

CODE OF CONDUCT – BACKGROUND PAPERS**ISSUE CONFLICT¹****I. Introduction – Definition of Issue Conflict**

1. Different views have been expressed by scholars on the definition of issue conflict.
2. Some scholars have defined it broadly and described issue conflict as the “...existence of actual or apparent bias on the part of the arbitrator stemming from his or her previously expressed views on a question that goes to the very outcome of the case to be decided. It denotes the arbitrator’s relationship to the subject matter of the dispute, and his or her perceived capacity to adjudicate with an open mind.”² Others add that an issue conflict also arises “from an arbitrator’s relationship with the subject matter of, as opposed to the parties to, a dispute.”³
3. Similarly, others have said that “[i]ssue conflicts focus on the likelihood of bias on the part of the arbitrator presiding on a particular matter at the material time,”⁴ which “can arise where an arbitrator is said to have “pre-judged” issues based on their prior awards or decisions, publications and statements indicating their views on particular legal issues or on ISDS as a regime.”⁵
4. Some define it more narrowly, suggesting that an “issue conflict denotes a situation in which ‘an arbitrator is also involved as counsel in another pending case.’”⁶ They add that a “challenge based on an arbitrator’s previously-expressed doctrinal opinions should be distinguished from a so-called issue conflict.”⁷

¹ This background document is intended to assist the discussions of delegates concerning the Code of Conduct and should not be taken as a legal opinion on the matters addressed. The cases included in this background paper are for illustrative purposes and do not constitute an exhaustive list of decisions addressing the matters discussed.

² Anthony Sinclair and Matthew Gearing, “Partiality and Issue Conflicts,” *Transnational Dispute Management*, Vol. 5, Issue 4 (July 2008).

³ Gavan Griffith and Daniel Kalderimis, “‘Pure’ Issue Conflicts in Investment Treaty Arbitration” citing Michael Hwang and Kevin Lim, ‘Issue Conflict in ICSID Arbitrations’ in Michael Hwang, *Selected Essays on International Arbitration* (SIAC 2013) 47.

⁴ Kuda Tshiamo, *Issue Conflicts in Investment Treaty Arbitration: A Move Towards Stricter Application of Impartiality Standards?* (Part 1 of a 3-Part Series (Kluwer Arbitration Blog, 30 March 2015).

⁵ UNCITRAL Working Paper Group III (Investor-State Dispute Settlement Reform) Thirty-sixth session (Vienna 29 October-2 November 2018) Doc. No. A/CN.9/WGIII/WP.151, ¶ 35.

⁶ Christoph Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1206: ‘The above situations [including a challenge based on an arbitrator’s previously expressed doctrinal opinions] should be distinguished from a so-called issue conflict. This type of conflict arises in investment arbitrations when an arbitrator is also involved as counsel in another pending case.’

⁷ *Ibid.*

5. *Griffith and Kalderimis*, note that “issue conflicts can and do arise because of subject-matter overlaps with other roles held by an arbitrator.” However, they note that “an issue conflict may arise without the overlay of any external relationships, simply because of an arbitrator’s prior expression of a legal view or opinion”, adding that “an issue conflict is a species of impartiality which may, but need not, involve any relationship at all.”⁸

As can be seen, “issue conflict” often overlaps with conflict of interests arising out of double-hatting and repeat appointments. These other two topics are addressed in separate background notes.

6. In combination, commentators suggest the following situations may raise concerns about issue conflict:
- where an arbitrator had rendered prior awards or decisions as arbitrator, dealing with (or had expressed a personal opinion on) a disputed issue in the case before that arbitrator; and⁹
 - where an arbitrator had expressed an opinion and or published a scholarly piece dealing with a disputed issue in the case before that arbitrator.
7. Further, some commentators suggest the following situations may raise concerns about issue conflict in the context of double-hatting:
- where an arbitrator is concurrently acting, or has previously acted, as counsel in another case raising the same or similar *factual* issues as the one before him/her;
 - where an arbitrator is concurrently acting, or has previously acted, as counsel in another case raising the same or similar *legal* issues as the one before him/her; and
 - where the arbitrator is to act as counsel in a subsequent case raising similar issues or involving the same party and/or counsel;

II. How has issue conflict been addressed?

8. In March 2016, the American Society of International Law (ASIL) and the International Council for Commercial Arbitration (ICCA) issued a Report on Issue Conflicts in Investor-State Arbitration due to the growing number of challenges to disqualify arbitrators in ISDS cases on the ground of “issue conflict”.

⁸ *Griffith and Kalderimis*, (n 3) p. 1.

⁹ See ICSID and UNCITRAL, Annotated Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (2020) ¶59 (Annotated Draft Code of Conduct)

https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf; *Griffith and Kalderimis* (n 3); *Hwang and Lim* (n 3) 474.

