Berkeley Journal of International Law

Volume 26 | Issue 1 Article 3

2008

The Judge Who Knew Too Much: Issue Conflicts in International Adjudication

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By
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I.
INTRODUCTION

Professor Thomas M. Franck once asked whether "any man, or any group of men, [can] administer justice impartially in an ideologically and culturally divided world."[1] His question may have been rhetorical, but it highlights the intractability of the problem of impartiality in international adjudication. Cases and commentary have elucidated various features of this problem, but one aspect of adjudicator impartiality, issue conflicts,[2] warrants greater discussion. Essentially, an issue conflict refers to actual bias, or an appearance of bias, arising from an adjudicator's relationship with the subject matter of, as opposed to the parties to, the dispute. It seems both intuitive and indispensable that an international adjudicator "should come to the case with an open mind, ready to be convinced by the arguments of the parties, and should not already have formed and expressed a view on the questions arising in the case."[3] In practice, however, determining when an adjudicator should be disqualified from adjudicating an international dispute because of "a prior commitment to one of the contending

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1. Thomas M. Franck, *Some Psychological Factors in International Third-Party Decision-Making*, 19 STAN. L. REV. 1217, 1217 (1967).

2. The label "issue conflict" in this Article focuses on adjudicators. A distinct problem that has also been described as an issue or positional conflict occurs when an attorney advocates contradictory outcomes of an issue for different clients in different disputes. For a discussion of that type of issue conflict, see, for example, John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993).

3. NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 190 (1989).

views of the grievances . . . in the case"[4] has proved difficult.

Addressing issue conflicts is valuable because of the prevalence of repeat players—whether states, private entities, or adjudicators—in international adjudication. More than ever, parties in international disputes are considering third-party adjudication as a means of settlement.[5] Not only are multinational companies increasingly involved in several arbitrations, but it is now common that sovereign states, their agencies, and entities find themselves entangled in multiple international proceedings: public disputes related to their foreign policies, private disputes arising out of their commercial contracts, and "mixed" disputes brought under their investment treaties. Similarly, some adjudicators, skilled in public and private international law, frequently serve on international courts and tribunals. In public disputes, the political stakes convince most states to select the leading experts as permanent and *ad hoc* adjudicators. Likewise, although private arbitration is touted for the freedom to select arbitrators familiar with both the applicable law and the relevant industry, parties repeatedly appoint the same arbitrators because of their preference for well-known or charismatic individuals who can sway other members of the tribunal. In all of these disputes, institutions favor established professionals whose decisions are more likely to be accepted. However, the consequence of parties' increased use of international adjudication under the auspices of a small number of expert adjudicators is an increase in the frequency with which issue conflicts arise.

The regulation of issue conflicts has often focused only on actual bias. An adjudicator's publicly declared opinion that prejudges the merits of a disputed issue is clear evidence of partiality, often resulting in voluntary recusal or withdrawal, whereas her general experience is not.[6] This stance seems reasonable: on the one hand, experience in international public or private law is a threshold qualification for international adjudicators (whether they are selected by an international institution or the parties), but on the other hand, the fundamental unfairness is obvious when a party is faced with an adjudicator who has closed her mind on important issues in dispute.

Yet, absent voluntary recusal, actual bias provides little guidance for an adjudicator's activities that lie between these two extremes. An adjudicator's past or current professional, academic, or even personal experiences may raise legitimate doubts about her ability to decide impartially controverted facts and contested legal propositions or justly apply the law to the particular dispute. Past and present academic articles, expert testimony, internal memoranda, interviews, diplomatic experiences, or advocacy on an issue related to the dispute may create a conflict of interest. Such activities may not evidence actual bias, but they

4. Edward Gordon et al., *The Independence and Impartiality of International Judges*, 83 AM. SOC'Y. INT'L L. PROC. 508, 509 (1989).

5. Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, 22(4) ARB. INT'L 495, 495-99 (2006).

6. *See infra* Part II.

can raise concerns about the propriety of the adjudicator's resolution of the international dispute.

Thus, just as the regulation of conflicts arising from national[7] and party[8] interests has expanded from an inquiry into actual bias to consider the appearance of bias,[9] regulation of the appearance of bias arising from issue conflicts is becoming increasingly considered in international adjudication. The appearance of bias has recently led to the disqualification of international adjudicators. Indeed, the resulting appearance of bias has led to calls for a prohibition against individuals simultaneously representing a party and serving as an adjudicator in different arbitrations under investment treaties.[10] The guiding principle seems to be that "the appearance of fairness is as important as fairness itself,"[11] because the appearance of fairness promotes and sustains public confidence in the legitimacy of international adjudication.[12] Legitimizing international adjudicators increases trust in the rule of law, persuading governments and private disputants to rely upon international courts and tribunals.[13] Moreover, such confidence allows international adjudicators to ensure individual rights and encourage economic and political stability—the purposes that international law is designed to protect.[14]

Academic commentary has recognized the problem of issue conflicts in international adjudication[15] but has not provided an in-depth treatment of its con-

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7. The regulation of national interests has moved beyond the actual bias of demonstrated jingoism to consider the appearance of bias where an adjudicator seems to favor—or disfavor—states with similar wealth levels, political systems, cultures, or languages. *See* ICJ Statute, *infra* note 24, arts. 2-3, 31; ITLOS Statute, *infra* note 23, arts. 2-3, 17, 36; ICTY Statute, *infra* note 50, art. 12. *See also* Omar E. Garcia-Bolivar, *Comparing Arbitrator Standards of Conduct in International Commercial Trade Investment Disputes*, 60 DISP. RESOL. J, Nov. 2005–Jan. 2006, at 76 (2006). Available empirical data supports some of these "appearance of bias" concerns. *See* Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2004) (concluding that ICJ "Judges vote for their home states about 90 percent of the time").

8. The impartiality concerns arising from party interests have extended past evidenced amity to consider an adjudicator's financial, professional, and personal interests in the outcome of the dispute, including indirect interests of a close friend or family member or an interest in a party's or counsel's affiliate. For an illustrative list of potential party interests, see International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2004), *available at* http://www.ibanet.org/images/downloads/guidelines%20text.pdf [hereinafter IBA Guidelines].

9. In the seminal American case on arbitrator impartiality, the Supreme Court held that an arbitrator must not only "be unbiased but also must avoid even the appearance of bias." Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968).

10. *See infra* Part V.D.

11. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably be Questioned"*, 14 GEO. J. LEGAL ETHICS 55, 66 (2000).

12. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7, 25-26 (1995).

13. Shimon Shetreet, *Standards of Conduct of International Judges: Outside Activities*, 2 LAW & PRAC. INT'L CTS. & TRIBUNALS 127, 161 (2003).

14. Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 359 (2005).

15. Issue conflicts are not unique to international adjudication, but their occurrence is more

tours or its proper resolution. In a panel discussion over 20 years ago, Professor Edward Gordon acknowledged the problem of an adjudicator's prior advocacy or viewpoint but contended that such concerns presented little systemic risk to the fifteen-member International Court of Justice.[16] More recently, Judge Theodor Meron noted that "[a]t some point in their judicial career, [judges] will be called upon to rule on issues they [have] considered as practicing lawyers or civil servants, or written about as academics" and broadly remarked that such an appearance of bias should be reviewed under an objective standard.[17] Similarly, Judith Levine reviewed examples of issue conflicts in international investment and commercial arbitration and concluded that "some clarification would . . . be welcome."[18] With less discussion, others have also noted the problem of issue conflicts.[19] Indeed, although noting the importance of appearances, the recently enunciated Burgh House Principles on the Independence of the International Judiciary provide little guidance, stating only that international adjudicators "shall not serve in a case with the subject matter of which they have had any other form of association that may affect or reasonably appear to affect their independence or impartiality."[20]

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likely in international adjudication than in domestic adjudication because of the absence of career judges, the use of *ad hoc* adjudicators, and requirements for specialized expertise. For brief remarks of the problem in the United States, see Abramson, *supra* note 11, at 76-79 (recommending more effective regulation of "judge's remarks about the parties or a litigation issue" in the United States); Tobin A. Sparling, *Keeping Up Appearances: the Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias,* 19 GEO. J. LEGAL ETHICS 441, 484 (2006) (reviewing the due process and First Amendment influences on regulating judges' extrajudicial speech in the United States). For a discussion of the appearance of bias and issue conflicts in England in the wake of *R. v. Bow Street Stipendiary Magistrate and Others ex parte Pinochet Ugarte* (No.2) [1999] 2 WLR 272, see Kate Malleson, *Judicial Bias and Disqualification after* Pinochet (No.2), 63 MOD. L. REV. 119, 127 (2000) (observing that the "expression of strong views about something connected to the case" has been a successful basis for appeal).

