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Emerging Expectations for Arbitrators: “Issue Conflict” in Investor-State Arbitration and Beyond

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ARTICLE

EMERGING EXPECTATIONS FOR ARBITRATORS:
“ISSUE CONFLICT” IN INVESTOR-STATE ARBITRATION
AND BEYOND

By Ina C. Popova and Jessica L. Polebaum***

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I. INTRODUCTION

It is by now well accepted that an arbitrator must be independent and impartial with respect to the parties and counsel appearing in a case. Many rules and guidelines exist regarding disclosure of the arbitrator’s prior exposure to parties and counsel. But what about when the arbitrator has prior exposure to a legal or factual issue in the case? Where do inclinations towards a particular issue fall on the “traffic light” spectrum of acceptable relationships?

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The arbitrator's pre-existing relationship to an issue in dispute in the case, and particularly the concern that that relationship may affect his or her ability to impartially decide the case, has been described as an "issue conflict." In the wake of such concerns—and against the background of several arbitrator disqualifications ostensibly made on this basis—in late 2013, the American Society of International Law ("ASIL") and the International Council for Commercial Arbitration ("ICCA") established their first joint task force on the topic of issue conflicts in investor-State arbitration (the "Task Force"). After several years of research and public consultation, the Task Force issued its final report in March 2016.¹

This article summarizes the Task Force's observations and provides an overview of recent developments on the topic, including the proposed revision to the Arbitration Rules of the International Center for Settlement of Investment Disputes ("ICSID") and recent proposals for codes of conduct for arbitrators.

II. *OBSERVATIONS OF THE ISSUE CONFLICTS TASK FORCE*

In November 2013, at the direction of former ASIL president Donald Francis Donovan and then-ICCA president Jan Paulsson, ASIL and ICCA assembled a group of experts tasked with evaluating, reporting on, and making best-practice recommendations regarding issue conflicts in investor-State arbitration. Co-chaired by Professor John R. Crook and Professor Laurence Boisson de Chazournes, over the course of nearly three years the Task Force collected and reviewed cases and literature, created and responded to a detailed questionnaire, and led briefings and meetings at ICCA and ASIL-International Law Association conferences.² The Task Force considered existing guidance, including rules and principles regarding jurists' and lawyers' ethical obligations,³ permanent international

1. AM. SOC'Y OF INT'L LAW, INT'L COUNCIL FOR COMMERCIAL ARBITRATION [ASIL-ICC], REPORT OF THE ASIL-ICCA JOINT TASK FORCE ON ISSUE CONFLICTS IN INVESTOR-STATE ARBITRATION (2016) [hereinafter ASIL-ICCA REPORT]

2. *Id.* ¶ 10.

3. Namely, the UN Basic Principles on the Independence of the Judiciary, Burgh House Principles on the Independence of the International Judiciary, Hague Principles on the Ethical Standards for Counsel Appearing before International Courts and Tribunals, the ICSID Convention and United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, and 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

court and tribunal decisions, and challenge decisions in investor-State arbitrations. After holding several working sessions open to the public, and in light of comments received on an advance draft, the Task Force produced a final report on the state of the field and recommendations for future development.⁴

The report, published in March 2016, grapples with how to appropriately define an “issue conflict.”⁵ Observing that the term “conflict” already presupposes a problem, the Task Force settled on the term “inappropriate predisposition” instead.⁶ It then attempted to chart the boundaries of when a predisposition becomes “inappropriate.”⁷ As noted below, that question bears on the nature of investor-State arbitration itself.

A. Overview of Existing Guidance and Practice

A comparison of existing guidance and practice illustrates a very high standard for disqualifying a decision-maker on the grounds of prejudgment in the context of standing international tribunals. For example, in the *Wall* case, a majority of the International Court of Justice found that Judge Elaraby’s prior statements, including a newspaper interview in which he had expressed criticism of Israel’s conduct with respect to the occupation of Palestinian territory and atrocities perpetrated on the Palestinian civilian population, did not disqualify him from considering the UN General Assembly’s request for an advisory opinion on Israel’s construction of a wall in the Occupied Palestinian Territory.⁸ In the *Furundzija* case, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) rejected a challenge to Judge Mumba on the basis that her association with the United Nations Commission on the Status of Women cannot be taken to suggest prejudgment in a trial involving the charge of aiding and abetting rape.⁹ The ICTY noted that “her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute [of the ICTY] for experience in

4. ASIL-ICCA REPORT, *supra* note 1, ¶ 10.

5. *Id.* ¶¶ 14-19.

