shall decide on the proposal to challenge an arbitrator. Where the challenge is made to a member of an annulment committee, the same rule applies. However, where a challenge relates to a sole arbitrator or to a majority of the tribunal, or where two unchallenged co-arbitrators cannot agree, the Chairman of the ICSID Administrative Council will decide on the proposal. Generation Ukraine v Ukraine (2003) suggests that, if the Chairman himself is disqualified, the matter will be referred to the Secretary-General of the PCA for final determination.

(ii) ICSID Jurisprudence on the Test for Bias under ICSID

26. As will be mentioned below (at [64]), there is a de facto doctrine of precedent whereby ICSID decisions often cite judgments of previous ICSID panels as persuasive authorities for the conclusions

60 Luttrell, supra note 3 at p. 215.
61 Luttrell, ibid. at p. 218.
62 Luttrell, ibid. at p. 224.
63 Luttrell, ibid. at p. 220.
66 ICSID Case No. ARB/00/9, Award (16 September 2003).
67 Luttrell, supra note 3 at p. 221.
reached.\textsuperscript{68} The same would apply to ICSID challenge decisions,\textsuperscript{69} hence, the relevance of examining ICSID jurisprudence on the matter.

27. When examining the relevant case law, a central question to keep in mind is this: “\textit{which test for bias does Article 14/57 of the ICSID Convention most closely resemble: Sussex Justices, Porter v Magill, or Gough?}”\textsuperscript{70} Unfortunately, the \textit{travaux preparatoires} to the ICSID Convention do not define or elucidate the meaning of “manifest” in Article 57. The vantage point to be adopted is also not clarified in Article 57; it makes no reference to the perspective of either the court or the reasonable observer.

28. Luttrell argues that the test created by the ICSID Convention is, “\textit{in its black letters, closest to Gough}” (more on this below at [35]-[38] and [65]-[70]).\textsuperscript{71} Schreuer is of the view that “manifest” operates as an evidentiary condition that “\textit{imposes a relatively heavy burden of proof on the party making the proposal [to disqualify]}”,\textsuperscript{72} and Luttrell notes that “\textit{similar opinions were expressed by certain state courts with respect to the Gough ‘real danger’ test.}”\textsuperscript{73} However, Luttrell observes that, even though \textit{Amco Asia v Indonesia} (1982)\textsuperscript{74} (“\textit{Amco}”) interpreted Article 57 as imposing a strict evidential burden in line with the Gough test, “\textit{the current trend is away from ‘real danger’ and towards the Sussex Justices test [i.e. ‘reasonable apprehension’ of bias from the viewpoint of the ‘fair minded and informed observer’]}.”\textsuperscript{75} A general examination of ICSID challenge decisions is useful at this point to illustrate Luttrell’s view, before a final evaluation of this issue is made (below at [65]-[70]).

29. \textit{Amco} (1982): “\textit{In stressing the significance of the Article 57 expression ‘manifest’, the tribunal held that, under the Washington Convention the challenger must prove not only the facts that indicate a


\textsuperscript{69} Most of the ICSID challenge decisions discussed in this paper cite and rely heavily upon earlier ICSID challenge decisions as authority for the conclusions reached. Even those decisions that refuse to follow earlier authorities either distinguish such authorities from the case at hand, or provide detailed reasoning for regarding the earlier authorities’ analysis to be lacking. See for instance OPIC Karimum Corporation \textit{v} Venezuela, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) at [47], which departs from part of the holding in the earlier challenge decision in \textit{Tidewater \textit{v} Venezuela} ICSID Case No. ARB/10/5, Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010) (on the issue as to whether an arbitrator’s prior multiple appointments as arbitrator (in unrelated disputes) by one of the parties in dispute may give rise to the perception that the arbitrator lacks independence \textit{vis-à-vis} his or her appointing party). This implies that ICSID tribunals recognize a \textit{prima facie} presumption that earlier ICSID challenge decisions have persuasive value. In this regard, see also Stephan Schill, “Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator” 23 \textit{Leiden J. Int’l Law} (2010) 401 at 417, who similarly notes that: “... inconsistent [investment treaty arbitration] decisions... deal, often extensively, with conflicting prior decisions, either by distinguishing cases on the basis of facts or by reading down a holding on a point of law from a rule to a principle or from a principle to an exception... Cases of dissent therefore show that, despite the disagreement about the interpretation of specific issues, investment tribunals have a deeply rooted perception... of the need for consistency...” See further Schill at 426-427.

\textsuperscript{70} Luttrell, \textit{supra} note 3 at p. 225.

\textsuperscript{71} Luttrell, \textit{ibid.} at p. 225.

\textsuperscript{72} Schreuer, \textit{supra} note 24 at p. 1202.

\textsuperscript{73} See for instance \textit{Webb} at 71.

\textsuperscript{74} ICSID Case No. ARB/81/1, Decision on Proposal to Disqualify an Arbitrator (June 24, 1982).

\textsuperscript{75} Luttrell, \textit{supra} note 3 at p. 225.
lack of independence, but also that the lack is ‘highly probable’, not just ‘possible’ or ‘quasi-
certain’.76 The authors’ view is that the test laid down in Amco may approximate the Gough test, but is set at a still higher threshold of probability than “real danger” (see further discussion, at [37]-[3838] and [65]-[70] below).

30. **Vivendi Universal v Argentina (2001)**77 (“Vivendi”): The test applied by the deciding tribunal members was: “whether a real risk of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party”78 (emphasis added). This formulation of the Article 14/57 ICSID Convention test is a combination of the Second Arms of Gough and Sussex Justices— “it merges ‘real risk’ with ‘reasonable apprehension’”.79 As explained above (at [17]-[21]), these two expressions cannot co-exist. This formulation of the Article 14/57 test is therefore of limited practical value. However, it does mark the transition towards the less onerous Sussex Justices test from the high watermark in Gough.80

31. **Suez (No. 1) (2007):** The tribunal observed obiter that the terms of Article 57 (in particular, the word “manifest”) implied a requirement that the challenger lead “evidence that a reasonable person would accept as establishing the absence of the qualities required by Article 14”.81 This is an approximation of the First Arm of the Sussex Justices test, which departs from the Gough “reasonable court” vantage point.

32. **Urbaser (2010):** The tribunal did say at [40] of its decision that: “the crux of the analysis is whether the opinions expressed by Professor McLachlan qualify as indicating a manifest lack of the qualities required to provide independent and impartial judgment” (emphasis added). Nonetheless, the tribunal formulated the test as follows:

> “an appearance of such bias from a reasonable and informed third person’s point of view is sufficient to justify doubts about an arbitrator’s independence or impartiality…. what matters is whether... a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the... arguments presented by the Parties...”82 (emphasis added)

This seemingly equates the word “manifest” with the threshold of “reasonable apprehension”, and emphasises the reasonable observer’s view as the applicable vantage point, in line with both arms of the Sussex Justices test.

33. On the basis of the case law referred to above, one may be tempted to agree with Luttrell’s hypothesis that the current trend is “away from ‘real danger’ and towards the Sussex Justices test [i.e. ‘reasonable apprehension’ of bias from the viewpoint of the ‘fair minded and informed observer’]”.83 Urbaser in particular appears to provide support for Luttrell’s view. Nonetheless, it should be noted that Luttrell did not have the opportunity to consider the recent decisions of

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76 Luttrell, supra note 3 at p. 226.
77 ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (October 3, 2001).
78 Vivendi at [25].
79 Luttrell, supra note 3 at pp. 227-229.
80 Luttrell, ibid. at p. 229.
81 Suez (No. 1) at [40].
82 Urbaser at [43]-[44].
83 Luttrell, supra note 3 at p. 225.
*Tidewater v Venezuela* (2010)\(^{84}\) ("**Tidewater**") and *Universal Compression International Holdings, S.L.U. v Venezuela* (2011)\(^{85}\) ("**Universal Compression**"), which may mark a return to the *Amco* interpretation of “manifest” that contradicts the Second Arm of *Sussex Justices*. In *Tidewater*, the tribunal held that the challenger must “establish facts that make it obvious and highly probable, not just possible, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment”\(^{86}\) (emphasis added). Similarly, in *Universal Compression*, the tribunal held that “[i]t is generally acknowledged that the term ‘manifest’ means ‘obvious’ or ‘evident’, and that it imposes a ‘relatively heavy burden of proof on the party making the proposal’”,\(^ {87}\) citing Schreuer’s commentary on the ICSID Convention\(^ {88}\) and *Suez (No. 1)*\(^ {89}\) as authority for this proposition (Luttrell referred to *Suez* (No. 1) as supporting *Sussex Justices*’ First Arm, but it is important to note, as *Universal Compression* points out, that *Suez* (No. 1) also contradicts *Sussex Justices*’ Second Arm). It will be argued below (at [35]-[38] and [65]-[70]) that this is the correct interpretation of the term “manifest” in Article 57 of the ICSID Convention.