16. *See* Gordon, *supra* note 4, at 509-10.

17. *See* Meron, *supra* note 14, at 365-67.

18. Judith Levine, *Dealing with Arbitrator "Issue Conflicts" in International Arbitration*, 61 DISP. RESOL. J, Feb.-Apr. 2006 60, 65 (2006).

19. *See, e.g.,* Ruth Mackensie & Phillipe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 280-81 (2003) (noting the impartiality problem arising out of "prior involvement . . . with an issue" in international public adjudication but merely indicating that "[i]n some cases the need for recusal will be clear, but in others it will be less so"); CRAIG, PARK & PAULSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 231 (2000) (indicating that disqualification may be appropriate for an international commercial arbitrator "who had publicly taken extreme and detailed views on political or economic issues central to the arbitration" but that "[t]he expression of academic views . . . does not necessarily preclude him from deciding a case in a completely impartial manner"). *See also* ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 238-39 (4th ed. 2004) (indicating that impartiality includes "actual or apparent bias of an arbitrator—either in favour of one of the parties or in relation to the issues in dispute"); Luke Eric Peterson, *Analysis: Arbitrator Challenges Raising Tough Questions as to Who Resolves BIT Cases*, INVEST-SD: INVESTMENT L. & POL'Y WEEKLY NEWS BULL., Jan. 17, 2007, *available at* http://www.iisd.org/pdf/2007/itn_jan17_ 2007.pdf (noting that there are no clear guidelines for issue conflicts).

20. The Burgh House Principles on the Independence of the International Judiciary, 9.2

Accordingly, this Article analyzes issue conflicts in international adjudication, focusing on the application of current and potential impartiality standards.[21] Part II summarizes how issue conflicts have been addressed in the major international adjudicatory bodies and systems of international adjudication. Part III asserts that the fundamental variables of issue conflicts are proximity, depth and timing. Part IV discusses structural features of international courts and tribunals that have confused, or may confuse, the analysis of issue conflicts in international adjudication. Part V assesses potential obstacles to, and avenues for, the establishment of impartiality standards that effectively regulate issue conflicts in the main international courts and tribunals. This Article concludes that both actual bias and the appearance of bias created by issue conflicts can and should be regulated to enhance the legitimacy and efficacy of international adjudication.

II.
IMPARTIALITY STANDARDS AND ISSUE CONFLICTS IN INTERNATIONAL ADJUDICATION

Allegations of issue conflicts have arisen in disputes before most of the major international adjudicatory bodies and systems of international adjudication.[22] The grounds cited for these issue conflicts are analytically similar, but the content and application of standards of impartiality have varied. This section delineates the applicable standards of impartiality in the most prominent international dispute resolution systems and reviews how these systems have handled issue conflicts.

A variety of sources provide standards of impartiality for international adjudicators. First, the agreement that created the adjudicatory forum, founded in treaty or contract, usually addresses impartiality. Second, institutional norms, established in guidelines or rules of conduct, may also include standards. Third, sometimes rules and practice of domestic law and courts, by persuasive reasoning or judicial intervention, provide direction. These standards address imparti-

(2005), *available at* http:// www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf. The principles were designed primarily for international judges but "should also be applied as appropriate to judges *ad hoc*, judges *ad litem*, . . . part-time judges, to international arbitral proceedings and to other exercises of international judicial power." *Id.* at recitals.

21. This Article focuses on the existence and application of impartiality standards because without standards the effective regulation of issue conflicts cannot occur. Nevertheless, disclosure, another aspect of regulating impartiality, is also important. A party cannot challenge an adjudicator for actual bias or an appearance of bias absent access to information from which an issue conflict arises. Thus, disclosure standards entail determining what information the adjudicator must disclose, the effects of failure to disclose, and what information parties are required individually to investigate or else be deemed to have waived any objection. Disclosure for issue conflicts is worthy of discussion beyond the limits of this Article.

22. For an overview description of the different international courts and tribunals, see MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (Phillippe Sands et al. eds. 1999).

ality generally, disqualification or removal, and, occasionally, outside activities.

A. The International Court of Justice

The International Court of Justice ("ICJ" or "World Court") has entertained allegations of issue conflicts in cases before it, but its impartiality standards do not explicitly address them.[23] Nevertheless, issue conflicts are partially regulated: ICJ standards tend to prevent actual bias, the appearance of bias from extrajudicial activities, and the appearance of bias that may result from an adjudicator's prior experience as an advocate before the ICJ.

1. The ICJ's Impartiality Standards

Adjudicator impartiality at the World Court is governed primarily by Article 17(2) of the Statute of the International Court of Justice ("ICJ Statute").[24] This article prohibits the participation of a Court member in "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." Although actual bias in a publicly expressed opinion regarding the preferred outcome of a specific case might be construed as advocacy for one of the parties, Article 17(2) does not address the appearance of bias. As detailed below, the ICJ "does not go so far as to disqualify a judge who has publicly taken a position on an issue that comes up in the case."[25]

Three other provisions of the ICJ Statute provide impartiality standards. Article 2 requires "independent judges." Article 24 permits a judge to recuse herself and also allows the President of the Court to remove a judge from a case if "some special reason" exists. However, the ICJ Statue does not define "independent judges" or "some special reason" and neither article has been invoked to disqualify a judge at the ICJ. Although there are many instances of voluntary recusal by members of the Court,[26] there is no "known instance of an issue of this kind being initiated by the President and being settled formally by the Court itself."[27] The occurrence of issue conflicts is limited by Article 16(1) of the ICJ

23. I note that although the relatively new International Tribunal for the Law of the Sea has not been confronted with issue conflicts in any of its cases, it is reasonable to infer that ITLOS would look to the ICJ cases in reviewing issue conflicts, given the textual similarities between their impartiality standards. *See* United Nations Convention on the Law of the Sea, Annex VI, arts. 7-8, Dec. 10, 1982, 1833 U.N.T.S. 397; ITLOS Rules of the Tribunal, U.N. Doc. ITLOS/8 (Apr. 7, 2005) *available at* http://www.itlos.org.

24. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments.htm [hereinafter ICJ Statute].

25. Gordon, *supra* note 4, at 510.

26. For a list of voluntary recusals and situations where Court members did not recuse themselves, see SHABTAI ROSENNE & YAËL RONEN, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 1062-65 (4th ed. 2006).

27. *Id.* at 1062.

Statute, which prohibits a member of the Court from exercising "any political or administrative function" and from engaging "in any other occupation of a professional nature." Issue conflicts are accordingly limited to an adjudicator's activities prior to election to the Court, her academic publications, and other public statements.

Although the ICJ Rules of the Court do not provide additional standards beyond requiring members of the Court to declare that they will serve "impartially,"[28] one of the ICJ's Practice Directions[29] reduces the risk of both actual bias and the appearance of bias. Practice Direction VII discourages individuals from serving as an *ad hoc* judge in one case and as an "agent, counsel, or advocate" in another within three years. Thus, for three years, these Directions partially ameliorate the problem of issue conflicts by avoiding the possibility of an *ad hoc* judge's decision on an issue being affected by her advocating a particular position on a similar issue in another dispute before the Court.[30]

2. ICJ Practice and Issue Conflicts

The ICJ's jurisprudence has dismissed, without thorough analysis, the problem of appearance of bias presented by issue conflicts by developing three rules. First, the ICJ has held that Article 17(2) does not exclude judges whose prior diplomatic activities as government representatives may provide an appearance of bias in the form of an issue conflict.[31] Historically, the Court's Orders have not contained reasons for dismissing these lack-of-impartiality claims.[32] However, in the 1971 Advisory Opinion regarding the *Continued Presence of South Africa in Namibia*, the Court explained its Orders and indi-

28. ICJ Rules of Court, art. 4, (1978, amended 2005), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments.htm.

29. ICJ Practice Directions, (2001, amended 2002), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments.htm.

30. It appears that the primary purpose of this Direction and Direction VIII is to prevent counsel in an ongoing dispute from influencing the judges. *See* ICJ Press Communiqué 2002/12 (April 4, 2002). Although the influence may only be slight, counsel that can "attend meetings and deliberations with the rest of the bench and deal with judges on an equal footing" will naturally have an advantage in the dispute she advocates, if only personal. *See* Pieter H. F. Bekker, *Letter to the Co-Editors in Chief*, 90 AM. J. INT'L LAW 645, 645-46 (1996). Moreover, these Directions do not allow the situation where counsel who also serves as an *ad hoc* judge could obtain an unfair advantage in litigation strategy "given that legal and factual . . . issues that are relevant to one pending case, including the one in which the judge *ad hoc* appears as counsel, may be referred to in another [case]." *Id.* Presumably, the length of the time period is to ensure a change in the composition of the Court because one-third of the Members are replaced every three years. *See* ICJ Statute, *supra* note 24, art. 13.