6. *Id.* ¶ 18.

7. *Id.* ¶¶ 151-68.

8. Int’l Court of Justice [ICJ], *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Order on Composition of the Court*, ¶ 8 (Jan. 30, 2004).

9. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Appeals Chamber Judgment, ¶¶ 164-168, 197-205 (Int’l Crim. Trib. For the Former Yugoslavia Jul. 21, 2000).

international law” and that “[i]t would be an odd result indeed if the operation of an eligibility requirement were to lead to an inference of bias.”¹⁰ Decisions of the International Criminal Tribunal for Rwanda, the Special Court of Sierra Leone, and the International Criminal Court similarly endorse a high bar for disqualification.¹¹

Although the written standards of independence and impartiality are not substantively different, an arbitrator’s prior exposure to issues in the case appears to have prompted heightened concern in international arbitration. Existing written rules and guidelines offer limited guidance. The International Bar Association Guidelines on Conflicts of Interest recommend disclosing circumstances in which the arbitrator “currently serves, or has served within the past three years, as arbitrator in another arbitration *on a related issue involving one of the parties* or an affiliate of one of the parties,”¹² as well as when an arbitrator has “publicly advocated a position *on the case*.”¹³ Arbitrators need not necessarily disclose, however, instances in which they have “previously expressed *a legal opinion* (such as in a law review article or public lecture) *concerning an issue that also arises in the arbitration* (but this opinion is not focused on the case).”¹⁴ The ICC Guidance Note on conflict disclosures similarly suggests disclosure when the arbitrator or his or her law firm “has expressed a view *on the dispute* in a manner that might affect his or her impartiality,” without offering guidance on prior expressions of views on issues arising in the dispute.¹⁵

In practice, disqualifications on the grounds of prejudgment have been rare. Challenges have been made on the basis of prejudgment where an arbitrator has (i) addressed an issue in prior academic

10. *Id.* ¶ 205.

11. *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgment on Appeal, ¶¶ 76-80 (Nov. 28, 2007); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Decision on Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case, ¶¶ 8-11 (Jan. 24, 2008); *Prosecutor v. Dyllo*, Case No. ICC-01/04-01/06, Decision on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song (June 11, 2013); *Prosecutor v. Nourain*, Case No. ICC-02/05-03/09, Decision on the Defence Request for the Disqualification of a Judge, ¶¶ 12-14 (June 5, 2012).

12. Int’l Bar Assoc. [IBA], *Guidelines on Conflicts of Interest*, art. 3.1.5 (2014) (emphasis added).

13. *Id.* art. 3.5.2 (emphasis added).

14. *Id.* art. 4.1.1 (emphasis added).

15. Int’l Court of Arbitration [ICC], *Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, ¶ 20 (Oct. 30, 2017) (emphasis added).

writing or speech;¹⁶ (ii) argued or advised on an issue in the role of counsel, whether in the past or concurrently (the so-called “double-hat” scenario);¹⁷ (iii) previously been exposed to similar facts;¹⁸ or (iv) addressed a legal issue in a prior decision or award as an arbitrator.¹⁹

More often than not, however, such challenges have failed. The Task Force’s research identified only three successful challenges ostensibly on the basis, at least in part, of an issue conflict.²⁰ All three were decided in a six-month period between September 2013 and March 2014.²¹

In *CC/Devas v. India*, Judge Peter Tomka, acting as the disqualifying authority, considered whether “on the basis of the prior view [expressed by the challenged arbitrators] 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.”²² He disqualified one of the challenged arbitrators on the grounds of his participation in four prior

16. See, e.g., *Repsol S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Request for Disqualification of the Majority of the Tribunal (Dec. 13 2013) [hereinafter *Repsol*]; *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶52 (Aug. 12, 2010) [hereinafter *Urbaser S.A.*].

17. See, e.g., *Saint-Gobain Performance Plastics v. Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant’s Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, ¶ 61 (Feb. 27, 2013) [hereinafter *Saint-Gobain Performance Plastics*].

