Dealing with Arbitrator "Issue Conflicts" in International Arbitration
by J. Levine

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How issue conflicts arise and recent examples of how this type of conflict is being handled by courts, tribunals, and international tribunals are discussed.
Recent efforts by the International Bar Association and established arbitral institutions to provide detailed guidance on an arbitrator’s duties of independence and impartiality are highly instructive with respect to an arbitrator’s relationships with the parties and their counsel, but less so with respect to an arbitrator’s relationship with the subject matter of the dispute. The latter type of relationship, which could involve an arbitrator’s prior statements about an issue in dispute (an “issue conflict”), has been the subject of scant guidance and has become the subject of growing controversy over the last few years. This article examines some recent cases in which an international arbitrator has been challenged because of an issue conflict in an arbitration proceeding on which he or she is sitting.

While issue conflicts can arise in any type of arbitration, the problem has been particularly acute in the field of international investment arbitration. That is due to a number of characteristics peculiar to that type of arbitration. One is that such cases often involve the interpretation of bilateral investment treaties (BITs) containing similar, if not identical, provisions and therefore similar legal issues. Second, unlike most private arbitration proceedings, which involve the application of domestic law identified by the parties in their arbitration agreement, investor-state arbitrations usually involve the application of an evolving body of international law; therefore, arbitrators in international investment arbitration perform more of a “law-making” role. Third, matters of public interest are often at stake in this type of arbitration. Fourth, the awards in investor-state arbitrations are usually published and therefore exposed to careful public scrutiny. Finally, the number of international arbitrators with experience deciding investment disputes is still quite small, and these arbitrators are often practitioners who also serve as counsel in similar cases. All of these factors have combined to place the spotlight of issue conflict onto this particular field of international arbitration. The next sections examine how this problem is being addressed in practice.

Recent Examples

An issue conflict recently came into sharp relief in an investor-state arbitration between a Malaysian investor and the Republic of Ghana. Telekom Malaysia Berhad made a claim under the Malaysia-Ghana BIT for expropriation of its investment in Ghana Telecommunications Co. Ltd. The dispute went to arbitration under the UNCITRAL Rules in a proceeding administered by the Permanent Court of Arbitration. After both parties successfully challenged each other’s first choice of arbitrator, the investor appointed Emmanuel Gaillard, a prominent professor and legal practitioner. Ghana challenged Gaillard’s appointment on account of the fact that he was concurrently acting as counsel to the investor in annulment proceedings in another BIT case, RFCC v. Morocco. Ghana argued that Gaillard had an issue conflict because he would take a pro-investor position in RFCC v. Morocco on an issue of expropriation law that was also involved in the Ghana case. The challenge came before the District Court of The Hague (the place of the arbitration), where the court, applying Dutch law, agreed that Gaillard had, if not an actual issue conflict, the appearance of one, and ruled that he could not both serve as an arbitrator and as counsel in cases raising similar issues. The court stated:

[Account should be taken of the fact that ... in the capacity of attorney [Prof. Gaillard] 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 ... 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.8

because of the privacy usually associated with arbitration, many arbitral institutions do not publish awards, so they do not become public unless challenged before a court. Finally, most arbitral institutions, including those that do publish final awards in some form, are reluctant to publish decisions on arbitrator challenges, or even reveal to the parties the reasons for such decisions.13 This means that much of the information about arbitrator challenges comes from anecdotal reports from people who work at arbitral institutions,14 counsel in the cases,15 or local media reports.16

Argentina, which is currently named as the respondent in over 30 investment arbitrations, has launched arbitrator challenges in at least three cases.17 Argentina's attorney general has

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The court instructed Gaillard to resign as counsel within 10 days if he wanted to remain an arbitrator in the Ghana case. The Court reasoned that “there will be justified doubts about his impartiality if Prof. Gaillard does not resign as attorney in the RFCC/Moroccan case” within that time frame.9 Following this ruling, Gaillard ceased his service as counsel in that case. Nevertheless, Ghana repeated its challenge to Gaillard's appointment.10 A different district court judge at The Hague rejected the challenge. This judge acknowledged a trend toward issue conflicts, observing that because “lawyers frequently act as arbitrators ... it could easily happen ... that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view before.” However, the judge opined that this did not warrant automatic resignation. He stated that in such circumstances there was “no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration.”11