9. According to the ASIL-ICCA Report, “the notion of ‘issue conflict’ is not squarely addressed in any international rules or guidelines concerning international arbitration or adjudication. A number of these rules and guidelines [in investor-State arbitration] touch upon the problems involving pre-disposition or bias at a general or abstract level.”¹⁰

i. Soft law instruments

10. Soft law instruments, such as the IBA Guidelines on Conflicts of Interest in International Arbitration,¹¹ define certain circumstances that may raise issue conflict and provide for detailed disclosure requirements. The IBA Guidelines contain three relevant rules in this regard:

- a) Section 2.1 lists circumstances on the waivable red list. These are circumstances that should be disclosed but may be waived by the parties. They include Section 2.1, where the arbitrator has given legal advice or an expert opinion to a party or its affiliate or had prior involvement in the dispute.
- b) Section 3 lists circumstances on the orange list. The orange list is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence. Thus, the arbitrator has a duty to disclose situations falling within the orange list.¹² Parties are deemed to have accepted the arbitrator if they do not object after disclosure. Section 3.1.5 lists the situation where an arbitrator currently serves or has served in the past three years on another arbitration addressing a related issue.
- c) Section 3.5.2., which is included on the orange list, relates to the situation where an “arbitrator has publicly advocated a specific position regarding the case that it is being arbitrated whether in a published paper or speech or otherwise”¹³; and

¹⁰ Report of the ASIL-ICCA Joint Taskforce on Issues of Conflict in Investor-State Arbitration, *The ICCA Reports No. 3* (17 March 2016) <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/asil-icca_report_final_5_april_final_for_ridderprint.pdf> (ASIL-ICCA Report).

¹¹ IBA Guidelines on Conflicts of Interest in International Arbitration (approved 22 May 2004 by the Council of the International Bar Association) available <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (IBA Guidelines), ss 3.1.5, 3.5.2 and 4.1.1 respectively.

¹² Ibid, pt II.3 – Practical Application of the Standards.

¹³ IBA Guidelines (n 11) section 3.5.2. See also Joseph R Brubaker, ‘The Judge Who Knew Too Much: Issue Conflicts in International Adjudication’ (2008) 26 Berkeley J Int’l L 111, 128: “Two provisions of the IBA Guidelines touch upon issue conflicts. First, an arbitrator is required to disclose whether she has “publicly advocated a specific position regarding the case that is being arbitrated” which, depending upon the circumstances, may result in her replacement. (footnote omitted) Second, the fact that an arbitrator “has previously published a general opinion (such as a law review article or public lecture) concerning an issue which also arises in the arbitration” does not require disclosure so long as “this opinion is not focused on the case that is being arbitrated.” (footnote omitted) Consequently, where the basis for an issue conflict allegation is an academic article or lecture, challenges are unlikely to be raised, and even less likely to succeed. Although the IBA Guidelines are frequently invoked, they have been criticized as providing “scant guidance” for issue conflicts. (footnote omitted).”

- d) Section 4.1.1. includes situations on the green list. The green list is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the green list.¹⁴ Section 4.1.1 includes the situation where an “arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).”¹⁵

11. The United Nations Basic Principles on the Independence of the Judiciary (1985)¹⁶ state in paragraph 8 that judges are “...entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”¹⁷ Interestingly, paragraph 2 deals with the decisions taken by the judiciary, noting that a decision shall be made “on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason,”¹⁸ thus creating a tension between the ‘freedom of expression’ regulated in paragraph 8 and the ‘duty to appear to be impartial’ regulated in paragraph 2.

12. The 2005 Burgh House Principles on the Independence of the International Judiciary refer in Paragraph 9 to a judge’s relationship to a case or subject matter at issue. It states that “[j]udges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute.”¹⁹ Further, Paragraph 9.2. indicates that exposure to certain issues in a case could create a ground for actual bias or an appearance of bias.²⁰

ii. Institutional Rules

13. All major institutional rules applicable to ISDS directly or indirectly address issue conflict through the concepts of independence and impartiality, however, their standards are worded differently.

¹⁴ Ibid, Part II.7 – Practical Application of the Standards.

¹⁵ Ibid, section 4.1.1.

¹⁶ United Nations Basic Principles on the Independence of the Judiciary (1985), Adopted by the Seventh United Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>> ¶ 8.

¹⁷ Ibid, ¶ 8.

¹⁸ Ibid, ¶ 2.

¹⁹ Burgh House Principles on the Independence of the International Judiciary http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf, ¶ 9.

²⁰ Ibid. Paragraph 9.2 states that: Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence of impartiality.

14. According to Article 14(1) of the ICSID Convention, arbitrators must be “persons...who may be relied upon to exercise independent judgement.”²¹ Under ICSID Arbitration Rule 6, an arbitrator must sign a declaration and attach a statement of their “past and present professional business, other relationship with the parties, and any other circumstance that might cause [the arbitrator’s] reliability for independent judgment to be questioned by a party.” Each arbitrator assumes a “continuing obligation” to notify the Secretary-General of the Centre if any such relationship or circumstance subsequently arises during the proceeding.²²
15. Similarly, Article 11 of the UNCITRAL Arbitration Rules (2013) requires disclosure of potential conflicts “when the arbitrator is approached in connection with his or her possible appointment as an arbitrator”, and once appointed, throughout the arbitral proceedings.²³
16. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) provides in its Canon I that “[o]ne should accept appointment as an arbitrator only if fully satisfied: (1) that he or she can serve impartially...”²⁴ The commentary to the Canon explains that “[a]rbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.”²⁵ Notably, this Canon draws a distinction between the arbitrator’s view on general issues and prejudgment of specific factual or legal determinations.
17. Article 16 of the Statute of the International Court of Justice (ICJ) prohibits members from obtaining and acting in certain roles.²⁶ Similarly, the Rome Statute of the International Criminal Court provides that “[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence,”²⁷ and, adds that “[j]udges required to serve on a full-time basis at the seat of the Court shall not engage in any other

²¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention), Article 14(1).

²² ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) (April 2006) <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>, r 6.

²³ Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules) (2013) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>, art 11: “When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.”

²⁴ AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) https://adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf, canon I(B).

²⁵ Ibid, Comment to Canon I.

²⁶ Statute of the International Court of Justice (1946) <https://www.icj-cij.org/en/statute>, art 16.

²⁷ Rome Statute of the International Criminal Court (2002) <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, art 40(2).

occupation of a professional nature.”²⁸ Similarly, the International Criminal Tribunal for the former Yugoslavia (ICTY) required judges to recuse themselves from cases if there was a reasonable likelihood or probability that they will not be impartial in their judgments.²⁹

18. Interestingly, the World Trade Organization (WTO) takes a different approach. Article 8 of the WTO Understanding on Rules and Procedures Governing the Settlement of Dispute states that “[m]embers shall undertake, as a general rule, to permit their officials to serve as panelists,” endorsing the potential to have a panelist who has previously acted as counsel in front of a WTO Panel.³⁰

iii. International Investment Agreements

19. Some recently concluded investment treaties contain a code of conduct for arbitrators acting in investor-State dispute settlement. These codes indirectly address issue conflict through disclosure obligations for arbitrators.
20. A number of these international investment treaties³¹, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (Chap. 9. Section B, 9.23.10); the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (Annex 29-B, ¶ 4); and the Indonesia Australia Partnership Agreement (Annex 14-A, ¶¶ 2 and 3), require an arbitrator to disclose “public advocacy or legal or other representation concerning an issue in the proceeding or involving the same matters.”
21. The Australia-Japan Economic Partnership Agreement³² (Attachment B, IV(d)) addresses disclosure of “considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements).”

²⁸ Rule 4 of the Rules of the Court of the European Court of Human Rights state that: Judges of the ECHR, similarly, “shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office.”

Rules of the Court of the European Court of Human Rights state that: Judges of the ECHR (2020)

https://www.echr.coe.int/documents/rules_court_eng.pdf.

²⁹ International Criminal Tribunal for the Former Yugoslavia Statute (2009)

https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. Article 13 (1) read with Rule 15 A of the ICTY Rules of Procedure and Evidence.

³⁰ World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. Article 8 provides that: “Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1847 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement...”).

³¹ Code of Conduct for Investor-State Dispute Settlement Under Chapter 9 Section B (Investor-State Dispute Settlement) of The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018; entered into force 30 December 2018); Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA) (signed 30 October 2016, provisionally in force since 21 September 2017); Indonesia-Australia Comprehensive Economic Partnership Agreement (signed 4 March 2019, entered into force 5 July 2020).

³² Australia-Japan Economic Partnership Agreement (JAPEA) (signed 8 July 2014, entered into force 15 January 2015).

22. The US-Mexico-Canada Agreement, (USMCA)³³ requires arbitrators to comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, including guidelines regarding direct or indirect conflicts of interest, or any supplemental guidelines or rules adopted by the Annex Parties” (Article 14.D.6(5)(a)).
23. A number of States have started to address issue conflict in their model bilateral investment agreements. Some include that a party may challenge an arbitrator “...if facts or circumstances ... that may, in the eyes of the parties, give rise to justifiable doubts as to the arbitrator’s independence, impartiality or freedom from conflicts of interest...”³⁴ Others indicate that arbitrators should disclose among others things “public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same goods.”³⁵ A more specific provision on ‘avoidance of conflict of interest of arbitrators,’ stating that an arbitrator cannot “act concurrently as counsel in another actual or potential treaty-based arbitration involving a foreign investor and a State”³⁶ has been incorporated into others.

III. Relevant Jurisprudence

24. Publicly available decisions on disqualification proposals identify three scenarios that could give rise to an issue conflict:
- a) previous arbitral appointments, where the arbitrator addressed similar issues (factual or legal);
 - b) public statements; and
 - c) academic writings.
- i. Alleged issue conflict arising out of previous arbitral appointments*
25. An arbitrator’s previous or concurrent arbitral appointments can raise an issue conflict by
- a) raising the same or similar legal issues; and/or;
 - b) raising the same or similar factual issues; and/or
 - c) involving the same party and/or same counsel.
26. Previous or concurrent arbitral appointments have been invoked as a ground to disqualify arbitrators sitting in ISDS proceedings under all major sets of arbitration rules. The majority of

³³ The United States-Mexico-Canada Agreement (USMCA) (signed 30 November 2019, entered into force 1 July 2020).

³⁴ India Model BIT (2015) art 19.3.

³⁵ Belgium-Luxembourg Model BIT (2019) annex I, 4(d).