31. *See* South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1965 I.C.J. 3-4 (Order of Mar. 18), Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 286 (1970), 1971 I.C.J. 2-10 (Orders 1-3 of Jan. 26), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 3 (Order of Jan. 30).

32. SINGH, *supra* note 3, at 191.

cated that in both that case and in the 1965 *South West Africa Cases* "the participation of [each] Member concerned in his former capacity as representative of his Government . . . did not attract the application of Article 17, paragraph 2, of the Statute of the Court."[33] The ICJ reiterated this rule in the Advisory Opinion about the *Construction of a Wall in the Occupied Palestinian Territory*. Israel claimed that Article 17(2) prohibited Judge Elaraby from sitting as a judge because "he [had] previously played an active, official and public role as an advocate for a cause that is in contention in this case."[34] Rejecting Israel's assertion, the ICJ's Order noted that Judge Elaraby's experience in the 1970s and 1980s as a legal adviser to the Egyptian Government, including his work at the Egyptian Ministry of Foreign Affairs and his involvement in both the Camp David Middle East Peace Conference of 1978 and the Israel-Egypt Peace Treaty in 1979,[35] "were performed in his capacity of a diplomatic representative of his country . . . many years before the question of the construction of the wall in the occupied Palestinian territory, now submitted for advisory opinion, arose." The Court concluded that Judge Elaraby could not be considered as having "previously taken part" in the case.[36]

Second, the ICJ has concluded that a judge's prior activities as a representative at the United Nations also do not violate Article 17(2). In the 1971 Advisory Opinion regarding the *Continued Presence of South Africa in Namibia*, the ICJ reasoned that a judge's activities "in United Nations organs of the Members concerned, prior to their election to the Court . . . do not furnish grounds for treating these objections differently from" objections to a judge's prior diplomacy on behalf of her country.[37] Furthermore, the ICJ noted that "participation of the Member concerned in the work of the United Nations" is permissible, and that account must also be taken in this respect of precedents established by the present Court and the Permanent Court wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret."[38] In its 2004 Order preceding the Advisory Opinion in the *Construction of a Wall in the Occupied Palestinian Territory*, the ICJ reinforced the holding

33. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 286 (1970), Advisory Opinion, 1971 I.C.J. 16, 18 (June 21).

34. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 4.

35. *Id.*

36. *Id.* at 5.

37. Continued Presence of South Africa in Namibia, Advisory Opinion, *supra* note 33. Judge Gros and Judge Fitzmaurice dissented on this point, considering "active participation on the part of a Member, before his election, in a question laid before the Court" a sufficient basis for disqualification under Article 17. Judge Morozov had participated in drafting a related Security Council resolution and had given "several speeches . . . on the substantive problem now decided by the Court." *Id.* at 316-17, 323-24 (Fitzmaurice, J. and Gros, J. dissenting).

38. In his dissenting opinion, Judge Gros contended that these precedents where "judges [had] contributed to the drafting of international treaties" were distinguishable because the disputes arose many years after their participation. *Id.* at 324 (Gros, J., dissenting).

of the 1971 Advisory Opinion, concluding that Judge Elaraby's involvement in the General Assembly "did not attract the application of Article 17, paragraph 2."[39] However, the Court obfuscated its interpretation somewhat by noting that, although Israel's construction of the wall had been discussed in the General Assembly, the question for the Court "was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt."[40] The implication is that Judge Elaraby may have been disqualified if he had participated in the General Assembly Session at the time the question was introduced. Given the ICJ's lenient view of representation, it nevertheless appears that any prior diplomatic activities at the United Nations by a judge are permissible under Article 17(2).

Finally, in considering a violation of Article 17(2), the ICJ has demanded a high degree of similarity between a disputed issue and any positions of a judge taken in her personal capacity. In the *Construction of a Wall in the Occupied Palestinian Territory*, Israel complained about Judge Elaraby's 2001 interview with an Egyptian newspaper "two months before his election to the Court, when he was no longer an official of his government and hence spoke in his personal capacity."[41] The newspaper quoted Mr. Elaraby's comments that "Israel is occupying Palestinian territory, and the occupation itself is against international law" and that Israel's territorial claims were fabricated to create "confusion and gain[] time."[42] The question before the ICJ was "[w]hat are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem . . . considering the rules and principles of international law . . . ?"[43] The majority of the Court stated that Judge Elaraby's comments "expressed no opinion on the question put in the present case."[44] Judge Buergenthal's lone dissent balked at this conclusion, asserting that although a "formalistic and narrow" construction of Article 17(2) had not been violated, legitimate concerns existed because "this question cannot be examined by the Court without taking account of the context of the Israeli/Palestinian conflict" and because the outcome would depend upon "the validity and credibility of [the parties'] arguments."[45] Against this backdrop, he reasoned that Judge Elaraby's remarks created an unacceptable "appearance of bias"[46] and that the Court had "implicit" power to ensure the "fair and impartial administration of justice."[47]

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39. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 5.
40. *Id.*
41. *Id.* at 8 (Buergenthal, J., dissenting).
42. *Id.*
43. G.A. Res. A/RES/ES-10/14, U.N. Doc. A/ES-10/L.16 (Dec. 12, 2003).
44. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 5.
45. *Id.* at 8-10 (Buergenthal, J., dissenting).
46. *Id.*
47. *Id.*

B. International Criminal Tribunals

An issue conflict allegation has arisen before the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the Special Court for Sierra Leone subsequently invoked the ICTY's ensuing jurisprudence regarding the appearance of bias as persuasive.[48] Considering the similarity of impartiality provisions amongst the international criminal tribunals and courts, the International Criminal Tribunal for Rwanda and the International Criminal Court will also most likely follow the ICTY's jurisprudence concerning issue conflicts.[49]

1. The ICTY's Impartiality Standards

The basic impartiality standard for ICTY judges is found in Article 13(1) of the ICTY Statute, which requires judges to be "persons of high moral character, impartiality and integrity."[50] Another provision, Rule 15(A) of the Rules of Procedure and Evidence, requires a declaration to serve "impartially" and disqualifies a judge from sitting "on a trial or appeal in any case in which the Judge has or has had any association which might affect his or her impartiality."[51] The ICTY Appeals Chamber has interpreted these two standards as follows: first, a "judge is not impartial if it is shown that actual bias exists"; and second, "[t]here is an unacceptable appearance of bias if: i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . or ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[52] The application of these standards to issue conflicts is discussed below but the occurrence of issue conflicts at the ICTY is limited by Article 13bis(3) of the ICTY Statute. This Article regulates a judge's extra-judicial activities by subjecting judges to the "terms and conditions of service . . . of the judges of the International Court of Justice,"[53] including Article 16(1) of the ICJ Statute.

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48. Prosecutor v. Issa Hassan Sesay, Case No. SCSL-2004-14-AR 15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Mar. 13, 2004), *available at* http://www.sc-sl.org/ Documents/SCSL-04-15-PT-058.pdf.

49. *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, annex, art. 12, Nov. 8, 1994, U.N. Doc. S/RES/944, (Nov. 8, 1994), *available at* http://69.94.11.53/ENGLISH/Resolutions/955e.htm; International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, rule 15(A), (1995, amended 2006), *available at* http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf; *and* Rome Statute of the International Criminal Court, art. 40-41, July 17, 1988, arts. 40-41, 2187 U.N.T.S. 90.

50. Statute of the International Criminal Tribunal for the Former Yugoslavia, May, 25, 1993, U.N. Doc. S/RES/827, *available at* http://www.icls.de/dokumente/icty_statut.pdf [hereinafter ICTY Statute].

51. ICTY Rules of Procedure and Evidence, Sept. 22, 2006, U.N. Doc. IT/32/Rev.39, *available at* http://www.un.org/icty/legaldoc-e/index.htm.

52. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, ¶ 189 (July 21, 2000).

53. *See* ICTY Statute, *supra* note 50, art. 13 bis(3).