The two decisions in the Ghana-Malaysia investment arbitration are unusual in that they are publicly available (as a result of Ghana having brought the matter into the national courts). Published decisions on arbitrator challenges are rare for several reasons. First, the sensitive nature of a challenge often leads to the arbitrator's resignation or withdrawal of nomination.12 Second, been critical of lawyers undertaking the quasi-judicial role of an arbitrator while also serving as legal counsel in other investment treaty cases.18 Examples include *Siemens v. Argentina* and *Azurix v. Argentina*, both administered by the International Centre for Settlement of Investment Disputes (ICSID), an arm of the World Bank and the principal forum for investor-state disputes. Yet the scenarios in these cases involve an even less direct relationship than the case concerning Prof. Gaillard described above.

In both cases, Argentina challenged the appointment of the tribunal chair, Dr. Andres Rigo Sureda, who was then affiliated with the law firm Fulbright & Jaworski. Argentina argued that there was a conflict because the lawyer acting for the investors in both *Siemens* and *Azurix* had been appointed by Dr. Rigo Sureda's firm to serve as an arbitrator in an ICSID proceeding against Peru, which was unrelated but raised similar issues. Pending the resolution of Argentina's challenges, Dr. Rigo Sureda resigned from Fulbright & Jaworski. In both cases, Argentina's challenge to Dr. Rigo Sureda was rejected, but the reasons for these decisions were not published.19

Argentina also sought to have Dr. Rigo Sureda disqualified from the tribunal in an *ad hoc* UNCITRAL arbitration commenced by the U.K.-based energy company, National Grid. The two remaining arbitrators turned to the ICC to decide the
challenge. The ICC dismissed Argentina’s challenge and, as is customary for that organization, provided no reasons. According to media reports, Argentina is considering options to discover these reasons, which may include recourse to a local court, a path Ghana took in the Telkom-Malaysia case.

Another arbitrator challenge based on a perceived issue conflict arose in Canfor Corp. v. United States, a North American Free Trade Agreement (NAFTA) arbitration submitted under the UNCITRAL Arbitration Rules. The claimant, a Canadian investor, alleged that the United States imposed anti-dumping duties on Canadian softwood lumber imports, in violation of NAFTA’s investment protection provisions. The claimant’s arbitrator had earlier made a speech to a Canadian government council in which he described the U.S. stance on softwood lumber as “harassment.” When the United States challenged the claimant’s arbitrator for bias based on an issue conflict, the arbitrator refused to resign. Both he and the claimant argued that the comments were innocuous general statements and were not directed to the Canfor case. The United States asked the Secretary-General of ICSID, the appointing authority for arbitrations under NAFTA’s investment chapter, to decide this challenge. According to one of the parties’ attorneys, the ICSID Secretariat counseled the arbitrator to resign and in March 2003 he did so. Thus, no published decision was necessary.

Efforts to Address Issue Conflict
ICSID, which is seeing increased growth in the filings of investor-State disputes, has acknowledged the concern over perceived issue conflicts. In October 2004, ICSID issued a discussion paper seeking input on five possible areas of improvement of the ICSID framework. One of these was disclosure requirements for arbitrators. The ICSID Secretariat observed that, due to the large number of cases, “the disclosure requirements for ICSID arbitrators might usefully be expanded” to contain the same requirements as the UNCITRAL Arbitration Rules. These rules require arbitrators to disclose to the parties any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. If so amended, the Secretariat stated, the ICSID provisions “would require the arbitrator to disclose, not only any past or present relationships with the parties, but more generally any circumstances likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment. This might in particular be helpful in addressing perceptions of issue conflicts among arbitrators.” The ICSID Secretariat also suggested elaborating on this by creating an ICSID code of conduct for arbitrators.