(iii) The Relevance of the IBA Guidelines on Conflicts of Interest to the Challenge Regime under ICSID

34. As noted above (at [27]), the ICSID Convention and Arbitration Rules do not provide guidance on the circumstances that may give rise to a “manifest” lack of the capacity for “independent judgment”. The IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**") may usefully serve to fill this gap. They adopt “a traffic light approach to situations that may create conflicts of interest”\(^ {90}\): green, orange, and red lists respectively describe relationships that do not create a conflict, may create a conflict, and certainly create a conflict.\(^ {91}\) Multiple tribunals applying the ICSID Convention have recognised the persuasive authority of the IBA Guidelines in assessing arbitrator bias.\(^ {92}\) The 2010 International Arbitration Report by Fulbright & Jaworski LLP (Issue 2) ("**Fulbright Report**") further notes that the frequent reliance by investment tribunals on the IBA Guidelines may indicate a “hardening of these soft-law norms” into what might in the future become “part of a corpus of international law of arbitration”.\(^ {93}\)

35. However, a note of caution should be sounded in respect of the Fulbright Report’s portrayal of the IBA Guidelines’ status, specifically in respect of arbitrations held under the ICSID Convention and Arbitration Rules. First, certain recent cases (cited in the Fulbright Report) which relied heavily upon

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84 ICSID Case No. ARB/10/5, Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010).
85 ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (May 20, 2011).
86 *Tidewater* at [39] See also *Suez v Argentina*, ICSID Case No. ARB/03/17, Decision on Second Proposal for Disqualification (May 12, 2008) at [29]; *Amco*; and *OPIC Karimum Corporation v Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) at [45].
87 *Universal Compression* at [71].
88 Schreuer, supra note 24 at p. 1202.
89 *Suez* (No. 1) at [34].
91 Ibid.
92 See for instance *Alpha Projektholding GMBH v Ukraine* (2010) ICSID Case No. ARB/07/16, Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (March 19, 2010) at [56]; *Tidewater*; *Participaciones Inversiones Portuarias SARL v. Gabon* ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator (November 12, 2009); and *Hrvatska Electroprivreda v. Slovenia* ICSID Case No. ARB/05/24, Decision on Disqualification, (May 6, 2008).
93 Fulbright Report, supra note 90 at p. 6.
the IBA Guidelines do not support the general proposition that the Guidelines have such great persuasive force in the context of ICSID arbitrations. Some of these cases were ad-hoc investment arbitrations applying the UNCITRAL Arbitration Rules (ICS Inspection and Control Services Ltd v Argentina (2009)94 and Gallo v Canada (2009)95). The challenge regime under the UNCITRAL Arbitration Rules is not analogous to that under the ICSID Convention, since the former only requires that there be “justifiable doubts” as to the arbitrator’s impartiality or independence (which is in pari materia with General Standard 2(c) IBA Guidelines96), as opposed to the “manifest” lack thereof required under Article 57 ICSID Convention, which is a more stringent requirement than the justifiable doubts standard.97 ICSID tribunals have noted such differences.98 In the same vein, the ICSID case of Perenco Ecuador Ltd v Ecuador (2009)99 (”Perenco”) (cited in the Fulbright Report), which relied heavily on the IBA Guidelines, is not indicative of their persuasive value in most ICSID proceedings, since the parties had expressly (and unusually) agreed that arbitrator challenges would be resolved by application of the IBA Guidelines.100

36. Second, the other ICSID decisions cited in the Fulbright Report, as well as more recent decisions (including Tidewater), took great pains to clarify that the IBA Guidelines are merely “guidelines and not a binding instrument”, which at best only “furnish a useful indication” of the circumstances giving rise to apparent bias.101 This is because the IBA Guidelines “do not override any applicable national law or arbitral rules chosen by the parties”,102: tribunals “must ultimately apply the legal standard laid down in the [ICSID] Convention itself”, which “mandates a general standard for disqualification which differs from the ‘justifiable doubts’ test in the IBA Guidelines”.103 This was

95 UNCITRAL Arbitration Rules, IIC 404 (2009).
96 General Standard 2(c) IBA Guidelines is itself in pari materia with Article 12(2) UNCITRAL Model Law, as stated in Explanation (b) of General Standard 2 IBA Guidelines.
97 See infra notes 103 and 112 and its accompanying text, and [65]-[70] below.
98 See infra notes 103 and 112 and its accompanying text, and [65]-[70] below.
99 ICSID Case No. ARB/08/6, PCA Case No. IR-2009/1, In the 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 in ICSID Case No. ARB/08/6 (December 8, 2009).
100 It should be noted that it is doubtful whether parties may derogate from the ICSID challenge regime by contrary agreement. As pointed out by Markert, supra note 65 at p. 252, the language of Articles 14 and 57 of the ICSID Convention do not indicate that these provisions are subject to contrary agreement by the parties, in contrast with, for instance, Articles 42, 46, and 47 of the Convention, which provide that the parties may “agree otherwise”.
101 Tidewater at [41]-[42]; and Urbaser at [37]. See also Universal Compression at [74] (“It is important to note that this decision is taken within the framework of the [ICSID] Convention and is made in light of the standards that it sets forth. The IBA Guidelines are widely recognized in international arbitration as the preeminent set of guidelines for assessing arbitrator conflicts. It is also universally recognized that the IBA Guidelines are indicative only—this is the case both in the context of international commercial and international investment arbitration.” (emphasis added)) and OPIC Karimum Corporation v Venezuela, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) at [48] (“We accept that the IBA Guidelines are not conclusive for the purposes of the decision that we are required to make on this challenge, and that the examples contained in the IBA Guidelines are both non-exhaustive and not in themselves decisive of whether or not the standards set out in the guidelines for impartiality and independence of arbitrators have been met. The IBA Guidelines do, however, indicate that multiple appointments represent an issue relevant to impartiality and independence and, in our opinion, are correct in so doing.” (emphasis added)).
103 Tidewater at [43]; and Urbaser at [37]. See also Sheppard supra note 64 at pp. 132-138.
most likely why the tribunal in *EDF International SA v Argentina* (2008)\(^{104}\) ("*EDF*"") expressed some doubts as to whether the IBA Guidelines were applicable to the Article 57 ICSID Convention challenge before it,\(^{105}\) and discussed the Guidelines *only to the extent that* the tribunal felt they did not, on their own terms, support the challenging party’s contentions based on them.\(^{106}\) The tribunal in *Urbaser* even found that certain provisions of the IBA Guidelines cited by the challenging party (which claimed the existence of issue conflict arising from the challenged arbitrator’s previously expressed academic opinions\(^{107}\)) were not helpful, as they were "unclear or totally ambiguous".\(^{108}\) In addition, *Urbaser* observed that the distinction drawn in the IBA Guidelines between “general” and “specific” academic views in the Guidelines (which were placed on the green and orange lists respectively) did not "make much sense".\(^{109}\)

37. In the final analysis, *Alpha Projektholding GMBH v Ukraine* (2010)\(^{110}\) ("*Alpha*") perhaps best illustrates the extent to which the IBA Guidelines should apply to ICSID proceedings. In *Alpha*, the Respondent challenged the Claimant appointed arbitrator, Dr Yoram Turbowicz, on the basis of, *inter alia*, the following grounds: (i) 20 years before, Dr Turbowicz had been classmates with the claimant’s counsel at Harvard Law School (although there had been no contact between the two since then); and (ii) Dr Turbowicz failed to disclose this fact to the parties. Ground (i) was rejected applying Articles 14/57 ICSID Convention and the “manifest” standard, notably without reference to the IBA Guidelines.\(^{111}\) Ground (ii) required discussion of Rule 6(2) ICSID Arbitration Rules, which was recently amended (in 2006) to add to the pre-existing clause (a) (which provided that the arbitrator should disclose "past and present professional, business and other relationships (if any) with the parties") a new clause (b) requiring disclosure of "any other circumstances that might cause [the arbitrator’s] reliability for independent judgment to be questioned by a party." After extensive consideration of the relevant drafting history, the tribunal in *Alpha* concluded that the disclosure parameters in Rule 6(2)(b) ICSID Arbitration Rules were meant to adopt a “justifiable doubts” standard, such as that encapsulated in Article 9 UNCITRAL Arbitration Rules, rather than to follow the “much higher ‘manifest’” threshold required to sustain a challenge under the ICSID Convention.\(^{112}\) Thus, the IBA Guidelines were “instructive” in interpreting Rule 6(2)(b), as they also adopted the “justifiable doubts” standard incorporated in Rule 6(2)(b).\(^{113}\) To this extent, the IBA Guidelines were given weight and applied to determine whether Dr Turbowicz should have disclosed

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\(^{104}\) ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (June 25, 2008). This case was cited in the Fulbright Report *supra* note 90 at p. 7 as a case where the Tribunal “decided to take [the IBA Guidelines] into account although it did not base its decision on them”.

\(^{105}\) A matter which was disputed by the parties: the Respondent in making the challenge relied heavily on the IBA Guidelines in its submissions, whilst the Claimant denied their applicability to ICSID arbitrations. The tribunal in *EDF* at [100] held that:

"Respondent’s argument with respect to the duty to investigate is equally misplaced. The provisions of IBA General Standard 7(c) (*were they applicable*) speak to “reasonable” enquiries of “potential” conflicts and “facts ... that may cause ... independence to be questioned.” No evidence has been presented that Professor Kaufmann-Kohler had reason to suspect any potential conflict or fact that would call into question her independence." (emphasis added)

\(^{106}\) *EDF* at [100], [107], and [111]-[115].