18. See, e.g., *Participaciones Inversiones Portuarias SÀRL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on Proposal to Disqualify an Arbitrator (Nov. 12, 2009) [hereinafter *PIP SÀRL*]; *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant’s Proposal to Disqualify Professor Philippe Sands, ¶ 74 (July 11, 2014) [hereinafter *İçkale İnşaat Limited Şirketi*].

19. See *Tidewater Inc. et al. v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern, Arbitrator, ¶ 60 (Dec. 23, 2010); see also, *İçkale İnşaat Limited Şirketi*, *supra* note 18, ¶ 72.

20. See ASIL-ICCA REPORT, *supra* note 1, ¶¶ 118-22, 130-31, 134-35.

21. See *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd., and Telecom Devas Mauritius Ltd. v. Republic of India*, PCA Case No. 2013-09, Decision on the Respondent’s Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30, 2013) [hereinafter *CC/Devas*]; *Blue Bank Int’l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal (Nov. 12, 2013) [hereinafter *Blue Bank*]; *Caratube Int’l Oil Co. LLP & Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014) [hereinafter *Caratube*].

22. *CC/Devas*, *supra* note 21, ¶ 58.

awards in which the arbitrator had been “confronted with the same legal concept in this case arising from the same language on which he has already pronounced,” as well as views he had expressed in an academic article defending those awards after their annulment.²³

In *Blue Bank International & Trust v. Venezuela*, the challenged arbitrator’s law firm represented an investor in another case against the same respondent State, in which it was alleged that similar issues were involved.²⁴ In disqualifying the arbitrator, the President of the ICSID Administrative Council relied on the commonality of issues in both arbitrations.²⁵ He held that “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 [the arbitrator] would be in a position to decide issues that are relevant in [the other case] if he remained an arbitrator in this case.”²⁶

Finally, in *Caratube v. Kazakhstan*, an arbitrator was disqualified in light of his previous service on a tribunal that dismissed a claim against Kazakhstan, which was based on similar facts.²⁷ The unchallenged members of the tribunal held that the arbitrator’s participation in the prior award created a risk that “his understanding of the situation may well be affected by information acquired in the [prior] arbitration” and that as a result the arbitrator may “make a determination . . . that could be based on such external knowledge.”²⁸

No challenge has succeeded since *Caratube*, though parties continue to attempt disqualifications. In September 2017, it was reported that the two unchallenged arbitrators in *TCC v. Pakistan*²⁹ had rejected Pakistan’s proposal to disqualify the claimant-appointed arbitrator on the grounds (among other things) that he had acted as counsel in another case in which the claimant had used the same valuation method as that put forward by the claimant in the pending proceeding.³⁰ More recently, in March 2018, it was reported that the

23. *Id.* ¶¶ 60-65.

24. *Blue Bank*, *supra* note 21, ¶¶ 66-68.

25. *Id.* ¶ 68.

26. *Id.*

27. *Caratube*, *supra* note 21, ¶¶ 78-86.

28. *Id.* ¶ 89.

29. *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1. Debevoise is counsel to the claimant in this arbitration.

30. Tom Jones, *Alexandrov survives Pakistan’s challenge over ‘rare’ damages model*, *GLOBAL ARB. REV.* (Sept. 8, 2017), <http://globalarbitrationreview.com/article/1147206/>

two unchallenged arbitrators in an ICSID arbitration against Turkmenistan³¹ rejected a challenge to the claimant-appointed arbitrator on the grounds that he had impermissibly prejudged the scope of a most-favored-nation clause because he was a member of the tribunal in a prior arbitration against Kazakhstan which also involved a most-favored-nation clause.³²

B. Task Force Conclusions

Based on the review of existing guidance and available disqualification decisions, the Task Force noted three major considerations in deciding challenges to arbitrators on the basis of prejudice:

1. **Degree of Commitment.** The conviction with which the view is expressed bears on whether the arbitrator could change his or her view in light of the specific circumstances of the case.³³ Thus, advocating a particular position as counsel on behalf of a client is generally not seen as an indication of the individual's unshakable personal conviction.³⁴ Similarly, views expressed in academic articles on legal principles generally do not foreclose a different application of that principle based on the facts of the case at hand.³⁵ One arbitral panel noted, in rejecting a challenge based on prior scholarship, that "[o]ne 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."³⁶
2. **Concurrency, Propinquity.** While prior professional advocacy generally does not indicate a closed mind to the issue, *concurrent* service as an arbitrator and counsel in matters

alexandrov-survives-pakistans-challenge-over-rare-damages-model [https://perma.cc/8YNQ-87BH] (archived May 7, 2018).