2. The ICTY's Determination on an Issue Conflict

The "reasonably apprehend bias" standard and the only detailed analysis of an issue conflict claim in ICTY jurisprudence is found in the *Furundzija* appeal.[54] The defendant was arrested on December 18, 1997,[55] and tried and convicted on December 10, 1998, of violating the laws of war for torture and rape in Yugoslavia.[56] Petitioning to vacate the judgment and sentence, the defendant contended that the prior involvement of Judge Florence Ndepele Mwachande Mumba[57] with the U.N. Commission on the Status of Women ("UNCSW") provided a basis for her disqualification because it created an impermissible appearance of bias. Among other things, the UNCSW addressed "the war in the former Yugoslavia and specifically the allegations of mass and systematic rape."[58] After noting that the Defendant did not allege that the judge was actually biased[59] and rejecting the contention that she had a party conflict of interest resulting from her relationship with the Prosecutor and with the three authors of an *amicus curiae* submission,[60] the ICTY turned to the issue conflict to determine whether a properly informed, reasonable observer would "reasonably apprehend bias," given the circumstances.[61]

The issue conflict allegation centered around whether Judge Mumba's participation in the adjudication created the appearance "that she had sat in judgment in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW."[62] The defendant contended that although Judge Mumba's participation with the UNCSW had formally ended, she "continued to promote the goals and interests of the UNCSW."[63] The Prosecutor asserted that a Judge "should not be disqualified purely on the basis of their beliefs or legal expertise" and argued that prior involvement with a "United Nations body . . . cannot give rise to any reasonable apprehension that the Judge has an agenda."[64]

The Tribunal discussed a number of factors to test for the appearance of bias. First, the Tribunal mentioned timing. The Tribunal noted that Judge

54. Prosecutor v. Furundzija, *supra* note 52, ¶¶ 164-215.

55. *Id.* ¶ 2.

56. *Id.* ¶ 10.

57. Judge Mumba has served in a number of distinguished public roles in Zambia and at the United Nations. She has been a Member of the ICTY since November 17, 1997, and has served as a Judge of the Appeals Chamber since 2003. *See* U.N.org., Biographical Note on Judge Florence Ndepele Mwachande Mumba, http://www.un.org/icty/judges/mumba-e.htm (last visited Nov. 1, 2007).

58. Prosecutor v. Furundzija, *supra* note 52. ¶ 166.

59. *Id.* ¶ 192.

60. *Id.* ¶¶ 193-94.

61. *Id.* ¶ 189.

62. *Id.* ¶ 169.

63. *Id.* ¶ 170.

64. *Id.* ¶ 171.

Mumba had served as a Judge since 1997 and that her activities at the UNCSW occurred between 1992 and 1995. Thus, "[a]t no stage was she a member of the UNCSW whilst at the same time serving as a Judge with the International Tribunal."[65] Although not further discussed in detail, the implication is that concurrency would have been problematic.

Second, although less absolute than the ICJ, the Tribunal concluded that the existence of an issue conflict is less likely if the adjudicator was serving as a governmental representative. Despite the defendant's argument that Judge Mumba "acted in a personal capacity and was 'personally involved' in the cause of the UNCSW,"[66] the Tribunal reasoned that as a representative of a U.N. member state, "a member of the UNCSW is subject to the instructions and control of the government of his or her country" and therefore "he or she speaks on behalf of his or her country."[67] The Tribunal determined that although "[t]here may be circumstances which show that, in a given case, a representative personally identified with the views of his or her government," there was no evidence to suggest that Judge Mumba concurred with the views of the Zambian Government or the UNCSW.[68] Thus, the Tribunal required the defendant to provide sufficient evidence that Judge Mumba's personal views aligned with her representation.

Third, similar to the ICJ, the Tribunal looked for a substantial nexus between the viewpoint taken by the Judge and the disputed issue. The Tribunal stated that even if Judge Mumba's representation at the UNCSW did indicate her personal viewpoint, that viewpoint would not create an issue conflict because "promoting and protecting the human rights of women" was of a "general nature."[69] Thus, "[i]t follows that she could still sit on a case and impartially decide upon issues affecting women."[70]

The Tribunal struggled, however, to determine whether Judge Mumba's involvement with the UNCSW still created an appearance of bias: Did Judge Mumba apply her general viewpoint to the specifics of the *Furundzija* case? To deal with this concern, the Tribunal turned to two sources. First, the Tribunal argued that any viewpoint she may have had was encouraged by the United Nations.[71] Noting that the Security Council resolutions that led to the establishment of the Tribunal sought "to put an end to such crimes [as systematic rape and detention] and to . . . bring to justice the persons who are responsible for them," the Tribunal adopted the Prosecutor's view that "[c]oncern for the achievement of equality for women, which is one of the principles reflected in the United Na-

65. *Id.* ¶ 166.
66. *Id.* ¶ 198.
67. *Id.* ¶ 199.
68. *Id.*
69. *Id.* ¶ 200.
70. *Id.*
71. *Id.* ¶¶ 201-02.

tions Charter, cannot be taken to suggest any form of pre-judgment in any future trial for rape."[72] Thus, even if Judge Mumba had a personal position in relation to the applicable legal rule, a conflict did not exist because the viewpoint was supported by the UN and was therefore legally permissible. Not completely satisfied, the Tribunal further rationalized any appearance of bias by looking to the qualifications of Judges serving on the ICTY. Article 13(1) of the ICTY Statute states that "[i]n the overall composition of the [ICTY] due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."[73] The Tribunal noted that Judge Mumba's experience with the UNCSW was likely one of the qualifications considered for her selection as a judge. Without further explanation, the Tribunal concluded that "[i]t would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias."[74]

Finally, the Tribunal addressed the defendant's argument that Judge Mumba's past experience led her to classify rape as a war crime, a purportedly novel proposition. In addition to noting that the definition of rape was not contested at trial, the Tribunal referred to other cases and held that the classification of rape as a war crime was not new.[75] Consequently, the ICTY rejected the defendant's appeal.

3. The Special Court for Sierra Leone

The Special Court for Sierra Leone adopted the ICTY's "reasonably apprehend bias" standard to determine an issue conflict, but, in contrast to the ICTY, the Court actually disqualified the judge. With little elaboration, the Court recited Rules 15(A) and 15(B) of the Rules of Procedure and Evidence of the Special Court (provisions that were textually similar to the ICTY's impartiality standards), repeated the ICTY's interpretation of its impartiality standards and prohibited Justice Robertson from deciding *every* dispute involving a member of the Revolutionary United Front.[76] Justice Robertson had published opinions regarding this group's barbarism in a book, alleging its "pillage, rape and diamond-heisting" as well as its "more devilish tortures" of mutilation.[77] The Appeals Chamber concluded that "the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality."[78] Subsequently, the Special Court amended its Rules to more clearly cover issue conflicts. The Rules now disqualify a judge "in any case in which his impartial-

72. *Id.*
73. *See* ICTY Statute, *supra* note 50.
74. Prosecutor v. Furundzija, *supra* note 52, ¶ 205.
75. *Id.* ¶¶ 208-10.
76. Prosecutor v. Issa Hassan Sesay, *supra* note 48.
77. *Id.* ¶ 2.
78. *Id.* ¶ 15.

ity might reasonably be doubted on any substantial ground."[79]

C. The World Trade Organization Dispute Settlement Understanding

At least one panel adjudicator has been challenged for an issue conflict under the WTO Dispute Settlement Understanding ("DSU").[80] Although standards of impartiality exist, the resolution of impartiality complaints, including issue conflicts, is not transparent. There is, however, no reason why issue conflicts, including appearances, should not be regulated under the existing standards.

1. WTO Impartiality Standards

The DSU, the DSU Rules of Conduct,[81] and the Working Procedures for Appellate Review[82] address impartiality. Article 8.2 of the DSU governs all panel proceedings, including Article 21.5 compliance proceedings and Article 22.6 arbitrations, and states that "[p]anel members should be selected with a view to ensuring the independence of the members." Article 17.3 of the DSU addresses the members of the Appellate Body, declaring that they "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest." The Rules of Conduct further require that all persons serving as a panelist, arbitrator or member of the Appellate Body[83] "shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest."[84] The Rules indicate that such interests are those that are "likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality."[85] The Working Procedures of Appellate Review lists both "active interests," which includes organizations with "a declared agenda," and "statements of personal opinion on issues relevant to the dispute in question" among the information that a member of the Appellate Body "may" have to disclose to satisfy the Rules of Conduct.[86]

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79. Rules of Procedure and Evidence of the Special Court, Rules 15(A)-(B), Nov. 24, 2006, http://www.sc-sl.org/rulesofprocedureandevidence.pdf.

80. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement, Establishing the Word Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

81. Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1 (Dec. 11 1996), *available at* http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm [hereinafter Rules of Conduct].

82. Working Procedures for Appellate Review, WT/AB/WP/5 (Jan. 4, 2005), *available at* http://www.wto.org/english /tratop_e/dispu_e/ab_e.htm [hereinafter Working Procedures for Appellate Review].