³⁶ SADC Model BIT (2016) art. 29.13.

proposals in this regard have been rejected,³⁷ except for three cases.³⁸

27. In the cases in which the challenge of an arbitrator was rejected, the disqualification decisions are summarized below:
28. In *Suez v. Argentina*, an arbitrator was challenged by the Respondent on the basis that he lacked independence and impartiality because she had been a member of a previous ICSID Tribunal that issued an earlier unanimous award against the Respondent. The unchallenged arbitrators rejected the challenge on the basis that: a) “a difference of opinion over a set of facts is not in and of itself evidence of lack of independence and impartiality”³⁹; and b) the fact that an arbitrator has made a determination of law or a finding of fact in one case does not mean that they cannot decide the law and the facts impartially in another case.⁴⁰
29. In *Electrabel v. Hungary*, an arbitrator was challenged by the Claimant on the basis that she had concurrently been appointed by the Respondent in another case arising out of similar facts, involving a dispute over the same govern decree similar power purchase agreements and related to the same treaty (Energy Charter Treaty).⁴¹ The unchallenged arbitrators rejected the challenge on the basis that it is not enough to state that “an arbitrator was exposed to similar legal or factual issues in concurrent or consecutive arbitrations.”⁴²

³⁷ *Suez, Sociedad General de Aguas de Barcelona SA & others v Argentine Republic*, ICSID Case No ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 October 2007); *Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Proposal to Disqualify an Arbitrator (25 February 2008) ¶ 41; *Participaciones Inversiones Portuarias Sàrl v The Gabonese Republic*, ICSID Case No ARB/08/17, Decision on Proposal to Disqualify an Arbitrator (12 November 2009); *Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, CA, Twenty Grand Offshore, LLC, Point Marine, LLC, Twenty Grand Marine Service, LLC, Jackson Marine, LLC and Zapata Gulf Marine Operators, LLC v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator (23 December 2010); *Universal Compression International Holdings SLU v The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators (20 May 2011); *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant’s Proposal to Disqualify an Arbitrator (February 27, 2013); *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant’s Proposal to Disqualify Professor Philippe Sands (11 July 2014); *KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on the Proposal to Disqualify Prof. Kaj Hobér (15 May 2020).

³⁸ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, UNCITRAL, Decision on the Respondent’s Challenge to the Hon. Mark Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (30 September 2013); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (20 March 2014); *Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Challenge to José Maria Alonso (12 November 2013).

³⁹ *Suez v. Argentina* (n 37) ¶ 35.

⁴⁰ *Suez v. Argentina* (n 37) ¶ 36.

⁴¹ *Electrabel v. Hungary* (n 37) ¶ 33.

⁴² *Ibid*, ¶ 41.

30. In *PIP Sàrl v Gabon*, an arbitrator was challenged by the Claimant on the basis that the arbitrator had been president of another tribunal which had issued an award against the Respondent related to similar factual and legal issues (expropriation concession agreements). The deciding authority rejected the challenge on the basis that “the question of whether termination of a concession agreement amounted to expropriation was recurrent in international investment law, and that answers would depend largely on the facts of each case, decided in a collegial manner by each tribunal.”⁴³
31. In *Tidewater v. Venezuela*, an arbitrator was challenged on the basis that the arbitrator held multiple appointments in pending arbitrations against the Respondent involving similar legal issues that would give rise to a risk of prejudgment of issues in the case. The unchallenged arbitrators concluded that: a) “the holding of multiple appointments could not, ‘without more’, indicate a manifest lack of independence and impartiality;”⁴⁴ and b) “...there is [no] material difference between prior consideration of issues of international law and issues of host state law which may arise in for determination in the course of the proceedings;”⁴⁵
32. In *Universal Compression v. Venezuela*, an arbitrator was challenged by the Claimant, in part on the basis of his participation in four cases against the Respondent that allegedly involved similar facts and legal issues that would give rise to an issue conflict. The deciding authority, citing *Suez v. Argentina*, rejected the challenge stating that: a) “[t]he international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations;”⁴⁶ b) “the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially in another case.”⁴⁷
33. In *İçkale İnşaat v. Turkmenistan*, an arbitrator was challenged by the Respondent on the basis that he had prejudged a legal issue material to the case given that he had concurred in the majority award in a prior case against the Respondent interpreting the exhaustion of remedies clause of the same treaty at issue in the case. The unchallenged arbitrators found that: a) there was no overlap of facts relevant to the merits in the two cases; the only overlap concerned facts relevant to the interpretation of the treaty;⁴⁸ b) the task of interpreting the treaty “involves the determination of facts that are of ‘a general and impersonal character’ and not specific to the Parties to this particular case;”⁴⁹ and c) the arbitrator “has not shown to have expressed any view subsequent to the [prior case] that would raise doubts as to his ability to approach the interpretation of [the treaty], and related legal issues with an open mind.”⁵⁰

⁴³ *PIP Sarl v. Gabon* (n 37) ¶ 33 (unofficial translation).

⁴⁴ *Tidewater v. Venezuela* (n 37) ¶ 67-68

⁴⁵ *Ibid*, ¶ 70.

⁴⁶ *Universal v. Venezuela* (n 37) ¶ 83.

⁴⁷ *Ibid*.

⁴⁸ *İçkale İnşaat v. Turkmenistan* (n 37) ¶ 119.

⁴⁹ *Ibid*, ¶ 120.

⁵⁰ *Ibid*, ¶ 122.