\(^{107}\) This is discussed below at [51]-[53].

\(^{108}\) *Urbaser* at [42].

\(^{109}\) *Urbaser* at [52].

\(^{110}\) ICSID Case No. ARB/07/16, Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (March 19, 2010).

\(^{111}\) *Alpha* at [42]-[45].

\(^{112}\) *Alpha* at [55].

\(^{113}\) *Alpha* at [56].
his historical association with the Claimant’s counsel (the tribunal found there was no need for disclosure of such fact).\(^{114}\) Crucially, the tribunal went on to reject the Respondent’s contention that one could simply impute the “justifiable doubts” standard in Rule 6(2) ICSID Arbitration Rules into Articles 14(1) and 57 of the ICSID Convention. This was because there exists a “clear distinction between the parameters of the duty to disclose and the standard required to uphold the merits of a particular challenge.”\(^{115}\) Applying the “manifest” threshold, the tribunal rejected ground (ii) as a basis for challenging Dr Turbowicz.

38. In light of the ICSID jurisprudence referred to above, the authors come to the following conclusions on the applicability of the IBA Guidelines to the ICSID challenge regime. The IBA Guidelines are more directly applicable to the disclosure requirements under the ICSID Arbitration Rules (Rule 6(2)(b)), as opposed to the challenge of arbitrators under Articles 14 and 57 (Alpha). The Guidelines are only at best illustrations of conflicts of interest which an ICSID tribunal may take into account in determining whether a challenge ought to be sustained (Tidewater and Urbaser). They may not in fact assist in assessing certain circumstances of conflicts of interest (EDF and Urbaser) and, even where they do provide some useful indication, it remains crucial that the tribunal must go on to critically examine the facts of each case in order to determine whether the requisite “manifest” threshold has been satisfied under Article 57 (Alpha). It is therefore probably too optimistic, given the absence of stronger textual support of the Guidelines’ principles in the ICSID Convention and Arbitration Rules, to agree with the Fulbright Report authors’ opinion that the IBA Guidelines could in the future attain the status of customary international law in the context of the challenge regime under ICSID.

### III. Issue Conflict

39. As already mentioned, issue conflict refers to a form of bias arising from the arbitrator’s relationship with the subject matter of the dispute (rather than the parties). Three types of situations may give rise to issue conflict: first, where the arbitrator is concurrently acting, or has previously acted, as counsel in another case raising the same or similar issues as the one before him (“Type A”); second, where the arbitrator is to act as counsel in a subsequent case raising similar issues (“Type B”); and third, where the arbitrator had rendered prior awards as arbitrator dealing with (or had expressed a personal opinion on) a disputed issue in the case before him (“Type C”). The case law examined below illustrates these various situations. While some of these cases applied institutional rules or municipal law on arbitrator challenges, which differ from the ICSID challenge rules, they nevertheless serve the purpose of illustrating the various types of issue conflict that may arise in ICSID arbitrations.

A. **Arbitrator is Concurrently Acting, or has Previously Acted, as Counsel in Another Case Raising Analogous Issues (Type A)**

40. An arbitrator may act concurrently as counsel in a different case raising the same or similar legal issues. On such facts, Professor Gaillard was challenged as an arbitrator in the UNCITRAL arbitration proceedings of Telekom Malaysia v Republic of Ghana (2004)\(^{116}\) (“Telekom Malaysia”). Ghana argued that Professor Gaillard could not discharge his role as arbitrator with impartiality

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\(^{114}\) Alpha at [60]-[63].

\(^{115}\) Alpha at [64].

because, as counsel in another case (Consortium RFCC v Kingdom of Morocco (2003)\textsuperscript{117}), he was arguing for the annulment of an award that Ghana was relying on in Telekom Malaysia. After the challenge was dismissed by both the tribunal and the Permanent Court of Arbitration (the institution administering Telekom Malaysia), Ghana further challenged Professor Gaillard in the District Court of The Hague. Under the lex arbitri, “the District Court considered that advocating the annulment of an ICSID award while assessing its merit as an arbitrator in the UNCITRAL proceeding required incompatible attitudes”.\textsuperscript{118} The Court held as follows:

“... 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 attitude Prof. Gaillard has to adopt 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. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Moroccan award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid the appearance of not being able to keep these two parts strictly separated.”\textsuperscript{119}

41. The Court instructed Professor Gaillard to resign as counsel within ten days if he wanted to remain as arbitrator in the Ghana case, which he proceeded to do. Ghana was still dissatisfied, and repeated its challenge to Professor Gaillard. A different District Court judge at The Hague rejected the challenge. The Court “determined that a position previously advocated by an arbitrator when acting as counsel was not to be attributed to him or her as a personal belief”.\textsuperscript{120} It specifically held as follows:

“... it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has 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.”\textsuperscript{121}

42. In principle, the second decision appears to be correct. As Nasib Ziade (“Ziade”) points out, “[t]o argue a point does not mean that one necessarily believes in its soundness”.\textsuperscript{122} “[A] counsel’s role is one of advocacy and not necessarily one of personal conviction, and arguments put forward by a

\textsuperscript{117} ICSID Case No. ARB/00/6, Award (22 December 2003).
\textsuperscript{118} Ziade, supra note 7 at p. 56.
\textsuperscript{120} Ziade, supra note 7 at p. 51.
\textsuperscript{121} Challenge No. 17/2004, Petition No. HA/RK 2004.788, Decision of the District Court of The Hague of 5 November 2004. Though not relevant for present purposes, it is interesting to note that the court rejected the additional argument mounted by Ghana that Professor Gaillard should be removed from the tribunal because he had taken part in the tribunal’s decisions before he had ceased acting as counsel in Consortium RFCC v Kingdom of Morocco. The court held that there was no risk of an appearance of bias relating to any material aspect in dispute between the parties, because of the “mere procedural and logical character” of the decisions taken, and “[t]he fact that there [had been] no adverse consequences” for Ghana.
\textsuperscript{122} Ziade, supra note 7 at p. 51.
counsel in presenting a case do not necessarily reflect his or her personal beliefs". However, our view is that the same arguments should also apply in the situation where the arbitrator is acting concurrently as counsel (the scenario dealt with in the first District Court decision). Just because an arbitrator is concurrently advocating a position on an issue before him in another case as counsel does not, on the sole basis of the simultaneity of the advocacy, mean that such advocacy represents the arbitrator’s personal beliefs.

B. Arbitrator is to Act as Counsel in a Subsequent Case Raising Analogous Issues (Type B)

43. In Eureko v. Poland (2005) (“Eureko”), the three-member tribunal handed down its partial award on liability in August 2005, finding by a majority that Poland was in breach of the bilateral investment treaty between the Netherlands and Poland. In October, Poland served a notice of recusal on Arbitrator Judge Schwebel. Poland failed at first instance on certain grounds of bias. On appeal, Poland advanced the additional objection that Judge Schwebel was co-counsel in an unrelated ICSID arbitration (Vivendi), in which Judge Schwebel had cited the Eureko award as authority for certain propositions he was making on behalf of his clients in that matter. The issue was whether Judge Schwebel's impartiality as arbitrator (in Eureko) was cast into doubt because he may have been tempted to render an award that would aid his arguments as counsel in Vivendi. The Belgian Court of Appeal declined to rule on Poland’s additional objection due to Poland’s failure to adhere to Belgian procedural rules in making its challenge.

44. Despite the absence of a decision on the matter, Eureko usefully illustrates a problem of issue conflict bias which is unique to investment arbitration— the problem of a small pool of practitioners who are “involved in substantive rule-making as arbitrators and substantive rule-using as counsel” (see [64] below for further discussion).

C. Arbitrator has Rendered Prior Award(s) Dealing with, orExpressed a Personal Opinion on, a Disputed Issue in the Case Before Him (Type C)

45. Where the arbitrator has previously rendered an award deciding similar issues raised in another case before him, a party in the second arbitration may raise concerns that the arbitrator has already prejudged the recurring legal issues. However, case law has firmly and consistently indicated that such circumstances alone are insufficient to raise issue conflict concerns over the arbitrator’s impartiality.

123 Ziade, supra note 7; and Peter and Lemarie, supra note 1 at p. 6.
124 UNCITRAL Arbitration Rules, IIC 98 (2005), Partial Award.
125 Luttrell, supra note 3 at pp. 92-93.
126 Luttrell, supra note 3 at p. 93.
127 An unreported ICC arbitration involving the first author demonstrates the opposite view. The first author was appointed as the chairperson of an LCIA arbitration between an international bank and a Ruritanian customer arising from a dispute over a series of foreign exchange transactions governed by English law, but relating to Ruritanian transactions and subject to the ISDA master swap agreement. The international bank was represented by Law Firm A and the Ruritanian party by Law Firm B. The defence was breach of certain Ruritanian foreign exchange laws, which in turn violated Article VIII 2(b) of the Bretton Woods Agreement and invalidated the transactions under English law. The tribunal decided (as a preliminary issue) that this defence would succeed. The case then settled. Shortly thereafter, the first author was nominated by the same Law Firm B which had acted for the Ruritanian customer in the LCIA arbitration as its party appointed arbitrator in an ICC arbitration between a second international bank and another Ruritanian party. The dispute in the ICC arbitration also involved a foreign exchange derivative transaction which was based on the ISDA master swap agreement and governed by English law. This
46. In *Participaciones Inversiones Portuarias SARL v Gabon* (2009), Gabon challenged the claimant’s appointed arbitrator, Professor Fadlallah, on the ground that he was the president of another tribunal which had recently issued an award against Gabon dealing with the same issue of expropriation of concession agreements. The Chairman of the Administrative Council dismissed the challenge, holding that Professor Fadlallah’s exposure in the previous case to legal questions similar to those raised in the present did not constitute a ground for disqualification, and sustaining the challenge on such basis “would hamper the proper functioning of every judicial system where judges frequently find themselves in similar positions”.