83. *Id.* (stating that the Appellate Body adopts the applicable Rules of Conduct on a provisional basis).

84. Rules of Conduct, *supra* note 81, at Rule II.

85. *Id.* at Rule III.

86. Working Procedures for Appellate Review, *supra* note 82, at Annex 2.

2. An Issue Conflict at the WTO

The only WTO adjudication addressing an issue conflict concluded that, absent agreement by the state parties, the Rules of Conduct provide the only avenue for redress for complaints against panelists. Since these Rules indicate that the Chair of the Dispute Settlement Body ("DSB") shall resolve such impartiality allegations,[87] the Panel in *Guatemala–Cement II*[88] stated that it could not adjudicate the issue conflict because "[n]either Article 8 nor any other provision of the DSU prescribes any role for the panel in the panel composition process."[89] This absence of involvement by the panelists is strange, especially considering the notion that a court or tribunal must have some power to ensure "the fair and impartial administration of justice."[90]

Nevertheless, the panel report in *Guatemala–Cement II* provides details of Guatemala's issue conflict allegation.[91] Without questioning the panelist's integrity or qualifications, Guatemala objected to the inclusion[92] in the panel of an adjudicator who had served on the *Guatemala–Cement I* panel.[93] Guatemala contended that since the second dispute would turn on the same issues examined in the first dispute, specifically "claims relating to the violation of Article 5.3 and 5.5" of the Anti-Dumping Agreement,[94] "it would be virtually impossible for [the panelist] . . . not to take account of the opinions of those who served with him and of the discussions held and the decisions taken in the previous dispute . . . ."[95] Relying on Article 8.2 of the DSU and the Rules of Conduct, Guatemala urged the Panel to declare itself without competence to adjudicate the

87. *See* Rules of Conduct, *supra* note 81, at Rule VIII (indicating that the Chair of the DSB should resolve problems via consultation with the adjudicator, except for complaints against Appellate Body members, which will be resolved by the Appellate Body).

88. Panel Report, Guatemala–Definitive Anti-Dumping Measures on grey portland Cement from Mexico, WT/DS156/R (Oct. 24, 2000) [hereinafter Guatemala–Cement II].

89. *See id.* ¶ 8.11.

90. *See supra* Part.II.A.2.

91. Guatemala–Cement II, *supra* note 88.

92. *Id.* The context of Guatemala's contention that the panelist "would have preconceived positions" was atypical. *Id.* ¶ 4.3. The Appellate Body had vacated the *Guatemala–Cement I* panel report on the ground that it had decided issues that were outside the terms of reference. *See* DSU, *supra* note 80, articles 6.2, 7.1, *and* David A. Yocis, Note, *Hardened Positions: Guatemala Cement and WTO Review of National Antidumping Determinations*, 76 N.Y.U. L. REV. 1259, 1286-89 (2001) (explaining that Mexico "had challenged Guatemala's conduct of the antidumping investigation, rather than the antidumping duties themselves"). As a result, Mexico had been required to pursue another dispute settlement complaint.

93. *See* Panel Report, *Guatemala – Anti-Dumping Investigation regarding portland Cement from Mexico*, WT/DS60/R (Nov. 25, 1998) [hereinafter *Guatemala–Cement I*].

94. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments–Results of the Uruguay Round, 33 I.L.M 1133 (1994).

95. Guatemala–Cement II, *supra* note 88, ¶ 4.3. As a third party, Honduras supported this argument. *See id.* ¶¶ 5.60, 5.70.

dispute.[96]

Mexico's response to Guatemala's allegation included three arguments. First, it demanded evidence of actual bias, namely "specific facts" rather than "appearances,"[97] and implied that panelists should be deemed impartial "irrespective of any past experience."[98] Second, Mexico contended that the DSU jurisprudence should permit this panelist to participate because panelists may serve as a DSU adjudicator more than once and occasionally adjudicate multiple disputes simultaneously.[99] Mexico suggested that the preference of Article 21.5 of the DSU for original panelists to adjudicate disputes regarding compliance measures indicates, by analogy, that it is acceptable for panelists to consider more than once issues arising out of the same circumstances.[100] Third, Mexico argued that the panel did not have the competency to declare itself incompetent, because the Rules of Conduct provided that a complaint of impartiality should be submitted to the Chair of the DSB rather than to the panel.[101]

Ultimately, the panel yielded to this third argument, a decision that allowed it to avoid discussing the issue conflict itself. The panel further indicated that it was unaware whether Guatemala had raised its complaint before the Chair of the DSB.[102] This is not surprising given the confidential nature of the Chair's proceedings under the Rules of Conduct.[103]

D. International Arbitration

As with permanent tribunals, international arbitrations have experienced allegations of issue conflicts against the arbitrators. Although domestic arbitration law and association guidelines may influence the assessment of an arbitrator's impartiality, the primary standards derive from the contract or treaty that subjects the dispute to arbitration. Such treaty and contract provisions often reference established international arbitration rules such as the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"),[104] the 1998 Arbitration Rules of the International Chamber of

96. *Id.* ¶¶ 4.7-4.8, 4.12-4.13. *See also* DSU, *supra* note 80, arts. 8, 11; Rules of Conduct, *supra* note 81, Rule III.2.

97. Guatemala–Cement II, *supra* note 88, ¶ 4.18.

98. *Id.* ¶ 4.41.

99. *Id.* ¶ 4.26.

100. *Id.* ¶¶ 4.25, 4.31. *See also* DSU, *supra* note 80, art. 21.5.

101. Guatemala–Cement II, *supra* note 88, ¶¶ 4.19, 4.28-4.29, 4.40. This position was also argued by third parties Ecuador and the European Communities. *See id.* ¶¶ 5.6, 5.26.

102. *Id.* ¶ 8.12.

103. *See* Rules of Conduct, *supra* note 81, Rule VIII (stating that information related to impartiality complaints "shall be kept confidential").

104. UNCITRAL Arbitration Rules, Apr. 28, 1976, 15 I.L.M. 701, *available at* http://www.uncitral.org/pdf/english/ texts/arbitration/arb-rules/arb-rules.pdf [hereinafter UNCITRAL Arbitration Rules].

Commerce ("ICC Arbitration"),[105] or the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes ("ICSID").[106] These impartiality standards are readily available but decisions interpreting them are not, even though the impartiality of arbitrators is frequently challenged. Reasons behind this include voluntary withdrawal by the arbitrator without a formal appraisal of the alleged conflict, confidentiality obligations mandated by these rules, and a prevalent practice of not publishing decisions on arbitrator challenges.[107] Nevertheless, recent available decisions indicate that these impartiality standards can address both the appearance and presence of bias presented by issue conflicts.

1. Impartiality Standards in International Arbitration

The impartiality provisions in frequently-used international arbitration rules are broad enough to include issue conflicts. The UNCITRAL Arbitration Rules state that an arbitrator "may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[108] The ICC Arbitration Rules have evolved from an understanding that parties "may not choose anyone of whom an unbiased decision cannot be expected,"[109] to requiring independence of party-nominated arbitrators,[110] to the current standard that "[e]very arbitrator must be and remain independent of the parties involved in the arbitration."[111] The ICSID Arbitration Rules permit disqualification of an arbitrator if any fact indicates "a manifest lack of the [required] qualities,"[112] including more specifically "recognized competence in the fields of law, commerce, industry or finance" but also the capacity "to exercise independent judgment."[113]

Except for ICSID arbitrations,[114] international arbitrations are typically subject to the domestic arbitration law at the *situs* of the arbitration, including its

105. ICC Arbitration Rules 1998, http://www.iccwbo.org/court/english/arbitration/rules.asp [hereinafter ICC Arbitration Rules 1998].

106. ICSID Arbitration Rules (as amended Apr. 10, 2006), http://www.worldbank.org/icsid/basicdoc/partF.htm [hereinafter ICSID Arbitration Rules].

107. *See infra* notes 124, 155, 163.

108. *See* UNCITRAL Arbitration Rules, *supra* note 104, art. 10(1).

109. E. J. Cohn, *The Rules of Arbitration of the International Chamber of Commerce*, 14 INT'L & COMP. L. Q. 132, 144 (1965) (explaining the nomination and appointment of arbitrators under the 1955 ICC Arbitration Rules).

110. ICC Arbitration Rules, 1975 Revision, art. 2(4), 15 I.L.M. 395, at 399.

111. ICC Arbitration Rules 1998, *supra* note 105, art. 7(1).

112. *See* ICSID Arbitration Rules, *supra* note 106, rule 9. *See also* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 57, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

113. ICSID Convention, *supra* note 112, art. 14(1).

114. *Id.*, art. 53(1) (stating that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention").

arbitrator impartiality standards. The domestic arbitration law of many states entails a standard similar to that found in the UNCITRAL Arbitration Rules because many states have adopted a version of Article 12 of the UNCITRAL Model Law on International Commercial Arbitration, which requires the existence of "circumstances . . . [that] give rise to justifiable doubts as to [the arbitrator's] impartiality or independence."[115] Thus, this standard is also broad enough to regulate issue conflicts.