34. In *KS Invest v. Spain*, an arbitrator was challenged by the Respondent, among other grounds, on the basis that he had expressed an opinion in a parallel arbitration on many “essential issues” of the case and that because of the “substantial similarities” between the parallel case and the present case, he was unable to consider the case impartially and independently. The deciding authority rejected the challenge on this basis stating that: a) in the “... circumstance that an arbitrator has expressed views on issues of law or fact common to two or more parallel arbitrations in which that arbitrator is involved is not -without more- evidence of partiality or appearance thereof;”⁵¹ b) the two cases at stake involve investments in the Respondent State by unrelated companies, made at different times, and in different sectors;⁵² c) the “parties could anticipate at the time of [the arbitrator’s] appointment that both cases would deal with similar issues of fact and law. They also knew that one of the cases could be decided in advance of the other; yet neither party asked that the two cases be decided simultaneously;”⁵³ d) The Respondent “did not raise concerns upon the appointment of [the arbitrator] in this case” and, noted that the Respondent “...has appointed the same individuals in several other investor State arbitrations.”⁵⁴

35. These cases demonstrate that:

- A difference of opinion between an arbitrator and one of the parties over an interpretation of a set of facts is not in and of itself evidence of a lack of independence or impartiality.⁵⁵ The existence of such disagreement itself is by no means manifest evidence that such judge or arbitrator lacked independence or impartiality.⁵⁶
- The fact that a judge or an arbitrator has made a determination of law or a finding of fact in one case does not mean that they cannot decide the law and the facts impartially in another case.⁵⁷
- For an alleged issue conflict to arise out of previous arbitral appointments involving the same or similar legal issues; and/or the same or similar facts, it is not enough to state that “an arbitrator was exposed to similar legal or factual issues in concurrent or consecutive arbitrations”⁵⁸ or that “an arbitrator has expressed views on issues of law or fact common

⁵¹ *KS Invest v. Spain* (n 37) ¶ 89.

⁵² *Ibid*, ¶ 90

⁵³ *Ibid*, ¶ 92

⁵⁴ *Ibid*, ¶ 92.

⁵⁵ *Ibid*, *Suez v. Argentina* (n 37), ¶ 35.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*, ¶¶ 35-36. “It is certainly common throughout the world for judges and arbitrators in carrying out their functions honestly to make determinations of fact or law with which one of the parties may disagree. The existence of such disagreement itself is by no means manifest evidence that such judge or arbitrator lacked independence or impartiality.” See also *PIP Sarl v. Gabon* (n 37); *Tidewater v. Venezuela* (n 37); *Universal Compression v. Venezuela* (n 37) ¶ 83; *Saint Gobain v. Venezuela* (n 37) ¶¶ 54-56.

Tidewater v. Venezuela (n 37) ¶ 67; *Universal Compression v. Venezuela* (n 37) ¶ 83.

⁵⁸ *Electrabel SA v Hungary* (n 37) ¶ 41.

to two or more parallel arbitrations in which the arbitrator is involved...”⁵⁹ To hold otherwise ‘would have serious negative consequences for any adjudicatory system.’”⁶⁰

- Prior interpretation of a legal clause at issue in a pending case in itself does not indicate a lack of impartiality, as it is not related to the merits of the case.⁶¹ The issue of prejudgment would arise only where, by virtue of the close interrelationship between the facts and the parties in the two cases, the arbitrator has ‘in effect prejudged the liability of one of the parties in the context of the specific factual matrix’.⁶²

36. The ICCA-ASIL Report summarizes that, “challenges citing an arbitrator’s exposure to relevant facts in a prior case have been rejected when decision makers found sufficient differences between the two situations.”⁶³

37. In the three cases in which the challenge of an arbitrator based on issue conflicts was upheld, the disqualification decisions can be summarized as follows:

38. In *Encana Corporation v. Ecuador*, where the challenged arbitrator was appointed by the Respondent in two parallel arbitrations involving similar claims under the same bilateral investment treaty.⁶⁴ Though the situation described would not be a ground for challenge under Article 10(1) of the UNCITRAL Arbitration Rules, the unchallenged arbitrators were concerned that “the common arbitrator would receive all of the pleadings and evidence of all three parties in both arbitrations,”⁶⁵ and thus “us[e] information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties.”⁶⁶ Ultimately, the Tribunal asked the challenged arbitrator to “disclose facts so derived whenever they appear to be relevant to any issue before th[e] Tribunal.”⁶⁷

39. *CC/Devas v. India*⁶⁸ was the first case where a deciding authority upheld a challenge determining there was an issue conflict arising out of the same or similar legal issues and academic writings and speeches. In this case, two arbitrators were challenged because they had allegedly prejudged the meaning of the “essential security interests’ clause” which was expected

⁵⁹ *KS Invest v. Spain* (n 37) ¶ 89. See also *VM Solar Jerez GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil (24 July 2020) <https://www.italaw.com/sites/default/files/case-documents/italaw11785.pdf>, ¶ 100.

⁶⁰ *Suez v. Argentina* (n 37) ¶ 36; *PIP Sàrl v. Gabon* (n 37); *Electrabel v. Hungary* (n 37); *Saba Fakes v The Republic of Turkey*, ICSID Case No ARB/07/20, Decision on Proposal to Disqualify an Arbitrator (26 April 2008) to similar effect.

⁶¹ See, for example, ICSID cases *Tidewater v. Venezuela* (n 37); *Universal Compression v. Venezuela* (n 36); *Saint Gobain v. Venezuela* (n 36) ¶¶54-56; *Suez v. Argentina* (n 37); *PIP Sarl v. Gabon* (n 37).

⁶² *Tidewater v. Venezuela* (n 37) ¶ 67.