47. Similarly, in *Suez* (No.1), the tribunal rejected Argentina’s Article 57 challenge to Professor Kaufmann-Kohler, holding obiter that it was without merit since participation in an unanimous award against Argentina six years earlier (*Vivendi*) was not “in and of itself obvious evidence” that she lacked independence or impartiality. It observed that:

“[a] finding of an arbitrator’s or a judge’s lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.”

48. Moreover, as Audley Sheppard points out, the tribunal emphasised that there were material differences between the *Suez* (No.1) and *Vivendi* cases:

“the claim in the Suez case related to measures and actions taken by the Argentine government during the financial crisis of 2001 while the Vivendi case arose out of the privatization of water and sewage systems some five years prior to the 2001 crisis—the cases involved different BITs with different States; and the different factual circumstances required different applications of the ‘general international legal principles’ and a different ‘determination of damages’.”

49. A more recent decision on Type C issue conflict is *Tidewater*. The tribunal addressed the argument by *Tidewater* that one of Arbitrator Professor Brigitte Stern’s other pending arbitrations second international bank was represented by the same Law Firm A which had acted for the first international bank in the LCIA arbitration. The skeletal Request for Arbitration and the Response indicated that the Ruritanian party was invoking the same Bretton Woods defence as in the LCIA arbitration, but without describing what those breaches were. When accepting his nomination, the first author disclosed to the parties his previous participation in the LCIA arbitration, even though it was not apparent at the time that the issues in the two cases were similar (other than the common Bretton Woods defence). Law Firm A objected to the first author’s appointment on, *inter alia*, the grounds that he was predisposed to a particular outcome and/or might have a closed mind in relation to a key question of legal principle that was in dispute. Without giving any reasons (as is customary) the ICC declined to confirm his appointment. This matter is discussed in greater detail in a TDM Article (soon to be published; citation forthcoming).

128 ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator (2009).
130 Fulbright Report, *ibid.* at p. 8.
131 *Suez* (No.1) at [34].
132 *Suez* (No.1) at [36].
133 Sheppard *supra* note 64 at pp. 153-154.
134 See [33] above.
would decide an identical issue expected to arise in the *Tidewater* case and amount to a prejudging of that issue. The challenge was rejected. First, the co-arbitrators nodded approvingly to a passage in an unreported case: 135 “Investment 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.” 136 Second, “[n]either Professor Stern, still less the present Tribunal as a whole, will be bound in the present case by any finding which the Brandes Tribunal [the Tribunal in Professor Stern’s other pending Venezuelan arbitration] may arrive at as to the issue of Venezuelan law referred to.” 137 Finally, the tribunal had no reason to doubt Professor Stern’s statement that “the fact of whether I am convinced or not convinced by a pleading depends upon the intrinsic value of the legal arguments and not on the number of times I hear the pleading.” 138

50. The 1989 *Vakauta v Kelly* 139 High Court of Australia case illustrates when dicta in a judgment may give rise to actionable issue conflict. In this case, a judge was removed for expressing preconceived and unfavourable views about defence experts in the body of his judgment. The Court considered that, “by characterising one particular expert's opinion as ‘negative as it always seems to be…’, the judge had failed to set aside his prejudices in consideration of the evidence.” 140

51. A similar issue conflict might arise if the arbitrator, through scholarly writings or speeches and interviews, took positions on issues disputed in a case before him or her. As the Fulbright Report notes:

“In investment treaty arbitration, practice and academia are often intertwined. Arbitrators and counsel are frequently prolific writers, commenting on various legal issues… A recurring question is whether academic views expressed through writings and teachings could be used to challenge an arbitrator’s impartiality…” 141

52. It is the general view that general doctrinal affinities or disinclinations, even if controversial, are not disqualifying *per se*. 142 In one ICSID case (unpublished), a challenge on the basis of an arbitrator’s doctrinal writings was dismissed because:

“... 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

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136 *Tidewater* at [68]. The unreported case cited in *Tidewater* goes on to state that the deciding arbitrators did not consider it possible to “outlaw widespread practices so long accepted by users and practitioners generally, particularly when such practices have helped to establish a growing body of specialist and experienced international arbitrators, so long desired by users.” See Ziade, supra note 7 at pp. 55-56.

137 *Tidewater* at [69]. See also *Universal Compression* at [83], which dismissed another Type C issue conflict challenge to Professor Stern in similar fashion.

138 *Tidewater* at [71]. See also *Universal Compression* at [84], which dismissed another Type C issue conflict challenge to Professor Stern in similar fashion.

139 (1989) 167 CLR 568.


141 Fulbright Report, supra note 90 at p. 9.

142 Ziade, supra note 7 at p. 51.
issue on which the opinion is expressed may arise in the arbitration. It is not because a scholar has expressed certain general and abstract opinions 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.”

53. In the same vein, the Article 57 ICSID Convention challenge to Professor McLachlan was dismissed in Urbaser. The decision is instructive and merits more extensive examination. In Urbaser, the Claimants argued that Professor McLachlan’s views on two legal issues relevant to the case (interpretation of the most-favoured-nation clause and the necessity defense), which were expressed in a book that he co-authored, favoured the Respondents’ position, and therefore showed that he had already prejudged the issue, casting doubt on his impartiality. The Claimants argued that he “cannot issue an opinion contrary to that which he published and thus face criticism that he was inconsistent or possibly ‘heretical’ himself.”

In dismissing the challenge, the tribunal held that:

“... the 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 arbitration... a [contrary] position... would [be]... incompatible with the proper functioning of the arbitral system under the ICSID Convention... the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter... The wide spreading of ICSID awards... has greatly contributed to dense exchanges of views throughout the world on matters of international investment law. This is very largely considered as a positive contribution to the development of the law and policies in this segment of the world’s economy. It goes without saying that such a debate would be fruitless if it did not include an exchange of opinions given by those who are actually involved in the ICSID arbitration process... Such an approach would lead to the disqualification of many arbitrators, including in particular those who have acquired the greatest experience, thus leading to the paralysis of the ICSID arbitral process.”

54. In the tribunal’s view, “what matters is whether the opinions expressed... are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties.” This would not be made out where the arbitrator merely expressed a view on “the interpretation of legal concepts in isolation from the facts and circumstances of a particular case” which is at a “more general level of legal interpretation... leav[ing] open a more in-depth analysis of each... issue in a particular arbitral dispute.” Finally, the tribunal noted that Professor McLachlan’s opinions were expressed:

“... 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. The Two Members have no doubt that Professor McLachlan reaches such high standard of science and conscience.”

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143 Ziade, supra note 7 at p. 51.
144 Urbaser at [41].
145 Urbaser at [45]-[46], [48], [54].
146 Urbaser at [44].
147 Urbaser at [42].
148 Urbaser at [56].
149 Urbaser at [51].
55. Professor McLachlan’s defence is also worth mentioning. He expressed the view that:

“... It is important to distinguish the tasks of the legal scholar from that of the arbitrator. When writing a book or article, the scholar must express views on numerous general issues of law, based on the legal authorities and other material then available to him. A scholar of any standing should always be prepared to reconsider his views in light of subsequent developments of the law or further arguments. However, and in any event, the task of the arbitrator is completely different. It is to judge the case before him fairly as between the parties and according to the applicable law. This can only be done in the light of the specific evidence, the specific applicable law and the submissions of counsel for both parties...”

56. However, as Ziade points out, “[v]iews previously expressed by an arbitrator may... give rise to a successful challenge if they relate to the merits, or deal with the particular facts, of the dispute at hand.”

57. In Perenco, the remarks of Judge Charles N. Brower (who was acting as arbitrator in that case) made in an interview after commencement of proceedings resulted in his recusal as arbitrator. Therein, in reference to Ecuador’s resistance to compliance with interim measures ordered by two ICSID tribunals, Judge Brower said: “but when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoked cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on.” Ecuador’s challenge was sustained by the PCA Secretary General, who noted that: “The combination of the words chosen... and the context in which he used them have the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to [the arbitrator’s] impartiality.” (Interestingly, in a separate case, Tanzania Electric Supply Co. Ltd v Independent Power Tanzania Ltd (2001), Judge Brower was even challenged because of the views expressed by his law clerk on legal issues relating to the case in an online blog, and resigned from his position as arbitrator after his co-arbitrators were unable to agree on the challenge.) Similarly, in Canfor Corp v United States, a NAFTA arbitration, the US successfully induced withdrawal of the claimant-appointed arbitrator, who, with reference to US measures related to the import of Canadian softwood lumber, which were the subject of the Claimant’s complaint in the arbitration, stated that: “This will be the fourth time we have been challenged. We have won every single challenge on softwood lumber, and yet they continue to challenge us with respect to those issues. Because they know the harassment is just as bad as the process.”