An indirect source of standards is found in association guidelines. The most influential of these is the 2004 International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines").[116] 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.[117] 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."[118] 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.[119]

2. Issue Conflicts Under the Major International Arbitration Rules

i. UNCITRAL Arbitration Rules

Although not evidenced in the practice of the Iran-US Claims Tribunal, which applies the UNCITRAL Arbitration rules,[120] issue conflicts have been

115. UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, 24 I.L.M. 1302, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.

116. *See* IBA Guidelines, *supra* note 8. For another set of guidelines, see the 2004 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Comment to Cannon I, http://www.abanet.org/dispute/commercial_disputes.pdf (focusing on actual bias and stating that "arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain 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").

117. IBA Guidelines, *supra* note 8, at 3.5.2.

118. *Id.* at 4.1.1.

119. *See* Levine, *supra* note 18, at 62.

120. The United States and Iran agreed that the Tribunal would conduct its business under the UNCITRAL arbitration rules as "modified by the Parties or by the Tribunal." *See* The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. 3(2), Jan. 19, 1981, 20 I.L.M. 230, 231. However, Article 10, the provision re-

raised under the UNCITRAL Arbitration Rules in at least three disputes.[121] First, in a sales contract dispute between Country X and Company Q, the appointing authority (designated by the Permanent Court of Arbitration[122]) determined that there is no indication of "potential bias" absent "a direct nexus" between the arbitrator's prior opinions and an issue within the dispute.[123] Country X, the claimant, challenged the arbitrator nominated by Company Q, a company in Country A, on the basis of both an issue conflict and a national conflict. The dispute arose out of events that took place during a period of "consistent hostility" between countries A and X,[124] during which the challenged arbitrator was "a high official of the government of Country A" and had "had some recent connection with a matter relevant to the underpinnings of the dispute in his capacity as one of the attorneys for a former government official."[125] In relation to the issue conflict, aside from noting that the arbitrator's prior legal opinions as an attorney did not necessarily reveal his "personal views," the appointing authority decided that those prior opinions were "on a peripheral but not directly related issue" about constitutional and domestic governmental law.[126] Because there was "no direct relationship to the disputed factual issues in this [present] case," the opinion did not provide an appearance of bias.[127] Moreover, the appointing authority rejected claimant's argument of an appearance of bias arising from "the totality of the circumstances."[128] The authority refused to assume that the legal opinions meant that the arbitrator, while working for Country A, was involved with issues concerning Country X.

Second, the Canfor dispute[129] relied upon the IBA Guidelines' indication that an arbitrator may be disqualified for "publicly advocat[ing] a specific posi-

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garding impartiality, was not changed. *See* Iran-United States Claims Tribunal Final Rules of Procedure, May 3, 1983, *reprinted in* 2 Iran-U.S.C.T.R. 405, 415 (1984).

121. It should be noted that only two challenges to arbitrators under the UNCITRAL Arbitration Rules have ever been reported in all of the volumes of Yearbook Commercial Arbitration. For commentary on the challenges before the Iran-US Claims Tribunal, see DAVID D. CARON ET AL., THE UNCITRAL ARBITRATION RULES, A COMMENTARY 187-193 (2006). *See also* STEWART ET AL., THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 37-49 (1992).

122. *See* UNCITRAL Arbitration Rules, *supra* note 104, arts. 6-7, 12 (indicating that challenges to arbitrators shall be determined by an appointing authority and that if the appointing authority is not determined by the parties' arbitration agreement, it will be selected by the Secretary-General of the Permanent Court of Arbitration at The Hague).

123. Challenge Decision of 11 January 1995, *reprinted in* Yearbook Commercial Arbitration XXII, 227, at 240 (1997).

124. *Id.* at 237.

125. *Id.* at 229.

126. *Id.* at 240.

127. *Id.*

128. *Id.*

129. Canfor Corp. v. U.S.A. (consolidated with Tembec, Inc. v. U.S. and Terminal Forest Prods. v. U.S. by Order dated Sept. 7, 2005), *details available at* http://www.naftaclaims.com/disputes_us_ canfor.htm.

tion regarding the case that is being arbitrated."[130] In a NAFTA arbitration under the UNCITRAL Arbitration rules, the Canadian Canfor Corporation sought damages from the U.S. for measures which imposed anti-dumping and countervailing duties on softwood lumber imported from Canada. A year and a half earlier, Canfor's nominated arbitrator stated, in a public speech to a Canadian government council, that "[w]e have won every single challenge on softwood lumber, and yet [the U.S.] continue[s] to challenge us with respect to those issues, because they know the harassment is just as bad as the process."[131] Although no official decision was published, the appointing authority agreed with the United States that the arbitrator's speech dealt with the specific matter in dispute and advised the arbitrator that if he did not resign, a decision upholding the challenge would be issued.[132] The arbitrator subsequently withdrew.[133]

Third, the dispute between Telekom Malaysia Berhad and the Republic of Ghana suggests that it is impermissible for an adjudicator of an international investment arbitration to advocate simultaneously in another such dispute.[134] Ghana, the respondent, challenged the arbitrator nominated by the investor-claimant, Telekom Malaysia Berhad,[135] in an arbitration instigated under the UNCITRAL Arbitration Rules, pursuant to the Ghana-Malaysia Bilateral Investment Treaty ("BIT").[136] The basis of the challenge against the arbitrator, Professor Emmanuel Gaillard,[137] was his ongoing representation of a consortium of Italian investors who sought to annul an adverse ICSID arbitration award[138] rendered pursuant to the Italy-Morocco BIT.[139] The topical nexus between the two arbitrations that provided the basis for the issue conflict was the

130. *Id.* Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 ARB. INT'L 241, 245 (2005). Barton Legum served as counsel for the United States when this challenge was asserted.

131. *Id.* at 243.

132. *Id.* at 245.

133. *Id.*

134. The Republic of Ghana/Telekom Malaysia Berhad, Arrondissementsrechtbank [Rb.], District Court, The Hague, Challenge No. 13/2004, Petition No. HA/RK 2004.667 (Neth.) ¶ 1 (Oct. 18, 2004) [hereinafter Ghana/TMB 1], *available in English in* 20 MEALEY'S INT'L ARB. REP. No. 1, at 7; Document No. #05-050128-010Z.

135. *Id.*

136. Agreement Between the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments, http://www.unctad.org/sections/dite/iia/docs/bits/ghana_malaysia.pdf.

137. Emmanuel Gaillard is a renowned academic and practitioner of international arbitration.

138. *See* Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/06, *available in French at* http://www.worldbank.org/icsid/cases/rfcc-award.htm. An ICSID Committee refused to annul the award but its reasons were not published. *See* Damon Vis-Dunbar, *ICSID Committee Rejects Request for Annulment in R.F.C.C. v. Morocco*, INVEST-SD: INVESTMENT L. & POL'Y WEEKLY NEWS BULL., Mar. 29, 2006, *available at* http://www.iisd.org/pdf/2006/itn_ mar29_2006.pdf.

139. Agreement Between the Government of Italy and the Government of Morocco for the Promotion and Protection of Investments, art. 5(2), *available in Italian at* http://www.unctad.org/sections/dite/iia/docs/bits/italy_morocco_it.pdf.

ICSID award's interpretation of the expropriation provision in the Italy-Morocco BIT. Under a similar, though not identical, expropriation provision in the Ghana-Malaysia BIT, Ghana intended to rely on the conclusion from the ICSID award that a state's action must be taken pursuant to the *puissance publique*, or public power, for a claim of indirect expropriation to succeed.[140] Ghana argued that Professor Gaillard's commitment to annul this ICSID award provided a conflict that would undermine his ability to impartially assess and adjudicate its argument.