⁶³ ASIL-ICCA Report (n 19), ¶137.

⁶⁴ ASIL-ICCA Report (n 10) ¶ 136.

⁶⁵ *EnCana v. Ecuador* (n 37) ¶ 44.

⁶⁶ *Ibid*, ¶ 45.

⁶⁷ *Ibid*.

⁶⁸ *CC/Devas v. India* (n 38).

to be a substantial part of the proceeding. The challenging party alleged that: a) both arbitrators had previously served together in two tribunals where they took a similar position on the meaning of ‘essential security clause’ in a BIT ; b) one of the arbitrators had participated in a third tribunal which also gave the same results on the meaning of the clause; and c) one of the arbitrator’s “strong public declarations on the subject have included at least one clear writing in addition to the three decisions in the aforementioned cases, a chapter in a book published in 2011 in which he strongly defended his position.”⁶⁹ Ultimately the deciding authority dismissed the challenge against one of the arbitrators because his pronouncements did not give rise to any appearance of bias, but upheld it against the second one stating that “being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to [his] ability to approach the question with an open mind.”⁷⁰

40. A similar issue was raised in *Caratube v. Kazakhstan*⁷¹ where the Claimant challenged an arbitrator on the basis that he had allegedly prejudged issues based on special knowledge (not known by the other Members of the Tribunal) gained through prior service as an arbitrator in a related case involving the Respondent.⁷² The unchallenged arbitrators upheld the challenge and held that: a) there was a significant overlap in the underlying facts between the [prior] case and the present arbitration; b) these facts were relevant for the determination of legal issues in the present arbitration; c) “a reasonable and informed third party would find it highly unlikely that, due to his serving in the [prior] case and his exposure to the facts and legal arguments in the case, [the challenged arbitrator’s] objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted;” and thus d) the challenged arbitrator would pre-judge legal issues in the present arbitration based on the facts underlying the [prior] case.⁷³
41. The *Caratube v. Kazakhstan* decision distinguished between special knowledge of facts relevant to the outcome of the dispute and those relevant to the interpretation of a legal provision. It stated that:

“in case of an overlap between issues of law in two otherwise unrelated cases, the record on which such issues will be decided will not be of the same nature in the two instances: as to the facts, the arbitrators will rely on documents and witnesses specific to each dispute (or more than one dispute), which are not of a general and impersonal character; as to the law, the arbitrators will rely on generally available knowledge of an impersonal and general character, including expert-witness testimony. The expert will opine on matters about which he has authoritative knowledge, as opposed to a fact witness who states what he has seen or otherwise knows. Second, the arbitrators should be experts in

⁶⁹ Ibid, ¶ 22.

⁷⁰ Ibid, ¶ 64. See also, *Repsol v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Request for Disqualification of the Majority of the Tribunal (Dec. 13, 2013) ¶ 79.

⁷¹ *Caratube v. Kazakhstan* (n 38).

⁷² In the first case the Tribunal found it did not have jurisdiction.

⁷³ Ibid, ¶¶ 89–90.

their field, especially in general in the field of law, while they should never be witnesses.”⁷⁴

42. Following this line of thought, the ICCA-ASIL Report highlighted a distinction between views about legal and factual issues.⁷⁵ The Report found that: a) “prior decisions on legal matters alone were unlikely to lead to disqualification (consistent with the approach under the IBA Guidelines)⁷⁶; b) “views about factual matters specific to the case at hand have been found to be a concern”⁷⁷” Adding that “challenges citing an arbitrator’s exposure to relevant facts in a prior case have been rejected when decision makers found sufficient differences between the two situations.”⁷⁸ However, the degree of engagement with the specific facts at issue in the case may explain the difference between the disqualifications in *Caratube* and *EnCana* and the rejections in *Suez*, *PIP* and *Içkale*.⁷⁹
43. In cases where issue conflict has been alleged when an arbitrator concurrently acts or recently acted as counsel in another case dealing with same or similar legal issue in the case before it, it has been stated that prior professional advocacy has not been seen as an indication of inappropriate partiality.⁸⁰ On the contrary, what has been seen as problematic is “concurrently serving as both counsel and arbitrator in matters involving the same party or that are otherwise related in some way.”⁸¹
44. In *Blue Bank v. Venezuela*⁸², the deciding authority upheld the challenge against one of the arbitrators due to his concurrent roles as arbitrator and advocate involving similar issues and the same respondent State. The challenging party alleged that the arbitrator’s law firm (though different office locations) concurrently represented parties in claims against the respondent State, which were similar to those to be considered by the challenged arbitrator in the present case. The deciding authority held that “a third party would find an evident or obvious appearance of lack of impartiality” “...given the similarity of issues likely to be discussed in [the other case] and the present case and the fact that both cases are ongoing, it is highly probable that [he] would be in a position to decide issues that are relevant in [the other case] if he remained an arbitrator in this case.”⁸³

⁷⁴ Ibid, ¶ 65.

⁷⁵ ASIL-ICCA Report (n 10).

⁷⁶ Ibid, ¶ 174.

⁷⁷ Ibid, ¶ 174.

⁷⁸ Ibid, ¶ 137.

⁷⁹ UNCITRAL Doc. No. A/CN.9/WGIII/WP.151 (n 5), ¶ 35; ASIL-ICCA Report (n 10) ¶ 137.