58. The case law therefore shows that the central question to keep in mind is this (as held by the English Court of Appeal in Locabail v Bayfield): is it the case that "on any question... the judge had

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150 Urbaser at [31].
151 Ziade, supra note 7 at p. 51.
152 Fulbright Report, supra note 90 at p. 9.
153 ICSID Case No. ARB/98/8, Award (22 June 2001).
154 See Markert, supra note 65 at pp. 264-265.
156 See Sinclair and Gearing, supra note 140 at p. 2.
157 Locabail v Bayfield was summarised by Sinclair and Gearing, ibid. at p. 1 as follows: “In Locabail, the first-instance judge – who sat only part-time – had, as counsel, previously published a series of articles demonstrating himself to be very sympathetic to the position of claimants in personal
expressed views... in such extreme and unbalanced terms as to throw doubt on his ability to try the
issue”. With the public interest attached to the arbitration of high-profile investment treaty disputes,
all arbitration practitioners “should avoid expressing themselves in terms that indicate a
preconceived view, such that others may reasonably perceive them as being incapable of deciding an
issue with an open mind.”\(^{158}\) However, this by no means suggests that arbitrators should remain
silent outside the hearing room. It has been correctly observed that "advocate[ing] absolute extra-
judicial silence... would silence our most experienced practitioners, our most learned professor-
arbitrators, and our up-and-coming younger lawyers, leaving ourselves unable to share the benefits
of our collective research, contemplation or experience."\(^{159}\) Surely, arbitrators should not be
disqualified merely because of their extensive expertise in the area, "which they cannot simply jettison in order to decide the case".\(^{160}\) As Urbaser and Professor McLachlan point out, an arbitrator
is not bound by his or her previous writings, and is always free to change his or her mind, in light of
the parties’ submissions and the specific facts of the case.\(^{161}\)

D. Why Issue Conflicts are Prevalent in International Investment Arbitration\(^{162}\)

59. While issue conflicts can arise in any type of arbitration, the problem has been particularly acute in
investment arbitration. This is due to a number of characteristics peculiar to investment arbitration
which distinguishes it from commercial arbitration.

60. First, investment arbitration awards are usually published and therefore exposed to careful public
scrutiny. This is a phenomenon largely absent from commercial arbitration, in which awards remain
confidential, or are anonymised if published. The publication of investment arbitration awards has
enabled the current trend of parties challenging an arbitrator on the basis of arguments which he has
made or upheld in previous cases.

61. Second, weighty matters of public interest are often at stake in investment arbitrations, which renders
it more vulnerable to public criticism where there exist circumstances creating the perception that
arbitrators may be biased. Dr Stephan Schill explains that:

... unlike a commercial dispute, investment treaty arbitrations often involve questions about the
scope and limits of the host state’s regulatory powers in view of its investment treaty obligations,
including, for example, disputes concerning limits of emergency powers, regulatory oversight

\(^{158}\) Sinclair and Gearing, supra note 140 at p. 4.
\(^{159}\) Sinclair and Gearing, ibid. at p. 4.
\(^{160}\) Peter and Lemarie, supra note 1 at p. 6; and Bishop and Reed, supra note 19 at p. 412.
\(^{161}\) However, a cynical observer may question whether, to a reasonable and informed observer, how likely it is that
an eminent scholar might be disposed to change a view which he or she had previously publicly espoused.
\(^{162}\) See generally Judith Levine, "Dealing with Arbitrator ‘Issue Conflicts’ in International Arbitration"
Transnational Dispute Management, Vol. 5, Issue 4 (July 2008); Fulbright Report, supra note 90 at p. 6; and Dennis
H. Hranitzky and Eduardo Silva Romero, “The ‘Double Hat’ Debate in International Arbitration” NY Law J. (June
14, 2010).
over public utility companies and the tariffs they charge, control and banning of harmful substances, protection of cultural property, or implementation of non-discrimination policies. As regards subject matter, investment treaty disputes thus involve public law rather than private law issues... For example, an investment dispute preventing a state from lowering water or electricity tariffs because of promises made to the investor could have the effect of cutting off parts of the host state’s population from access to that fundamental utility... Decisions by arbitral tribunals on these matters may directly affect the social fabric in the host state and are thus of public interest.”

62. Third, most of the arbitrations between foreign investors and states are complex and call for highly experienced arbitrators. However, the pool of such arbitrators is not large, and the arbitrators are often practitioners who also serve as counsel in similar cases. It is therefore “not unusual in the investment arbitration world for an individual to be called upon to rule on an issue as an arbitrator on which he or she has taken or will later take a position as counsel to a party in another case.”

63. Fourth, investment arbitrations frequently turn on the interpretation of investment treaties containing similar provisions and may repeatedly involve the same State parties. For this reason, a narrow range of recurring legal issues are often raised in investment arbitrations. As explained by Ziade,

“This [recurring legal issues] include jurisdictional questions, such as the definition of ‘investment’, and the use of a most-favored nation clause. They also comprise substantive questions, such as the requirements for direct or indirect expropriation, the minimum standards of treatment in international law that include the notions of fair and equitable treatment and full protection and security, and the concept of discriminatory acts. The status of BITs as international treaties also attract application of similar treaty interpretation rules.”

64. Fifth, unlike in commercial arbitration, arbitrators in investment arbitrations perform a more significant law making role. Private arbitration proceedings generally involve the application of domestic law tied to a municipal legal system, which the arbitrator has little or no opportunity to shape. On the other hand, investment arbitrations involve the application of an evolving body of international law, which arbitrators are in a position to influence through their awards. This is a result of the application by tribunals of what academics describe as a de facto doctrine of precedent. It is de facto rather than de jure, because there is no system of binding precedent in international law (the

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163 Schill, supra note 69 at 410-412.
164 Hranitzky and Romero, supra note 162.
165 As explained by Ziade, supra note 7 at p. 50:

“These [recurring legal issues] include jurisdictional questions, such as the definition of ‘investment’, and the use of a most-favored nation clause. They also comprise substantive questions, such as the requirements for direct or indirect expropriation, the minimum standards of treatment in international law that include the notions of fair and equitable treatment and full protection and security, and the concept of discriminatory acts. The status of BITs as international treaties also attract application of similar treaty interpretation rules.”

166 McLachlan, Shore, and Weiniger, supra note 68. See also Luttrell, supra note 3 at pp. 239-241, who observes that:

“Leading investment arbitration practitioners have confirmed the trend towards precedent: according to Philippe Fouchard, Emmanuel Gaillard, and Berthold Goldman, ICSID awards ‘naturally serve as precedents’. Albert Jan van den Berg has observed that ‘there is a tendency to create a true arbitral case law’ in the field of investment disputes; in 2005, Pierre Duprey noted the similarity between investment arbitration awards and judicial case law.”

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Statute of the International Court of Justice\textsuperscript{167} and ICSID Convention\textsuperscript{168} specifically excludes any such doctrine, yet tribunals regularly cite and follow earlier awards when they determine the same legal issues.\textsuperscript{169} Hence, in arbitration, the rule-makers are also the rule-users; “counsel one day, arbitrator the next.”\textsuperscript{170} It follows that, if an arbitral award has weight as a precedent, the award “may assume a commercial value when an arbitrator ‘changes hats’ to counsel: he or she may get the benefit of a rule that he or she made.”\textsuperscript{171} There is thus the risk of arbitrators (perhaps unconsciously) “generating case law for their clients’ benefit” in a later case.\textsuperscript{172} This specifically gives rise to Issue Conflict Type B (referred to above at [43]-[44]).

IV. What Should be the Test for Bias in Assessing Issue Conflict under ICSID?

65. Having examined the nature of issue conflict in the preceding section (Section III), we discuss in this section what should be the test for actionable issue conflict bias under the ICSID Convention. The central issue is this: where does mere intellectual predilection, which typically would be non-censurable, cross the line “into a censurable appearance of an inability to decide a case solely on the basis of its facts and law”?\textsuperscript{173} It is a difficult question, as it requires: (i) striking the right balance between the demands of procedural fairness on the one hand, and procedural efficacy and efficiency on the other; (ii) whilst adhering to textual limitations imposed by the ICSID Convention, particularly the requirement that a sustainable challenge requires demonstration of the arbitrator’s “manifest” lack of independent judgment (bearing in mind that its provisions are to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”\textsuperscript{174} (emphasis added)); and (iii) giving due regard to the persuasive value of ICSID case law. Recalling the two arms of the Gough, Sussex Justices, and

\textsuperscript{167} Article 59 provides that: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

\textsuperscript{168} As observed by McLachlan, Shore, and Weiniger, supra note 68 at [3.85]: “Article 53(1) of the ICSID Convention provides that: ‘The award shall be binding on the parties...’ Schreuer interprets this to exclude a doctrine of precedent within the ICSID system, that is to say, the award is binding on the parties and on no-one else. This point has also been made by treaty tribunals.”