In contrast to the determinations of the arbitral tribunal and the appointing authority that there was no issue of partiality,[141] the District Court of The Hague, Netherlands, held that Professor Gaillard had an issue conflict. Since the parties chose The Hague as the *situs* of the arbitration,[142] Dutch courts had jurisdiction to determine the impartiality of the arbitrator pursuant to The Netherlands Arbitration Act, which includes a standard similar to the UNCITRAL Model Law.[143] Rejecting Telekom Malaysia Berhad's claim of irrelevance based on the fact that the two disputes were factually different, the District Court concluded that "there will be justified doubts about his impartiality, if Prof. Gaillard does not resign as attorney in the RFCC/Moroccan case."[144] The District Court reasoned that Professor Gaillard had the "duty to put forward all possibly conceivable objections against the [ICSID] award" and that "[t]his attitude is incompatible with the attitude Prof. Gaillard has to adopt as an arbitrator in the present case, for example, 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."[145] Notably, the Court rejected Telekom Malaysia Berhad's assertion that Professor Gaillard's experience with the issue of expropriation is permitted under the IBA Guidelines approval of a "general opinion . . . concerning an issue which also arises in the arbitration."[146]

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140. *See* Ghana/TMB 1, *supra* note 134, ¶ 3. *See also* Luke Eric Peterson, *Dutch Court Finds Arbitrator in Conflict Due to Role of Counsel to Another Investor*, INVEST-SD: INVESTMENT L. & POL'Y WEEKLY NEWS BULL., Dec. 17, 2004, *available at* http://www.iisd.org/pdf/2004/investment_investsd_dec17_2004.pdf.

141. *See* Peterson, *Dutch Court Finds Arbitrator in Conflict Due to Role of Counsel to Another Investor*, *supra* note 140. It appears that the Permanent Court of Arbitration designated an appointing authority that reviewed this challenge.

142. *See* Ghana/TMB 1, *supra* note 134, ¶ 1.

143. *See* The Netherlands Arbitration Act 1986, arts. 1033 ("An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence"); 1035(2) ("If the challenged arbitrator does not withdraw within two weeks . . . the President of the District Court shall, at the request of either party, decide on the merits of the challenge"); 1073 (indicating that arts. 1020-73 apply "if the place of arbitration is situated within the Netherlands"), *available in English in* P. SANDERS & A.J. VAN DEN BERG, THE NETHERLANDS ARBITRATION ACT 1986 (Stichting Nederlands Arbitrage Institut 1987).

144. *See* Ghana/TMB 1, *supra* note 134, ¶ 4.

145. *Id.*

146. *Id.* ¶ 3.

The Dutch Court also held that unless these roles of advocate and arbitrator are performed concurrently, an appearance of bias does not exist. Under the Court's first order, Professor Gaillard resigned as counsel in the ICSID case to continue serving as an arbitrator in the dispute between Telekom Malaysia Berhad and Ghana.[147] Ghana again challenged Professor Gaillard and, although the Court acknowledged the principle that "in international arbitrations, avoiding such appearances is an important prerequisite for the confidence in, and thereby the authority and effectiveness of, such arbitral jurisdiction,"[148] it rejected Ghana's challenge, declaring that Professor Gaillard's recent involvement in the disputed issue did not warrant his removal.[149] Explaining its rationale for temporally limiting the scope of issue conflicts, the Court stated that, "[a]fter all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore, 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."[150] The judge opined that, "[s]ave in exceptional circumstances, there is no reason to assume . . . that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before" and therefore there is "no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration."[151]

ii. ICC Arbitration Rules

The ICC "independence" standard has also been interpreted to include issue conflicts but data is limited because challenges to arbitrators are not published.[152] This standard has included at least three principles in relation to issue

147. *Id.* ¶ 5.

148. The Republic of Ghana/Telekom Malaysia Berhad, Arrondissementsrechtbank [Rb.], District Court, The Hague, Challenge No. 17/2004, Petition No. HA/RK 2004.778 (Neth.) ¶ 7 (Nov. 5, 2004) [hereinafter Ghana/TMB 2], *available in English in* 20 MEALEY'S INT'L ARB. REP. No. 1, 7; Document No. #05-050128-010Z.

149. The nature of Professor Gaillard's involvement in the *Consortium R.F.C.C. v. Kingdom of Morocco* dispute prior to his resignation is unclear. Ghana objected to his continuance as an arbitrator on the basis that there was an issue conflict at an earlier date in the dispute, when the Tribunal issued various orders. *Id.* ¶ 2. A discussion regarding the amount of time that Professor Gaillard had devoted to and his responsibility for attacking the ICSID award's analysis of indirect expropriation would have been more helpful. *See infra* Part III.A.2.

150. *See* Ghana/TMB 2, *supra* note 148, ¶ 2.

151. *Id.*

152. The ICC does not publish reasons for disqualifying arbitrators. *See* ICC Arbitration Rules 1998, *supra* note 105, art. 11 (indicating that the ICC Court determines the admissibility and merits of challenges to arbitrators); Appendix, art. 6 (stating that "[t]he work of the Court is of a confidential nature"). Thus, there are no discussions of challenges to arbitrators in the following published collections of ICC awards: SIGVARD JARVIN & YVES DERAINS, COLLECTION OF ICC ARBITRAL AWARDS 1974-1985 (1990); SIGVARD JARVIN, YVES DERAINS, JEAN-JACQUES ARNALDEZ, COLLECTION OF ICC ARBITRAL AWARDS 1896-1990 (1994); JEAN-JACQUES ARNALDEZ, YVES DERAINS, DOMINIQUE HASCHER, COLLECTION OF ICC ARBITRAL AWARDS 1991-1995 (1997); JEAN-JACQUES ARNALDEZ, YVES DERAINS, DOMINIQUE HASCHER, COLLECTION OF ICC ARBITRAL

conflicts. First, a claim of issue conflict must explain why there is a conflict. For example, a party unhappy with the decision on costs in an adverse arbitral award cannot simply contend that the arbitrator appears to be biased on the basis that the arbitrator delivered a public presentation regarding arbitration costs during the time that the issue was contested before the arbitral tribunal. The ICC is likely to reject such a challenge because the party has failed to explain whether the arbitrator formed any particular view that may have influenced the issue of costs in the arbitration. The ICC Court rejected the challenge because the party failed to explain whether the arbitrator had formed any particular view that may have influenced the issue of costs in the arbitration.

Second, an arbitrator may be precluded from reviewing identical issues of fact and law that arise from similar treaty or contract provisions. Parties have successfully challenged party-appointed arbitrators who have rendered adverse rulings in earlier arbitrations involving a contract with identical terms. Similarly, arbitrators have been disqualified from adjudicating multiple disputes arising out of the same contract if the composition of the arbitral tribunal is not identical. The rationale is that "the knowledge gained by the person in question from the other arbitration may make it difficult to consider, with complete impartiality, the issues in the parallel or subsequent arbitration."[153]

Finally, an arbitrator may be disqualified on the basis of her prior involvement in the legal affairs from which the claim arises. In contrast to challenges to Members of the ICJ, arbitrators have been disqualified under the ICC Arbitration Rules because of personal experiences in drafting legal texts at issue or negotiating issues that are relevant to the dispute. For example, an arbitrator could be successfully challenged at the ICC because of her prior work as a legal advisor in a government ministry on a contract if the dispute relates to that contract. Indeed, the rationale for disqualification in such a situation need not be the arbitrator's personal affinity for the government because her involvement and familiarity with the issues underlying the dispute alone could create an unacceptable appearance of bias. The rationale was not that the arbitrator had a personal affinity for the government ministry, but that his involvement and familiarity with the issues underlying the disputed contract created an unacceptable appearance of bias.

iii. ICSID Arbitration Rules

Focusing on the ICSID requirement that arbitrators "exercise independent judgment," an issue conflicts was the ground for one recent challenge.[154] In a

AWARDS 1996-2000 (2003); *and* DOMINIQUE HASCHER, COLLECTION OF PROCEDURAL DECISIONS IN ICC ARBITRATION 1993-1996 (1997).

153. YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 129 (2d ed. 2005).

154. The author characterizes Argentina's challenges to Dr. Andres Rigo Sureda as attenuated party conflicts, and not issue conflicts. *Cf.* Levine, *supra* note 18, at 63-64.

dispute about electricity distribution,[155] Argentina[156] challenged the arbitrator Mr. Fernando de Trazegnies Granda on the basis of an expert opinion that he provided to the U.S. investor, Duke Energy, in an ongoing ICSID arbitration against Peru.[157] The expert opinion was confidential, but it apparently concerned jurisdiction.[158] Before a final decision, the arbitrator withdrew from the tribunal.[159] It is unclear how many other times an issue conflict has officially arisen in ICSID arbitrations,[160] but the concern prompted a recent amendment to Rule 6,[161] requiring greater disclosure for adjudicators[162] in order to "address[] perceptions of issue conflicts among arbitrators."[163]

III.
A RUBRIC FOR ANALYZING ISSUE CONFLICTS IN INTERNATIONAL ADJUDICATION

The foregoing review of issue conflict allegations before international courts and tribunals describes issue conflicts in international adjudication. In addition to actual bias, some cases examine the appearance of bias but available analyses provide inadequate guidance for determining when an adjudicator's experience with and opinions about an issue constitute a conflict that justifies her disqualification. Taken together, the cases reviewed in Part II suggest that the impact of an adjudicator's opinion depends on three factors: the proximity, depth, and timing of the adjudicator's commitment to one potential outcome of

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155. *See* EDF International S.A., SAUR International S.A and Léon Participaciones Argentinas S.A. v. Argentina Republic, ICSID Case No. ARB/03/23, *available at* http://www.worldbank.org/icsid/cases/pending.htm.