⁸⁰ *St. Gobain v. Venezuela* (n 37)

⁸¹ ASIL-ICCA Report (n 10) ¶¶ 128 and 164; *Blue Bank v. Venezuela* (n 38) ¶131. See also *Telekom Malaysia Berhad v. The Republic of Ghana*, Case No. HA/RK 2004, 788.

⁸² *Blue Bank v. Venezuela* (n 38) ¶¶ 68-69; see also *Grand River Enterprises v. United States*, Letter from ICSID Secretary-General Ana Palacio to Professor James Anaya (28 November 2007).

⁸³ *Blue Bank v. Venezuela* (n 38) ¶¶ 68-69. See also ¶ 67 where the deciding authority also noted that “[t]he sharing of a corporate name, the existence of an international arbitration steering committee at a global level, and Mr. Alonso’s statement that his remuneration depends “primarily” but not exclusively on the results achieved by the

45. A review of the public cases where ‘issue conflict’ overlaps with ‘double-hatting,’ indicate “that *past* service as an advocate is generally not objectionable; it is only when the context may require participants to take inconsistent positions in related situations at the same time that continued service has been found problematic.”⁸⁴

ii. Alleged issue conflict arising out of public statements

46. An alleged issue conflict may arise out of public statements when an arbitrator publicly and specifically makes comments on a case on which he or she is sitting, i.e. moving from generalities to specifics of a case.⁸⁵

47. An example of this is *Canfor v. United States*.⁸⁶ There an arbitrator was challenged on the basis that it had made remarks in a speech to a Canadian government council meeting criticizing the Respondent’s conduct in relation to softwood lumber cases.⁸⁷ The challenging party stated that those remarks ‘reflected a bias and a prejudgment on a contested allegation in the arbitration that was incompatible with the arbitrator’s obligation to decide the case independently, impartially and based solely on the evidence presented by the parties’⁸⁸ The challenge proceeding seemed to focus “on whether the reported comments were in some way generic, or went to a particular case.”⁸⁹ Ultimately, the arbitrator resigned before a decision had been issued by the Secretary-General of ICSID. In this regard, *Brubaker* states that “[t]wo aspects should be considered in determining whether a prior or concurrent opinion is proximate to a disputed issue. First, the more closely related the legal or factual opinion is to the issue at hand, the higher the risk is that the adjudicator will not neutrally review it and therefore the greater the appearance of bias. Second, the proximity of the opinion to accepted legal precepts or established factual circumstances mitigates the appearance of bias presented by a prior or concurrent opinion.”⁹⁰ However, he also add that “[t]he issue must be reasonably disputed before it can be relied upon to disqualify an adjudicator.”⁹¹

iii. Alleged issue conflicts arising out of academic writings and speeches

48. The majority of challenges which involve alleged issue conflicts arising out of academic writings, lectures or remarks at meetings have been dismissed.

Madrid firm imply a degree of connection or overall coordination between the different firms comprising Baker & McKenzie International.”

⁸⁴ ASIL-ICCA Report (n 10) ¶171.

⁸⁵ *Griffith and Kalderimis* (n 3) p.617.

⁸⁶ *Canfor Corp v. The United States of America; Terminal Forest Products, Ltd v The United States of America; Terminal Forest Products, Ltd v. The United States of America*, UNCITRAL, Order of the Consolidation Tribunal (7 September 2005) ¶ 20.

⁸⁷ *Griffith and Kalderimis* (n 3) p.614.

⁸⁸ *Ibid*, p.615.

⁸⁹ ASIL-ICCA Report (n 10) ¶123.

⁹⁰ *Brubaker* (n 12) 135.

⁹¹ *Ibid*.

49. Challenges brought under this category includes expressions of opinion by an arbitrator in his writings, lectures or remarks which allegedly showed a pre-conceived position with regards to arbitration in which he or she is sitting.
50. In *Saipem SpA v. Bangladesh*,⁹² an arbitrator was challenged on the basis that he had expressed opinions in writings which allegedly showed a pre-conceived position with regards to some of the central issues of the arbitration.⁹³ The unchallenged arbitrators rejected the challenge on the basis that “the arbitrator’s doctrinal opinions ‘expressed in the abstract without reference to any particular case do not affect the arbitrator’s impartiality and independence.’”⁹⁴
51. In *Urbaser v. Argentina*,⁹⁵ an arbitrator was challenged on the basis of views expressed in two previous academic publications (a textbook and an article published in the International and Comparative Law Quarterly) in relation to legal issues presented in the current case (Most Favoured Nation (MFN) clause and the necessity defense). The Claimants argued that the arbitrator’s publications showed that he had prejudged the essential element of the dispute, by: a) having taken, a position on the question of extension of MFN clauses to procedural matters (textbook); b) endorsing a line of criticism taken by the annulment committees with regards to three other decisions involving the Respondent which addressed the defense of necessity.⁹⁶ The two unchallenged arbitrators rejected the challenge on the basis that: “the mere showing of opinion, even if relevant to a particular arbitration, is not sufficient to sustain a challenge for lack of independence and impartiality.”⁹⁷ They added that “[f]or such a challenge to succeed there must be a showing that such an opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator.”⁹⁸
52. In *Repsol v. Argentina*⁹⁹, an arbitrator was challenged on the basis of previous academic publications which allegedly defended an award, following its annulment, and allegedly adopted the views of a an author who expressed negative views against the Respondent in that case.¹⁰⁰ The deciding authority rejected the challenge on the basis that an opinion on a legal provision that is not contained in the treaty in question and references by an arbitrator to a publication by a

⁹² *Saipem SpA v. The People’s Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Proposal to Disqualify an Arbitrator (11 October 2005).