\textsuperscript{169} As observed by Schill, supra note 69 at 414-416: “Arbitral tribunals, in turn, actively engage in building a system of treaty-overarching precedent in investment treaty arbitration, partly reacting to the parties’ expectations, partly driven by their own sense of direction in the interpretation of international treaties based on past experience and practice... Although no system of binding precedent exists in investment treaty arbitration, references to earlier investment treaty jurisprudence can be found in virtually every recent investment treaty decision or award... While arbitral tribunals emphasize the lack of de jure stare decisis, they nevertheless systematically turn to earlier decisions for guidance, in particular when it comes to interpreting and applying the standard substantive investor’s rights that are contained in virtually all BITs... The reliance on precedent is also shared by the parties to investment treaty arbitration and partly a reaction to their expectations. The Tribunal in El Paso v. Argentina, for example, stated that it would ‘follow the same line [as earlier awards], especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent’. The way the parties to the disputes rely on precedent therefore suggests the emergence of expectations that tribunals will decide cases not by abstractly interpreting the governing BIT, but by embedding their interpretation within the discursive framework created by earlier investment treaty awards.”

\textsuperscript{170} Luttrell, supra note 3 at p. 240.

\textsuperscript{171} Ibid.

\textsuperscript{172} Ibid.

\textsuperscript{173} Ziade, supra note 7 at p. 49-50.

\textsuperscript{174} As is required by Article 31(1) of the Vienna Convention of the Law of Treaties.
Porter v Magill tests, one is prompted to consider in formulating a suitable test for actionable issue conflict: first, what vantage point should be used (First Arm); and second, what should be the evidentiary threshold (Second Arm).

66. Luttrell advocates the Gough test for assessing arbitrator bias under the ICSID Convention.175 Accordingly, he proposes that assessment of the impugned arbitrator be based on the facts available to the tribunal and its analysis of such facts (First Arm). This sets a higher bar for a bias challenge, as a judicial inquiry of the likelihood of bias presents a more stringent analysis than that of the reasonable, well-informed member of the public, who may be “sensitive to the possibility of judicial bias”.176 After all, one cannot “attribute to the lay observer judicial qualities of discernment, detachment and objectivity which judges take for granted in each other.”177 Luttrell also favours the evidentiary threshold set in Gough (Second Arm), that of real danger/possibility of bias, which imposes a more onerous burden on the challenger than the Sussex Justices test of reasonable apprehension. Luttrell’s support for the Gough test is motivated by his concern over what he sees as “an emerging ‘Black Art’ of bias challenge”.178 Other commentators add that a lower bar for arbitrator challenges may limit the pool of qualified arbitrators available for any given case, and deter practitioners from making controversial contributions to matters of academic debate.179 As a matter of interpretation of the ICSID Convention, Luttrell further argues that the Gough test best approximates the test for actionable bias created by the ICSID Convention, since (i) neither Article 14 nor Article 57 establishes a third person reasonable observer vantage point; (ii) the term “manifest” is a usage of administrative law that implies court vantage; and (iii) the use of the word “manifest” to preface the word “lack” in Article 57 elevates the ICSID standard above that of a simple lack of capacity for independent judgment into the realm of evidentiary probability.180

67. We disagree with Luttrell’s view that assessment of bias under the ICSID challenge regime should be conducted from the tribunal’s perspective (as required by the First Arm of the Gough test), and would argue for the application of the reasonable observer’s vantage point instead. First, the literal terms of Articles 14 and 57 of the ICSID Convention cannot be read as supporting the application of the tribunal’s vantage point. Article 14 and Article 57 are in fact silent on the matter of the applicable vantage point—in themselves, they neither support nor reject the application of either the tribunal’s or the reasonable observer’s vantage point. Mere usage of the word “manifest” in Article 57 is in our view an unlikely indication (contrary to Luttrell’s suggestion) that the Washington Convention drafters intended to import a usage of municipal administrative law with its implications of court vantage into an international treaty, when it was most likely only intended to refer to the requisite evidentiary threshold for sustaining an arbitrator challenge, as its plain meaning provides. Second, even though the literal terms of Articles 14 and 57 are of no assistance in determining the applicable vantage point, the object and purpose of the ICSID Convention strongly suggest that it is the public’s perception of the impugned arbitrator which should govern the assessment of bias under Articles 14 and 57. The preamble and the drafters of the ICSID Convention indicate that its raison d’être is to encourage investment arbitration as a means of fostering “international cooperation for economic development”,181 through the “creation of an institution designed to facilitate the settlement of

175 Luttrell, supra note 3 at pp. 225, 242-247.
176 Dicta of the High Court of Australia in Johnson v Johnson, which was cited approvingly by Re Shankar Alan.
177 Sengupta v Holmes, Times 19 Aug. 2002 at [10], cited in Re P (a barrister) [2005] 1 WLR 3019 at [46].
178 Luttrell, supra note 3 at pp. 246, 279.
179 Peter and Lemarie, supra note 1 at p. 6.
180 Luttrell, supra note 3 at p. 225.
181 Preamble ICSID Convention.
disputes between States and foreign investors... [so as to] promot[e] an atmosphere of mutual confidence.”

Ignoring the public perception of ICSID arbitrators’ probity in the evaluation of actionable bias under the ICSID Convention may give rise to suspicions of procedural unfairness, erode host states’ confidence in the resolution of their investment disputes through ICSID arbitration, and possibly encourage further denunciation of the Convention. As Lord Denning once said (whose view is equally applicable to ICSID arbitrations which are subject to intense public scrutiny): “The court looks at the impression which would be given to other people... The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’”. Third, many of the ICSID challenge decisions reviewed above expressly adopted a third party observer’s perspective in assessing whether the impugned arbitrator’s alleged appearance of bias justified his or her removal, and there has been no other decision (of which the authors are aware) which disapproves of this approach. Finally, Luttrell’s policy reasons for advocating the tribunal’s vantage point (which imposes a higher bar for challenging parties) are unconvincing. A higher bar for arbitrator challenges will not necessarily reduce unmeritorious challenges, since unscrupulous parties seeking to delay proceedings will still challenge arbitrators on tenuous or manufactured grounds regardless of the stringency of the applicable test for bias. Moreover, even with the application of a reasonable observer vantage point (which lowers the bar for bias challenges), recent challenge decisions appear to be “managing the issue conflicts ‘problem’” as unmeritorious challenges are rejected—Urbaser and Tidewater amply demonstrate this.

68. We now turn to the Second Arm (evidentiary threshold) of the test for bias under the ICSID challenge regime. We agree with Luttrell that the ICSID Convention’s “manifest” standard is

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182 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States at [9].

183 As observed in OPIC Karimum Corporation v Venezuela, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) at [47]:

“In our opinion, multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge. In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the [ICSID] Convention.” (emphasis added)

While this observation was made in the context of an arbitrator’s lack of independence (as opposed to non-impartiality arising from issue conflict), it is generally applicable as an indication of the importance of public perception in the assessment of actionable bias (both non-impartiality and lack of independence) under the ICSID challenge regime. The need to safeguard the procedural legitimacy of ICSID proceedings in the eyes of the public is even more pressing in present times, given the likelihood that “investment law and arbitration may already be, or may soon come to be, in a veritable ‘legitimacy crisis’” (see Schill, supra note 69 at 402-403, noting in this regard the “withdrawal of some Latin American states from their investment treaties and the ICSID Convention, and in the re-crafting of the substance of investment treaties... in a way that reflects concerns about jurisprudential trends in arbitration.”).


185 See for instance Tidewater at [58]; Urbaser at [43]-[44]; Suez (No. 1) at [40]; and Vivendi at [25]. See also supra note 183.

186 See Hranitzky and Romero, supra note 162.

187 Urbaser at [50], [54] refers to the perception of a “third party” as the vantage point for testing the appearance of bias. Urbaser is discussed at [53]-[55] above.

188 Tidewater at [58] refers to the perception of an “observer” as the vantage point for testing the appearance of bias. Tidewater is discussed at [49] above.
“closest to Gough’s” real danger/possibility test (see [28] above), as compared to the Sussex Justices reasonable apprehension test. Put another way, the Sussex Justices reasonable apprehension test is even further removed from the “manifest” standard than the Gough test. However, it is important to realise that there is nevertheless a huge gap between the Second Arm of the Gough test and the ICSID Convention’s “manifest” test. A “manifest” standard of proof is arguably higher than a balance of probabilities standard, which is in turn higher than the real danger/possibility test in Gough. It will be recalled that ICSID jurisprudence on arbitrator challenges (including the most recent cases of Tidewater and Universal Compression) has interpreted “manifest” to mean “obvious or evident”, and requires the challenger to “establish facts that make it obvious and highly probable, not just possible, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment.” (emphasis added) These interpretations of the term “manifest” imply that the challenging party bears an extremely heavy evidentiary burden to discharge, which surpasses even the balance of probabilities standard (a fortiori, satisfaction of the Gough test’s real danger/possibility threshold, which is pegged at an even lower threshold than the balance of probabilities standard, will not meet the “manifest” standard of proof). Indeed, Schreuer observes that such understanding of the word “manifest” corresponds to its ordinary dictionary meaning, which tribunals have favoured in their interpretation of the same word in Article 52(1)(b) (an interpretation which Schreuer notes can be applied to Article 57 as well):

“In accordance with its dictionary meaning, ‘manifest’ may mean ‘plain’, ‘clear’, ‘obvious’, ‘evident’ and easily understood or recognized by the mind… it relates to the ease with which it is perceived. On this view, the word relates... to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.”