31. *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6.

32. Alison Ross, *Hanotiau survives challenge by Turkmenistan*, GLOBAL ARB. REV. (Mar. 20, 2018), <https://globalarbitrationreview.com/article/1166798/hanotiau-survives-challenge-by-turkmenistan> [https://perma.cc/TB48-DACM] (archived May 7, 2018).

33. ASIL-ICCA REPORT, *supra* note 1, ¶ 161.

34. *Id.*; *see, e.g., Saint-Gobain Performance Plastics*, *supra* note 17; *Telekom Malaysia Berhad v. Ghana, District Court*, The Hague, Challenge No. 17/2004, Petition No. HA/RK 2004 [hereinafter *Telekom Malaysia Berhad*].

35. ASIL-ICCA REPORT, *supra* note 1, ¶ 162; *see, e.g., Repsol S.A.*, *supra* note 16; *but see CC/Devas*, *supra* note 21.

36. *Urbaser S.A.*, *supra* note 16, ¶ 51.

involving the same party or that are otherwise related in some way is problematic.³⁷ Such concurrence could present an immediate conflict or allow for the development of a conflict as both proceedings progress.³⁸

3. **Specificity/Proximity to the Current Case.** Related to the level of commitment with which the view is expressed, the specificity of the view expressed and its relationship to the case at hand also affect where the line is drawn.³⁹ As noted above, in *Caratube*, an arbitrator was disqualified on the grounds of exposure to similar facts in a separate case; in *PIP SARL*, factual differences between the related cases were sufficient to overcome a challenge based on alleged prejudgment.⁴⁰

The Task Force also observed that the concern as to prejudgment appears to be more acute for arbitrators in investor-State disputes than for members of courts and standing tribunals, reflecting criticisms of the legitimacy of the investor-State arbitration framework in general.⁴¹ As the Chairman of the ICSID Administrative Council has noted, “[t]he international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having

37. ASIL-ICCA REPORT, *supra* note 1, ¶164; *see, e.g., Vito Gallo v. Canada*, UNCITRAL, Challenge Decision (Oct. 14, 2009); *Grand River Enterprises v. United States*, Letter from ICSID Secretary-General Ana Palacio to Professor James Anaya (Nov. 28, 2007).

38. *See Blue Bank*, *supra* note 21, ¶ 68; *Telekom Malaysia Berhad*, *supra* note 34; *see also Saint-Gobain Performance Plastics*, *supra* note 17, ¶ 84 (rejecting the challenge before it regarding prior service as counsel but recognizing that concurrent service as counsel “can potentially raise doubts as to the impartiality and independence of the concerned individual in his role as arbitrator. It seems possible that the arbitrator in such a case could take a certain position on a certain issue, having in mind that if he took a different position as arbitrator, he could undermine his credibility as counsel as [*sic*] which he is arguing on the same, or very similar, issue.”).

39. ASIL-ICCA REPORT, *supra* note 1, ¶ 166.

40. *PIP SARL*, *supra* note 18, ¶¶ 31-35; *see also EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Partial Award on Jurisdiction, ¶¶ 43-46 (Feb. 27, 2004); *Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶¶ 36-38 (Oct. 22, 2007); *İçkale İnşaat Limited Şirketi*, *supra* note 18, ¶¶ 118-25; *see also Barton Legum, Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 *ARB. INT’L* 241, 244 (2005) (discussing the readiness of the disqualifying authority in *Canfor Corp. v. United States* to accept a challenge based on the previous statements of an arbitrator regarding a measure at issue in the arbitration; the arbitrator in question resigned before any decision was published).