Having received positive feedback to the suggestions in the Discussion Paper, in May 2005, ICSID recommended augmenting the signed declarations required by the ICSID Rules for Arbitrators to cover not just “past and present professional, business and other relationships with the parties,” but also “any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party.” This suggestion was well received by some groups, though others asked for an even more radical reformulation of the rule.

One advantage of clarifying the rules on arbitrator disclosure with respect to perceived or actual issue bias is a practical one—it might discourage parties from mounting time-consuming, unmeritorious challenges.

Approach of the ICJ
Issue conflict is not unique to international investment disputes. It has come up in the private commercial arbitration context and in cases involving public international law, including international criminal tribunals. The International Court of Justice (ICJ) in The Hague has issued “practice directions” aimed at those who serve both as ad hoc judges and counsel at the same time, or within short time periods. For the most part, these directions counsel that it is con-
trary to "the sound administration of justice" to have a person who is (or recently was) serving as counsel in one before the court serve as the ad hoc judge in another case. The ICJ also addressed the problem of perceived issue bias in a recent Advisory Opinion involving Israel's construction of a wall in the occupied Palestinian territory. Israel argued to the court that it was inappropriate for a particular judge to sit on the case when, in a press interview and in previous diplomatic positions for the Egyptian government, he allegedly "played an active, official and public role as an advocate for a cause that is in contention in this case." A majority of the ICJ rejected Israel's position, finding that the situation did not fall within the (somewhat limited) provisions of the ICJ statute for disqualification of a judge. Judge Buergenthal dissented (with respect to the judge's more recent press interview comments made in a personal capacity). In the course of his dissent, Judge Buergenthal remarked that "judicial ethics are not matters strictly of hard and fast rules—I doubt that they can ever be exhaustively defined—they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy."

**Conclusion**

While it may be difficult to come up with exhaustive definitions, some clarification would nevertheless be welcome. Greater clarity might be achieved by having decisions involving issue conflicts made public, or by setting more precise guidelines identifying the circumstances in which arbitrators might be disqualified due to issue conflicts. It is too early to say whether the recent examples of arbitrators withdrawing from tribunals or resigning from their "conflicting" roles of counsel herald a new trend in how arbitrators will deal with allegations of perceived issue bias.

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1 These include the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, available at www.ibanet.org/images/downloads/guidelines%202006.pdf (IBA Guidelines) and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, available at www.adr.org/sp.asp?&p=21958. These projects were considered necessary to expand upon the very broad statements of principle contained in the rules of most arbitral institutions. See for example the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules), Art. 9; art. 7 of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR) (a division of the American Arbitration Association); arts. 5.2 and 5.3 of the Arbitration Rules of the London Court of International Arbitration (LCIA Rules); arts. 7.1 & 7.2 of the Arbitration Rules of the International Chamber of Commerce (ICC Rules); art. 6 of the Arbitration Rules of the International Center for the Settlement of Investment Disputes (ICSID); arts. 2, 16 & 17 of the Statute of the International Court of Justice. A chart with extracts, prepared by the D.C. Bar, is available at www.dcbarr.org/doc_lawyers/sections/international_law/ arbitrationchart.pdf.

2 There are a few references to issue conflict in the IBA guidelines, but they focus on publications on general issues. See IBA Guidelines, art. 4.1.1 (Green List, not necessary to disclose when "the arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated."). The AAA/ABA Code of Ethics, in the Comment to Canon I, states that arbitrators "do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration."

3 Public statements may include articles, lectures, interviews, or arguments made by an advocate on behalf of a party in an unrelated case.

4 See for example, discussion of the public interest, particularly among environmental groups, surrounding the matter of Agnas del Tunari v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005, at ¶¶ 15-18; available at www.worldbank.org/icsid/cases/Ar_T_D_Judgement-en.pdf. See also discussion of arguments by Argentina regarding general policy connected with situation of economic, financial and social emergency, in CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, at ¶¶ 23-35; which can be accessed at www.worldbank.org/ icsid/cases/awards.htm#awardARB018.