⁹³ Schreuer et al (n 6) 1205–6.

⁹⁴ Ibid, 1206.

⁹⁵ *Urbaser SA & others v. Argentine Republic*, ICSID Case No ARB/07/26, Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010).

⁹⁶ Ibid.

⁹⁷ Ibid, ¶¶ 45–46.

⁹⁸ Ibid, 44–45.

⁹⁹ *Repsol v. Argentine Republic* (n 70).

¹⁰⁰ Ibid, ¶ 79.

third party expressing certain views do not constitute evidence of manifest lack of impartiality as required by Article 57 of the ICSID Convention.¹⁰¹

53. Authorities that have dealt with these issues have stated the following:

- The mere expression of opinion about an issue, even if the issue is relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. There must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator.”¹⁰²
- Tribunals have considered the need to avoid chilling scholarly writing and debate. Stating that, among other things, that if “no potential arbitrator of an ICSID tribunal would ever express legal views, ‘whether ... procedural, jurisdictional, or touching upon the substantive rights deriving from BITs,’ ... [t]his would restrict debate and exchanges of views, which is ‘part of the “system” and well known to all concerned’.”¹⁰³
- An arbitrator’s previously adopted opinions do not “prevent the arbitrator from taking full account of the facts, circumstance, and arguments presented by the parties.”¹⁰⁴
- Prior decisions have not found scholarly publications to be a reason for disqualification. The deciding authority suggested, that “to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, [one] must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.”¹⁰⁵ Thus, scholarly publications “when taken together with other relevant circumstances, published views could indicate unacceptable pre-judgment.”¹⁰⁶
- Such decisions support the proposition that “scholarly expressions of views that do not address a specific case, standing alone, are not a normally cause for removal.”¹⁰⁷

¹⁰¹ ASIL-ICCA Report (n 10), ¶ 114, citing *Repsol v. Argentina*, ¶ 79 (informal translation).

¹⁰² *Urbarser v. Argentina* (n 96), ¶¶44-45.

¹⁰³ *Ibid.*, ¶ 48.

¹⁰⁴ *Ibid.*, ¶ 49; Decision in *ST-AD GmbH v. Republic of Bulgaria*, Enforcement of Arbitral Award, Higher Regional Court of Thüringen, Jena, Nov. 21, 2013. See Luke Eric Peterson and Katherine Simpson, *Bulgaria Obtains Enforcement of Costs Award; Court Dismisses Investor’s Belated Allegations of Arbitrator Bias Due to Issue-Conflict*, IAR 3 (14 February 2014) (unofficial translation): “That a judge has expressed a certain legal view on a particular legal question in several [previous] proceeding, and possibly also publicly, such as in publications, does not affect his [or her] impartiality with respect to the concrete case to be decided – even if this particular legal view is crucial to the result.”

¹⁰⁵ *CC/Devas v. India* (n 38) ¶ 58.

¹⁰⁶ *Ibid.*

¹⁰⁷ ASIL-ICCA Report (n 10), ¶ 117.

However, it should be noted that the deciding authority in one case, “cautions that in some circumstances, scholarly publication can be weighted, along with other factors, in assessing a challenge alleging inappropriate prejudice.”¹⁰⁸

IV. Relevant Draft Code Provisions

54. Article 5(2)(c) and (d) of the draft Code of Conduct states:

*Article 5: Conflict of Interest: Disclosure Obligations*¹⁰⁹

2. Disclosures made pursuant to paragraph (1) shall include the following:

[...]

(c) All ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, [conciliator and mediator]; and

(d) A list of all publications by the adjudicator or candidate [and their relevant public speeches].

[...]

55. Paragraphs 58 to 61 of the commentary to the draft Code of Conduct identify a number of practical considerations concerning issue conflict. The duty of disclosure aims to give the parties: a) specific knowledge of the writings of a nominated or prospective adjudicator; and b) enhance the opportunities of parties to learn comprehensively about the adjudicator’s work. Thus, if a party believes after disclosure that an adjudicator may have an issue conflict, it can decide to raise a challenge.¹¹⁰

56. The policy reason underlying the disclosure requirement “is to permit a full assessment by all parties and to avoid possible problematic situations during the proceedings. For this reason, an adjudicator should err on the side of more extensive disclosure.”¹¹¹

V. Summary of Comments Received

57. The comments from States and other stakeholders on proposed Article 5(2)(d) of the Draft Code of Conduct are found at pp.97-108 of the [Draft Code of Conduct Compilation of Comments by Article & Topic](#).

¹⁰⁸ *CC/Devas v. India* (n 38).

¹⁰⁹ Annotated Code of Conduct Draft (n 9), Article 5. In addition, Article 4 of the Draft Code of Conduct also addresses Independence and Impartiality which is relevant to the topic of issue conflicts.

¹¹⁰ Annotated Code of Conduct (n 9), ¶ 58-61.

¹¹¹ *Ibid.*