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189 See [21] above and Re Shankar Alan at [49]-[51] and [74].
190 See [26]-[33] above.
191 Suez (No. 1) at [34]; Universal Compression at [71].
192 Suez v Argentina, ICSID Case No. ARB/03/17, Decision on Second Proposal for Disqualification (May 12, 2008) at [29]; Tidewater at [39]; and Amco.
193 It should be noted that it naturally follows from these interpretations of “manifest” lack of independence (or impartiality) that such lack “[must] be proven by objective evidence and... the mere belief by the challenge[r] [sic] of the contest[ed] [sic] arbitrator’s lack of independence or impartiality is not sufficient to disqualify the contested arbitrator.” (Suez (No. 1) at [40]) See also Universal Compression at [71].
194 Article 52(1)(b) provides that: “Either party may request annulment of the award [on the ground]... (b) that the Tribunal has manifestly exceeded its powers;...” (emphasis added).
195 Schreuer supra note 24 at p. 1202 states: “The requirement that the lack of qualities must be ‘manifest’ imposes a relatively heavy burden of proof on the party making the proposal [to disqualify] (see also Art. 52...)” (emphasis added).
196 Schreuer ibid. at pp. 938-939. Schreuer notes in the context of Article 52(1)(b) that “[o]n another view, the word ‘manifest’ is a qualitative matter concerned not with the clarity of any excess [of powers] but its extent [i.e. the seriousness of the tribunal’s excess of powers]” (emphasis added). While such an interpretation of Article 52(1)(b) is arguable (see Schreuer ibid. at pp. 938-943), it would clearly be untenable in the context of Article 57. Requiring a party to establish not only that an arbitrator lacks independence or impartiality per se, but that he or she is seriously or egregiously (applying the alternative view under Article 52(1)(b) that manifest means the extent or seriousness of an excess of powers) non-independent/non-impartial, would wholly contradict the requirement in Article 14 that: “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment...” (emphasis added)
69. This heavy evidentiary burden of proof of apparent bias (even coupled with the “reasonable
observer” vantage point suggested at [67] above) should quell fears of the “Black Art” of bias
challenges infecting ICSID arbitrations. However, even with this merit of the manifest standard, we
are unconvinced for policy reasons that the bar should be set so high. The manifest standard of proof
was also propounded in Amco (in the context of a challenge against an arbitrator for lack of
independence), which became subject to strong criticism by commentators, as it: “imposed a
standard that would tolerate virtually all prior business or professional relationship.”197 Applied
to challenges on grounds of impartiality and issue conflict in particular, the “manifest” standard would
similarly tolerate almost all such conflict, barring those cases where the arbitrator had made or makes
particularly extreme or unbalanced comments on the parties or the merits of the dispute in pending or
ongoing arbitrations (Type C issue conflict). For instance, it is difficult to see how the appearance of
an arbitrator’s issue conflict bias can be manifest (even from the viewpoint of a third party observer
where the circumstances in question are those in which Professor Gaillard (Type A issue conflict—
arbitrator acting as counsel in another case raising analogous issues) or Judge Schwebel (Type B
issue conflict— arbitrator to act as counsel in another case raising analogous issues) found
themselves in when they were challenged in Telekom Malaysia and Eureko respectively (see [40]-
[44] above). It would surely have been an almost impossible task for Poland’s counsel to establish
that the reasonable observer would have thought it obvious or highly probable that Judge Schwebel
would decide Eureko in such a matter as would support his subsequent submissions as counsel in
Vivendi, an argument which has a somewhat speculative ring to it (coincidentally, the Vivendi
tribunal’s decision on the challenge to Yves Fortier Q.C. interpreted “manifest” in Article 57 to
to “exclude reliance on speculative assumptions or arguments”.198) Similarly, in Professor Gaillard’s
case, it would have been extremely difficult, if not impossible, for Ghana’s counsel to establish that
Professor Gaillard’s alleged lack of impartiality (arising from the fact that as counsel in a separate
case he was arguing for annulment of an arbitral decision that the challenging party was relying on
before Professor Gaillard as arbitrator) was either obvious or highly probable from the viewpoint of a
reasonable and well-informed observer, especially if one considers that the reasonable and well-
formed observer should be able to distinguish between a lawyer’s personal convictions and his duty
as counsel to put forward his client’s best case (see [42] above). It may have been possible for the
challenging party to make a reasonably persuasive argument in these cases that the reasonable
observer would have had justifiable or reasonable doubts, or thought that there was a real danger of,
arbitrator bias. The argument could even have been made that the reasonable observer would have
thought it to be more likely than not that the arbitrator was biased (though, being a higher evidentiary
standard, this would be necessarily more difficult to prove); indeed, while the first Dutch District
Court applied the justifiable doubts standard and upheld the challenge to Professor Gaillard,199 its
judgment suggests that even if the applicable standard for disqualification was the more stringent

197 The Amco award has been criticized as it “imposed a standard that would tolerate virtually all prior business or
professional relationship. Such a standard has no precedent in the municipal law of any country, and it is quite
astonishing that it should have been applied in ICSID, with its unique and delicate balance of the rights of host
states and foreign private investors.” See M. Tupman, “Challenge and Disqualification of Arbitrators in
198 Vivendi at [25].
“In examining a plea of absence of impartiality or independence on the part of an arbitrator within the
meaning of article 1033 of the Code of Civil Procedure, it has to be assumed that an arbitrator may be
challenged if from an objective point of view- i.e. as a result of facts and circumstances- justified doubts
exist with respect to his impartiality or independence… there will be justified doubts about his
impartiality if Prof. Gaillard does not resign as attorney in the RFCC/Moroccan case.” (emphasis added)
balance of probabilities test, it would still have upheld the challenge to Professor Gaillard. However, the very high threshold of certainty required by the “manifest” standard is extremely unlikely to be satisfied in almost every case. The empirical evidence certainly supports this view. As a recent survey of ICSID jurisprudence points out, there has only been one case (Victor Pey Casado v Republic of Chile) which has sustained a challenge based on the arbitrator’s manifest lack of impartiality. The “manifest” evidentiary standard is clearly slanted too heavily in favour of promoting expeditious proceedings, which comes at the expense of endangering the procedural fairness and legitimacy of the ICSID arbitral process. It should not be forgotten that ICSID arbitrators wield extensive powers of review over host states’ regulatory policies, and their decisions can thus have a significant impact on matters of intense public importance to entire populations.

The impartiality and independence of ICSID arbitrators (as a matter of fact and perception) should therefore not be any less important than the probity of municipal court judges. However, as was pointed out by those who criticized the “manifest” standard in Amco, “[s]uch a standard has no precedent in the municipal law of any country, and it is quite astonishing that it should have been applied in ICSID, with its unique and delicate balance of the rights of host states and foreign private investors.” (emphasis added) The fact that recusal of court judges may (generally speaking) be procured on establishment of a relatively low evidentiary probability of bias falling far short of the

200 The court held in Challenge No. 17/2004, Petition No. HA/RK 2004.778 (D. Ct. The Hague, Nov. 5, 2004) that: “... 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 attitude Prof. Gaillard has to adopt 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. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Moroccan award, account should in any event be taken of the appearance of his not being able to observe said distance.” (emphasis added)

201 Markert, supra note 65 at p. 268.

202 ICSID Case No. ARB/98/2, Award (May 8, 2008). Markert, supra note 65 at p. 244 notes that in this case, “the Chairman of the ICSID Administrative Council upheld the application for disqualification of one of the arbitrators based on the recommendation of the Secretary General of the PCA. However, the decision remains unpublished and the award of the arbitral tribunal does not contain enough information to get an idea of the application of the ‘manifest lack of qualities’ threshold.”

203 As Schill, supra note 69 at 412 notes:

“Since one of the disputing parties in an investor–state dispute is not a private commercial actor but a state, investment treaty awards may directly affect the host state’s population, in that the state, in order to be in compliance with its international law obligations, needs to adapt its behaviour according to what its treaty obligations entail. For example, an investment dispute preventing a state from lowering water or electricity tariffs because of promises made to the investor could have the effect of cutting off parts of the host state’s population from access to that fundamental utility. Similarly, investment treaty arbitrations increasingly involve complaints by foreign investors about general regulatory policies concerning, for example, the protection of the environment, labour standards, anti-discrimination policies, and so on. The disputes submitted relate to subject matters that are concerned more often with questions of public law and judicial review of sovereign acts than with questions of the contracting behaviour of the state in its private capacity. Decisions by arbitral tribunals on these matters may directly affect the social fabric in the host state and are thus of public interest.”


204 See Tupman, supra note 197 and Luttrell, supra note 3 at p. 226.

205 Note however the German courts’ test of “grave and obvious partiality or dependence” for establishing actionable bias. See [14] above.
ICSID challenge regime’s “manifest” threshold amply demonstrates that the ICSID challenge regime does not attach sufficient importance to the procedural fairness of the ICSID arbitral process.