9 Id. at ¶ 4.


11 Id. at ¶ 11.

12 See discussion in Markham Ball, "Prohiby Deconstructed: How Helpful, Really, Are the New International Bar Association Guidelines on Conflicts of Interest in International Arbitration?" 21 Arb. Int'l 323, 326-7. See also discussion in Barton Legum, "Investor-State Arbitrator Disqualified for Pre-Appointment..."
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27. Id. at ¶ 1.
28. See UNCITRAL Rules, art. 9, supra n. 2.
29. Id.
30. Id.
32. See ICSID, Suggested Changes, supra n. 31.
33. See, e.g., British Institute of International and Comparative Law, Investment Treaty Forum, Response to Working Paper of 12 May 2005 on Suggested Changes to the ICSID Rules and Regulations, dated June 10, 2005; Howard Mann et al., ICSID's International Investment and Sustainable Development Team, Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration," December 2004 at 4-6, available at www.isisd.org/pdf/2004/investment_icsid_response.pdf (expressing the view that "practicing lawyers who either themselves act as counsel in cases or have partners who do by definition have a conflict of interest (actual or perceived) that is inimical to their participation as arbitrators. . . . A clear statement of the scope of possible conflicts circumstances requiring disclosure is also needed. A code of conduct that is appropriately expansive may also assist in this regard.").
34. British Institute, supra n. 33, at 3 ("The proposal to incorporate in the disclosure obligations of arbitrators circumstances that might give rise to doubts as to an arbitrator's reliability for independent judgment, and to do so on a continuing basis, appears to be particularly helpful. Perceptions of issue conflicts—rather than only actual issue conflicts—would thereby be addressed, helping to avoid many later potentially time-consuming challenges."). For comment on arbitrator challenges as a tactical maneuver, see Ball, supra n. 12, at 326.
35. See 22 News from ICSID 11 (2005) and remarks by ICSID Secretary General Roberto Dañino, "Recent Institutional Developments" at 22nd Joint Colloquium on International Arbitration, New York, Nov. 18, 2005.
36. See Jean-Louis Delvolvé et al., French Arbitration Law and Practice 97, 98 (2003) ("bias covers any inclination towards one party's case, or prejudice against the other's, and may arise, for example, if an arbitrator has . . . given his views in his published work on a topic relevant to the arbitration"). See also Giorgio Bernini, ICC Pub. No. 472 at 35 (1991) ("If prior opinions are expressed by the prospective arbitrator on specific points, without possible variables concerning special factual details or circumstances, and such points are clearly the object of the award to be rendered, it is proper that the designated arbitrator decline the appointment."). The author is aware of one ICC challenge based upon perceived issue conflict.
38. International Court of Justice, Practice Directions VII and VIII, available at www.icj-cij.org/icjwww/ibasic_documents/ibasicxtet/ibasic_practice_directions_20040730_i-xii.htm. Under Practice Direction VII, the ICJ "considers that it is not in the interest of the sound administration of justice that a person sit as judge ad hoc in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge ad hoc pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge ad hoc in another case before the Court." Under Practice Direction VIII, the ICJ "considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge ad hoc, Registrar, Deputy Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge ad hoc, Registrar, Deputy Registrar or higher official of the Court." Practice Directions VII and VIII do not affect a choices or designation made by the parties prior to Feb. 7, 2002, the date of the adoption by the Court of those Directions.
40. Id. at ¶ 2.
41. Id. at ¶¶ 7-8. Statute of the International Court of Justice, art. 17 ("No member of the Court may act as agent, counsel, or advocate in any case. 2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity. 3. Any doubt on this point shall be settled by the decision of the Court.").
43. Id. at ¶ 10.
44. A recent effort in the context of the international judiciary is the International Law Association's Burgh House Principles on the Independence of the International Judiciary, available at www.ucl.ac.uk/laws/cict/docs/burgh_fin al_21204.pdf (Article 9.2 counsels against a judge serving "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 or impartiality."). See also Ruth McKenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge," 44 Harv. Int'l L.J. 271 (2003).