41. ASIL-ICCA REPORT, *supra* note 1, ¶¶ 158, 177.

faced similar factual or legal issues in other arbitrations.”⁴² But public dialogue surrounding reform of investor-State arbitration frequently criticizes the small group of actors and their perceived self-interest in deciding cases one way or the other.⁴³

What makes arbitration different from national court litigation or proceedings before international tribunals? One major difference is that, in arbitration, the parties can choose their decision-maker. Moreover, in arbitration there is no appellate review or binding precedent to settle the law and thus rein in the potential impact of any one arbitrator’s subjective predisposition towards a particular outcome.⁴⁴

Both of those elements, however, are fundamental institutional features of international arbitration. Party autonomy, in particular, entails a certain—albeit not unlimited—freedom to choose an arbitrator that one considers appropriate for the case.⁴⁵ Judging whether an arbitrator is appropriate for the case typically involves considering, among other things, the candidate’s prior experience with, and approach to, the issues in dispute.⁴⁶ After all, who would challenge a decision-maker for staunchly believing in the right to due process at all costs? Assessing the role and limits of party autonomy in appointing arbitrators therefore entails assessing the role and limits of investor-State arbitration itself.⁴⁷

Ultimately, the Task Force made three concrete recommendations. *First*, the Task Force counseled that bright-line rules are “unnecessary” and “counterproductive.”⁴⁸ Disqualification decisions are ultimately highly fact-specific, and bright-line rules may have an unwelcome effect on the development of the field by chilling scholarship and discouraging productive interventions by experts in the field.⁴⁹ *Second*, challenge decisions should be more fully reasoned and publicly available.⁵⁰ Creating an accessible body of decisions will

42. Universal Compression Int’l Holdings, *S.L.U. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, ¶ 83 (May 20, 2011).

43. See ASIL-ICCA REPORT, *supra* note 1, ¶ 170 & n.187.

44. *Id.* ¶¶ 24-25.

45. *Id.* ¶ 178.

46. See *id.* ¶¶ 121-23.

47. See *id.* ¶¶ 177-88.

48. *Id.* ¶ 183.

49. *Id.* ¶¶ 183-84.

50. *Id.* ¶ 185.

serve the twin goals of advancing the arbitration community's understanding of the boundaries of impermissible prejudgment and enhancing the legitimacy of the investor-State system.⁵¹ Publication of challenge decisions should foster shared expectations and minimize unpredictability for parties, and clear, reasoned conceptualizations of prejudgment would help improve perceptions of the investor-State framework.⁵² *Finally*, the Task Force recognized that there are practical challenges regarding the timing of disclosures stemming from the fact that, at the time of appointment, there is limited information about the issues that might arise in a case.⁵³ The Task Force expressed the hope that solutions to these practical difficulties could be considered as the contours of inappropriate prejudgment become more defined through practice.⁵⁴

III. RECENT REFORM PROPOSALS

Since publication of the Task Force report, there have been several initiatives to define the proper approach to the perceived problem of issue conflicts, including through codes of conduct for arbitrators and other institutional guidelines. These initiatives reflect varying degrees of institutionalization, and attract varying degrees of support. We consider three proposals below: (i) ICSID's announcement of a revision to its Arbitration Rules that might include an arbitrator code of conduct, (ii) the European Commission's continued pursuit of a standing investment court to replace investor-State arbitration, and (iii) various proposals made to reform arbitrator ethical standards.

A. ICSID Rules Revision

In October 2016, ICSID announced that it would commence consultations with Member States on revisions to the ICSID Arbitration Rules and invited Member States to suggest topics worthy

51. *Id.*

52. *Id.* ¶¶ 185-88.

53. *Id.* ¶ 189.

54. *Id.*

of consideration.⁵⁵ That invitation was extended to the broader public of interested stakeholders in January 2017.⁵⁶

A code of conduct for arbitrators was one of the main topics of suggested reform.⁵⁷ ICSID noted:

Code of Conduct for Arbitrators: the ICSID rules currently require a declaration that an arbitrator meets the required qualifications in the Convention, however some recent treaties have included more elaborated codes of conduct outlining expectations. This could be incorporated in the ICSID process.⁵⁸

Currently, there is no comprehensive code of conduct governing ICSID arbitrators or the treatment of potential issue conflicts. Article 14(1) of the ICSID Convention dictates that arbitrators must be “persons . . . who may be relied upon to exercise independent judgment.”⁵⁹ At the outset of all ICSID proceedings, each arbitrator must sign a declaration “to judge fairly as between the parties” and append a description of past and present professional and other relationships with the parties, as well as “any other circumstance that might cause [his or her] reliability for independent judgment to be questioned by a party.”⁶⁰ An arbitrator may be disqualified where he or she shows a “manifest lack of the qualities required by paragraph (1) of Article 14” of the Convention.⁶¹ This standard is at least facially different from that in the UNCITRAL Arbitration Rules, which adopts a standard of “justifiable doubt” as to the arbitrator’s independence and impartiality.⁶²

55. ICSID, Amendment of ICSID’s Rules and Regulations, <https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx> [https://perma.cc/T22W-8TGX] (archived May 7, 2018).