70. Unfortunately, the hard truth of the matter remains that, short of an amendment to Article 57 of the ICSID Convention (which is, needless to say, a very unlikely prospect), its use of the word “manifest” leaves tribunals with no choice but to impose this onerous standard on parties applying to challenge an arbitrator. The case law and commentary assessed above (see [26]-[33] and [68]) certainly does not permit one to mount the argument that “manifest” should be understood as referring to any standard lower than that provided by its unambiguous literal meaning. The reasonable observer vantage point which we have argued for does mitigate the high bar imposed by the “manifest” evidentiary threshold, but only to a limited extent, since the likelihood of bias must still be “obvious” or “highly probable” from the reasonable observer’s perspective.

V. Mitigating the Problem of Issue Conflict

71. How can the problem of issue conflict in ICSID arbitration be mitigated, given that the ICSID challenge regime appears to be rather ill-designed to ensure procedural propriety? One of the solutions that have been suggested is to implement new rules prohibiting the practice of arbitrators serving as counsel. This is not unprecedented. The Court of Arbitration for Sport (CAS) amended its regulations in 2009 to prohibit the “double hat” arbitrator/counsel role. Should the same rules be adopted for investment arbitrations? Philippe Sands Q.C. is in favour of implementing such rules because, in his view, issue conflicts are “imperilling the entire system of investment arbitration.” His proposal has sparked a spirited debate in the international arbitration community.

72. There are arguments supporting both points of view. Advocates of separating the pool of arbitrators from the pool of advocates argue that such a separation would alleviate the problem of issue conflicts and restore lost confidence in international arbitration. Thomas Buergenthal also notes that separation would mitigate the concern illustrated by Type B issue conflict (see above [43]-[44]):

> “I have long believed that the practice of allowing arbitrators to serve as counsel, and counsel to serve as arbitrators, raises due process of law issues. In my view, arbitrators and counsel should be required to decide to be one or the other, and be held to the choice they have made, at least for a specific period of time. That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel. ICSID is particularly vulnerable to this problem because the interpretation and application of the same or similar legal instruments—the Bilateral Investment Treaties, for example—are regularly at issue in different cases before it.”

Furthermore, rules requiring lawyers to choose between roles would create more opportunities for promising but less experienced practitioners to be retained to represent parties in international arbitrations, or to be appointed as arbitrators.

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206 See Hranitzky and Romero, supra note 162.
207 Mr Sands’ proposal was made at the annual conference of the International Bar Association held in Madrid in October 2009. See Hranitzky and Romero, supra note 162.
208 See Hranitzky and Romero, ibid.
210 See Hranitzky and Romero, supra note 162.
73. Critics of "separate bars" rules counter with the following arguments.²¹¹ First, barring counsel who represent parties in arbitration from serving as arbitrators may "deprive the international arbitration community of some of its best talents who, when forced to choose, may opt for the more lucrative role of counsel."²¹² Second, "in the investment arbitration sphere, it is far from clear that issue conflicts, as opposed to other factors, contributed significantly to the decisions of a handful of countries to withdraw from... the system."²¹³ Third, it is arguably the case that existing rules and institutions are "managing the issue conflicts 'problem'" by rejecting unmeritorious challenges²¹⁴ but sustaining challenges where there are sufficient doubts regarding the arbitrator’s impartiality. Without sufficient evidence to the contrary, "it is difficult to justify such a radical departure from a time-honoured practice."²¹⁵ The authors generally agree with these criticisms of "separate bars" rules, but we also reiterate our objections to the ICSID challenge regime’s overly onerous “manifest” standard, which certainly would not tolerate unmeritorious challenges, but is pitched at too high an evidentiary threshold to ensure that arbitrators who reasonably appear to be infected by issue conflict bias are disqualified from sitting on ICSID tribunals. While in our opinion, there has not yet been any egregious case of a challenge against an ICSID arbitrator failing to satisfy the “manifest” requirement even though there was a substantial risk of the arbitrator having an issue conflict, there is a distinct possibility of such a case arising in the future and having severe negative repercussions on the legitimacy of ICSID. Nonetheless, we believe that separate “bars” rules may be premature and an overly drastic response to the problem of issue conflict. As the critics of separate “bars” rules point out, the detriments of such rules may outweigh their benefits as they would deplete an already limited supply of competent arbitrators even further, and there is also insufficient evidence that the absence of such rules will contribute to further withdrawals from the ICSID Convention. In any event, the implementation of separate “bars” rules is unlikely to be a feasible option at this point in time, since there appears to be insufficient consensus and political will (as yet) to effect the necessary changes to the ICSID Convention or Arbitration Rules.

74. If separation of arbitrator and counsel is not feasible, a second option would be to adopt more precise rules identifying the circumstances in which ICSID arbitrators may be disqualified on the grounds of issue conflict, and to have clearer, more comprehensive, and better adapted disclosure requirements.²¹⁶ Clearer conflict rules can encourage arbitrators to disclose potential issue conflicts in good time, which not only helps to safeguard the procedural fairness of arbitral proceedings, but also prevents them from becoming bogged down by bias challenges at the critical advanced stages and reduces the risk of having to conduct re-hearings should the challenged arbitrator be replaced. Disclosure rules that are better adapted to the ICSID challenge regime can also help ease the (overly) onerous burden imposed on the challenging party. For instance, if an arbitrator fails to disclose circumstances that may give rise to an issue conflict, even though accepted disclosure guidelines (which have been adapted to the “manifest” requirement in Article 57) mandate disclosure, the challenging party could rely on such breach of the disclosure guidelines to make out the arbitrator’s “manifest” lack of impartiality (see the discussion of Alpha above at [37]).²¹⁷ In this regard, given the

²¹¹ See Hranitzky and Romero, supra note 162; and Ziade, supra note 7 at pp. 57-58.
²¹² Ziade, ibid. at pp. 57-58. This has already happened to some extent amongst CAS arbitrators.
²¹³ Hranitzky and Romero, supra note 162.
²¹⁴ See Hranitzky and Romero, ibid.
²¹⁵ Hranitzky and Romero, ibid.
²¹⁷ Some of the factors to consider in determining whether non-disclosure of circumstances that may give rise to conflicts of interest amounts to actionable bias under the ICSID challenge regime were set out in Suez v Argentina,
rising number of arbitrator challenges in investment arbitrations and the recent spate of issue conflict challenges (which show no signs of abating), it is suggested that the time may be ripe for ICSID or the IBA to consider adapting the IBA Guidelines to the challenge regime under the ICSID Convention (in light of the “manifest” requirement in Article 57 and the special characteristics of ICSID arbitrations which distinguish it from commercial arbitration), in order to provide better and more relevant guidance for ICSID arbitration practitioners on the rules governing issue conflicts and conflicts of interest in general.

ICSID Case No. ARB/03/17, Decision on Second Proposal for Disqualification (May 12, 2008) at [44] (“Whether the failure to disclose was inadvertent or intentional, whether it was the result of an honest exercise of discretion, whether the facts that were not disclosed raised obvious questions about impartiality and independence, and whether the non-disclosure is an aberration on the part of the conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality. The balancing is for the deciding authority ... in each case.”). It is interesting to note that in Universal Compression (at [93]-[94]), it was held that Professor Stern’s non-disclosure of her previous appointments by the Respondent (Venezuela) was the product of “an honest exercise of discretion” by Professor Stern, as “it was her understanding at that time that only facts that are... unknown, and not publicly available information [such as the fact of her prior appointments by the Respondent], must be disclosed”, notwithstanding the fact that Rule 6(2) of the ICSID Arbitration Rules required disclosure of “past and present professional, business and other relationships (if any) with the parties” and “any other circumstance that might cause [the arbitrator’s] reliability for independence judgment to be questioned by a party”, without making any distinction between publicly available and non-publicly available information. Indeed, it was observed that the “Rule 6(2) declaration should include... information about publicly available cases” (Universal Compression at [92]). The Chairman of the Administrative Council’s ultimate finding that Professor Stern’s non-disclosure nevertheless did not “evidence a manifest lack on her part of independence or impartiality” (Universal Compression at [95]) indicates how even a breach of disclosure rules does not satisfy the high threshold of the manifest requirement under the ICSID challenge regime. However, it is submitted that failure to adhere to more specific disclosure requirements (adapted to the manifest requirement as suggested in this paragraph) may not be looked upon so leniently, and could demonstrate the arbitrator’s “manifest” lack of independence/impartiality, thus assisting parties to discharge their burden of proof and mount a successful challenge (which would otherwise have been impossible in the circumstances).

On the importance of formulating and enforcing clear and specific disclosure obligations in general, see Rogers supra note 10 at 117-119.

As pointed out by Markert, supra note 65 at p. 239, “there exists a shared sense in the investment arbitration community that arbitrator challenges are on the rise... more than half of the challenges brought in arbitral proceedings under the ICSID Convention and its Arbitration Rules have been brought within the last four years.” See also Luttrell, supra note 3 at pp. 3-4. The most recent ICSID challenge decision on issue conflict (of which the authors are aware) is Universal Compression, which was decided as recently as 20 May 2011.

See the discussion above at [34]-[38] (in particular, the comments made by the Tribunal in Urbaser on the applicability of the IBA Guidelines) and [59]-[70].