56. *Id.*

57. ICSID, List of Topics for Potential ICSID Rule Amendment (Feb. 2017), <https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential%20ICSID%20Rule%20Amendment-ENG.pdf> [https://perma.cc/E2DX-DKUG] (archived May 7, 2018); ICSID, The ICSID Rules Amendment Process (Apr. 2017), at 2, <https://icsid.worldbank.org/en/documents/about/icsid%20rules%20amendment%20process-eng.pdf> [https://perma.cc/PK8Z-BL7T] (archived May 7, 2018) [hereinafter ICSID Rules Amendment Process].

58. See ICSID Rules Amendment Process, *supra* note 57, at 2.

59. Int’l Ctr. for Settlement of Investment Disputes [ICSID], Convention art. 14(1) (2006).

60. ICSID Arbitration Rule 6(2).

61. ICSID Convention art. 57.

62. See LAW COUNCIL OF AUSTRALIA, *Potential rule amendments or improvements to the arbitration and conciliation procedures of ICSID*, in ICSID, PUBLIC COMMENTS TO AMENDMENT OF ICSID’S RULES AND REGULATIONS ¶ 10 (2016-2018) [hereinafter LAW

ICSID's background paper on the topic of codes of conduct has not yet been released, although it is expected in 2018.⁶³ Public comments on potential areas for revision have expressed a range of viewpoints on a potential ICSID code of arbitrator conduct. For example, the Law Council of Australia has noted that "clearer guidelines" are needed to "minimize the persistence of [the double-hat] trend" in order to bolster ICSID's legitimacy.⁶⁴ In its public comments, Baker & McKenzie echoed that sentiment and suggested the stipulation of "a certain period of grace during which arbitrators cannot act as counsel."⁶⁵ Noting that under the current ICSID rules, the "guarantees of independence and impartiality are inadequate," the Columbia Center on Sustainable Investment provided that the revised rules should preclude entirely the practice of simultaneous service as an arbitrator and counsel in investor-state arbitral disputes.⁶⁶ Several commenters also noted that arbitrator challenges should not be heard by the unchallenged arbitrators, but rather by ICSID itself.⁶⁷ ICSID is expected to publish a Working Paper on Proposed Amendments in time for consideration at a September 2018 meeting of Member State representatives.⁶⁸

B. *Standing Investment Tribunals*

Over the past several years, the European Commission (the "EC") has reacted to criticisms of the legitimacy of investor-State

COUNCIL OF AUSTRALIA, *Potential Rule Amendments or Improvements*], <https://icsid.worldbank.org/en/Documents/about/Public%20Comments%20to%20Amendment%20to%20ICSID%20Rules%20and%20Regulations.pdf> [https://perma.cc/5ZVJ-9XYR] (archived May 7, 2018); Claudiu-Paul Buglea, *Potential Amendments to ICSID Rules and Regulations*, in ICSID, PUBLIC COMMENTS TO AMENDMENT OF ICSID'S RULES AND REGULATIONS ¶ 2.1 (2016-2018).

63. ICSID, Next Steps in the Rules Amendment Process, <https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue4/Next-Steps-in-the-Rules-Amendment-Process.aspx> [https://perma.cc/8YN7-GT4Z] (archived May 7, 2018) [hereinafter ICSID, Next Steps].

64. LAW COUNCIL OF AUSTRALIA, *Potential Rule Amendments or Improvements*, *supra* note 62, ¶ 11.

65. BAKER & MCKENZIE, *Submissions to the ICSID Secretariat on revisions to the ICSID Rules and Regulations*, in ICSID, PUBLIC COMMENTS TO AMENDMENT OF ICSID'S RULES AND REGULATIONS ¶ 1.32.

66. COLUMBIA CENTER ON SUSTAINABLE INVESTMENT, *Illustrative Suggestions for Amendments to the ICSID Arbitration Rules*, in ICSID, PUBLIC COMMENTS TO AMENDMENT OF ICSID'S RULES AND REGULATIONS 5.

67. *Id.*; Buglea, *supra* note 62, ¶ 2.2.

68. ICSID, Next Steps, *supra* note 63.

arbitration by advocating for codes of conduct for arbitrators and for replacing the investor-State dispute settlement system with a standing investment court.⁶⁹ The EC has implemented these goals in the European Union's trade agreement with Canada ("CETA"), which was ratified by Canada in May 2017, and with Vietnam, which is in the process of being ratified, as well as in the EC's proposal for a Transatlantic Trade and Investment Partnership.⁷⁰ Through the establishment of alternative dispute resolution mechanisms and standards, these instruments address certain (but not all) aspects of the prejudgment concern. All three prohibit concurrent service as arbitrator and counsel: they provide that arbitrators "shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law."⁷¹ They also contain codes of conduct for arbitrators. These codes of conduct include general language requiring arbitrators to be "independent and impartial"⁷² and to disclose relationships or matters likely to affect an arbitrator's independence or impartiality or that might create an appearance of impropriety or bias.⁷³

CETA goes several steps further: it imposes explicit disclosure obligations requiring potential arbitrators to disclose "public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same matters."⁷⁴ CETA

69. See, e.g., EUROPEAN COMMISSION, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm [https://perma.cc/2Q7Z-SYXM] (archived May 7, 2018).

70. See, e.g., European Union-Canada Comprehensive Economic and Trade Agreement, c. 8, § F (Oct. 30, 2016) [hereinafter CETA Code of Conduct] (regarding a standing investment tribunal and a future multilateral investment court system); European Union-Vietnam Free Trade Agreement, c. 8, § 4 (Feb. 1, 2016) [hereinafter EU-Vietnam FTA Code of Conduct] (regarding a standing investment tribunal and a future multilateral investment court system); Transatlantic Trade and Investment Partnership EU Proposal, c II, § 4 (Nov. 12, 2015) [hereinafter Proposed TTIP Code of Conduct] (regarding a standing investment tribunal and a future multilateral investment court system).

71. Proposed TTIP Code of Conduct, *supra* note 70, c. II, § 2, art. 11(1); EU-Vietnam FTA Code of Conduct, *supra* note 70, c. 8, § 3, art. 14(1); CETA Code of Conduct, *supra* note 70, c. 8, § F, art. 8.30(1).

72. Proposed TTIP Code of Conduct, *supra* note 70, c. II, § 2, Annex II; EU-Vietnam FTA Code of Conduct, *supra* note 70, c. 8, § 3, Annex II; CETA Code of Conduct, *supra* note 70, c. 8, § F, Annex 29-B.

73. Proposed TTIP Code of Conduct, *supra* note 70, art. 3(1); EU-Vietnam FTA Code of Conduct, *supra* note 70, art. 3(1); CETA Code of Conduct, *supra* note 70, art. 3(1).

74. CETA Code of Conduct, *supra* note 70, art. 4(4).

entered into force provisionally in September 2017, although it will not fully apply until it has been ratified by all Member States.⁷⁵

In November 2017, the EC announced that it would pursue the establishment of a permanent multilateral investment court system.⁷⁶ The court would be composed of a tribunal of first instance and of appeal; members of the court would be appointed to fixed, long, and non-renewable terms.⁷⁷ This institutionalization project aims to address, in part, concerns about the pernicious effects of party appointment of the decision-maker, but with the attendant consequences for the principle of party autonomy.

C. Ethics Regulation Proposals

Several suggestions for ethics regulation for arbitrators emerged in late 2016. Although these proposals do not specifically address it, they form part of the same current of institutionalization confronting the perceived problem of issue conflicts.

In October 2016, the Swiss Arbitration Association's ("ASA") working group on counsel ethics—whose mandate included considering arbitrator impartiality and independence—scrapped a previous proposal for a global ethics council.⁷⁸ The idea of a transnational body tasked with applying and enforcing ethical principles, with "the main [though not exclusive] power to apply rules of professional ethics that it deems relevant and applicable," had been suggested by the ASA's President in 2014.⁷⁹ The ASA's working

75. See EUROPEAN COMMISSION, EU-Canada trade agreement enters into force, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723> [<https://perma.cc/T3QG-BZC5>] (archived May 7, 2018).

76. See European Commission, Recommendation for a Council Decision, authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, Sept. 13, 2017, COM(2017) 493, <http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-493-F1-EN-MAIN-PART-1.PDF> [<https://perma.cc/KPE3-YLDQ>] (archived May 7, 2018).

77. European Commission, Annex to the Recommendation for a Council Decision, authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, ¶ 9, Sept. 13, 2017, COM(2017) 493, <http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-493-F1-EN-ANNEX-1-PART-1.PDF> [<https://perma.cc/6HEC-7KL9>] (archived May 7, 2018).

78. ASA, ASA Working Group on Counsel Ethics Releases Latest Findings (Oct. 3, 2016), <http://www.arbitration-ch.org/en/asa/asa-news/details/993.asa-working-group-on-counsel-ethics-releases-latest-findings.html> [<https://perma.cc/VJ7K-XTCL>] (archived May 7, 2018).

79. Elliot Geisinger, *President's Message: Counsel Ethics in International Arbitration – Could One Take Things a Step Further?*, 32 ASA BULL. 453, 455 (2014).

group deemed the extra-institutional structure to be premature, though not definitively unnecessary.⁸⁰

One month after the ASA's findings were announced, Singapore Chief Justice Sundaresh Menon proposed that the Chartered Institute of Arbitrators ("CI Arb") hear challenges to arbitrators in proceedings administered by other institutions.⁸¹ Justice Menon argued that, because CI Arb has "devoted considerable attention to the development of best practices," it can build on existing disciplinary procedures to self-regulate the arbitration community.⁸² This "robust and independent disciplinary process" would, in his view, "enhance the legitimacy of arbitration as a whole."⁸³ Under Justice Menon's proposal, an ethics complaint against an arbitrator would first be raised with the relevant arbitral institution, then referred to CI Arb, which could elect to begin disciplinary proceedings.⁸⁴ CI Arb's intervention would be limited to cases of egregious ethical breach.⁸⁵ Disciplinary proceedings would be heard by arbitrators selected from a list maintained by CI Arb.⁸⁶ The process would be written into the rules of the respective arbitral institutions, and CI Arb's disciplinary decisions "would be published and notified to other arbitral institutions enrolled in the scheme."⁸⁷ Sanctions could include removal of the arbitrator from the list of the administering institution or from CI Arb.⁸⁸

Justice Menon's proposal has not yet been followed by concrete steps to implement such self-regulation. In October 2017, the President of the ICC International Court of Arbitration, Alexis Mourre, argued that no separate ethics body is necessary or advisable: rather, institutions can police arbitrators and arbitrators can police counsel, both according to existing institutional guidelines and best

80. *Id.*

81. Sundaresh Menon, *Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-appointed Arbitrator*, 34 J. OF INT'L ARB. 347, 369 (2017).

82. *Id.*

83. *Id.* at 370-71.

84. *Id.* at 370.

85. Alison Ross, *Tribunals and institutions can monitor ethics, argues Mourre*, GLOBAL ARB. REV. (Oct. 9, 2017), <http://globalarbitrationreview.com/article/1148684/tribunals-and-institutions-can-monitor-ethics-argues-mourre> [<https://perma.cc/WGZ5-ANHF>] (archived May 7, 2018) (describing new elements of the proposal as reported by former CI Arb president Doug Jones).

86. Menon, *supra* note 82, at 370.

87. *Id.*

88. *Id.*

practices.⁸⁹ A third supervisory authority would be in no better a position to judge ethical challenges than the relevant arbitral institution.⁹⁰ Moreover, Mourre argued, disciplinary proceedings could be misused for tactical ends.⁹¹

IV. CONCLUSION

“Integrity has no need of rules.”
—Albert Camus, *The Myth of Sisyphus*

Suggestions for the reform of arbitrator duties prompt valuable discussion of the nature of international arbitration itself. What do we expect from arbitrators? What can we tolerate, and to what do we aspire? What value and limits do we place on party autonomy, academic freedom, consistency in outcomes? How do we balance the appearance of an open mind with the preference for certainty as to an arbitrator’s approach, and the reality that experienced decision-makers will have preconceived (and not necessarily problematic) notions of what the law is and should be?

The voices for institutional reform may eventually converge on a consensual approach. In the meantime, however, the existing general standards of independence and impartiality are expansive enough to cover alleged prejudgment of legal or factual issues. On this, as on other issues, the arbitration community as a whole will no doubt ultimately generate best practices through healthy debate, rigorous analysis, and seasoned practice.

89. Ross, *supra* note 86.

90. *Id.*

91. *Id.*