156. Argentina has raised a number of challenges to arbitrators in proceedings organized pursuant to the ICSID Arbitration Rules. In general, Argentina's Attorney-General has objected to arbitrators simultaneously serving as advocates in other investment treaty disputes. *See* Luke Eric Peterson, *ICSID Tribunals Diverge over Independence of Arbitrator to Hear Argentine Claims*, INVEST-SD: INV. L. & POL'Y WEEKLY NEWS BULL., Mar. 24, 2005, *available at* http://www.iisd.org/pdf/2005/investment_investsd_mar24_ 2005.pdf.

157. *See* Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru, ICSIDICSID Case No. ARB/03/28, *available at* http://www.worldbank.org/icsid/cases/pending.htm.

158. *See* Luke Eric Peterson, *Argentina Persists with Challenges to Arbitration in BIT Cases*, INVEST-SD: INVESTMENT L. & POL'Y WEEKLY NEWS BULL., Jul. 19, 2006, *available at* http://www.iisd.org/pdf/2006/itn_july19 _2006.pdf.

159. *Id.*

160. As under the ICC and UNCITRAL Arbitration Rules, disqualification proceedings under the ICSID Arbitration Rules are not published "without the consent of the parties." *See* ICSID Arbitration Rules, *supra* note 106, rule 48(4); ICSID Convention, *supra* note 112, art. 48(5).

161. ICSID, Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat May 12, 2005, http://www.worldbank.org/icsid/sug-changes.htm.

162. As amended and effective on April 10, 2006, Rule 6 now requires arbitrators to disclose "any other circumstance that might cause my reliability for independent judgment to be questioned by a party," a requirement comparable to Article 9 of the UNCITRAL Arbitration Rules. *See* UNCITRAL Arbitration Rules, *supra* note 104.

163. ICSID, Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper, Oct. 22, 2004, http://www.worldbank.org/icsid/improve-arb.pdf.

an issue. These factors suggest a number of propositions for properly analyzing whether an adjudicator should be disqualified for appearance of bias. These three factors also reveal that the analysis of an issue conflict should be independent of other aspects of adjudicator impartiality.

A. Proximity, Depth, and Timing

1. Proximity of the Opinion

International adjudicators frequently express their views on legal and factual issues in a variety of settings. As illustrated in Part II, an international adjudicator may have been "counsel before the same tribunal, or . . . an advisor to one of the parties before the tribunal; she may have served as a diplomat dealing with issues which subsequently come before the court; or she may have expressed views in academic writings on issues directly relevant to the case."[164] In some cases, such as the Canfor Dispute,[165] the impartiality problem is simple: an adjudicator's expressed preference for a particular resolution of the disputed issue readily permits disqualification for actual bias. In other cases, however, decision makers must determine whether the proximity of an expressed opinion to a disputed issue creates the appearance of bias.

i. Aspects of Proximity

Two 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. At one end of the spectrum, an adjudicator's expressed views are sufficiently close to an established legal principle or historical data that they cannot provide a basis for questioning the adjudicator's impartiality. However, a stance on a particular issue may raise legitimate concerns when the view has not yet been adopted or, worse, when it has been generally rejected. The issue must be reasonably disputed before it can be relied upon to disqualify an adjudicator.

ii. Types of Viewpoints and Proximity

The types of opinions that form the basis of an issue conflict can be classi-

164. Mackensie & Sands, *supra* note 19, at 280.

165. *See supra* Part II.D.2.a.

fied as legal preferences, factual views, or combinations of the two.[166] While an adjudicator with a national or party interest in the outcome of a dispute is likely to exercise the adjudicatory functions of law declaration, fact identification, and law application in a manner favorable to the party that she prefers to vindicate, issue conflicts only give the appearance of bias in regard to one of these three functions.

International adjudicators often express their preferences about the content of a legal rule. An adjudicator may have advocated a legal proposition in general terms that affects a class of cases, including the dispute that she is to adjudicate. The possibility of such opinions affecting international disputes is real,[167] and is greater than in the domestic context. This is so because international law as defined in Article 38 of the ICJ Statute includes "the teachings of the most highly qualified publicists of the various nations"[168] and because international disputes that rely upon domestic laws often permit the choice of various "rules" of law[169] or the application of "general principles of law" or *lex mercatoria*.[170]

Preferences regarding the nature of a legal rule may provide the appearance of bias. An opinion regarding the proper interpretation of a disputed treaty or contract provision is directly proximate. The Dutch Court astutely realized that Professor Gaillard's ICSID representation would create a conflict, or at least appear to create a conflict, in the dispute between Telekom Malaysia Berhad and Ghana: both disputes focused on the same legal issue, the elements of indirect expropriation.[171] Likewise, opinions about the meaning of treaty provisions or other analogous legal principles may be sufficiently related to preclude the adjudicator's involvement with the case. In contrast, tangential opinions, such as the arbitrator's memoranda about constitutional and governmental law in the sales contract dispute between Country X and Company Q, would not be.[172]

Only legal opinions that are both proximate to a disputed issue and distant from established law provide sufficient appearance of bias to justify the dis-

166. *Cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 350-52 (Foundation Press Inc. 1994) (discussing the adjudicator's roles of law declaration, historical fact identification, and law application).

167. This is particularly true if the proposition that "[j]udges have traditionally relied mainly on their own experience and common sense in shaping the propositions of law which they announce" is accurate. *See id.* at 361.

168. ICJ Statute, *supra* note 24, art. 38.

169. This most commonly occurs in international arbitration. *See, e.g.*, ICC Arbitration Rules 1998, *supra* note 105, art. 17.1 (stating that "[t]he parties shall be free to agree upon the rules of law to be applied . . . to the merits of the dispute," in the absence of which, "the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate"). *See also* ICSID Arbitration Rules, *supra* note 106, Art. 42 (stating that, absent agreement, "the Tribunal shall apply the law of the Contracting State Party to the dispute . . . and such rules of international law as may be applicable").

170. For a famous discussion of *lex mercatoria*, see Lord Justice Michael Mustill, *The New Lex Mercatoria: the First Twenty-Five Years*, 4(2) ARB. INT'L. 87 (1988).

171. *See supra* Part II.D.2.a.

172. *Id.*

qualification of an adjudicator. Thus, although proximate to a disputed issue, the extent that Judge Mumba's past opinions influenced her decision to classify rape as a war crime was irrelevant, because the classification had already been established by the ICTY, and hence she followed the established law.[173] However, considering the generality and correspondingly distant proximity of the United Nations Charter principles, the ICTY's reliance on these principles to justify Judge Mumba's prior experiences and their impact on the dispute rendered the decision dubious.[174]

International adjudicators may have expressed opinions about the factual circumstances from which the dispute arises and these views may lead to an issue conflict. Absent a national or party interest, the likely scenario is where an adjudicator was involved in obtaining the relevant facts, for example, an international adjudicator may have been a journalist or a member of a peace-keeping mission. The appearance of bias may exist even where the adjudicator's factual viewpoint is not specifically at issue in the dispute, but merely reasonably related to the dispute and not yet generally accepted. This occurred when the Special Court of Sierra Leone disqualified Justice Robertson from adjudicating disputes involving members of the Revolutionary United Front.[175] His documentation of the Revolutionary United Front's atrocities, though not referring individually to any of the defendants, provided an appearance of bias.

Finally, international adjudicators may have expressed legal and factual opinions about circumstances closely related to the disputed issue. In this situation, the adjudicator has offered an opinion about how the law applies to the facts. In addition to opinions that exactly identify a legal issue in the context of the unique facts of the dispute, disqualification may be appropriate to avoid the appearance of bias stemming from an opinion about closely related circumstances. Judge Elaraby's comments concerning the legality of Israel's occupation of Palestinian territory is such an example.[176] The ICJ's 13-1 vote properly noted that Judge Elaraby's comment "expressed no opinion"[177] on the specific question of the legal consequences of Israel's construction of the wall and that therefore Article 17(2) did not apply. That conclusion, however, does not address Judge Buergenthal's point that the comment nevertheless created an appearance of bias.[178]

2. Depth of the Commitment

An adjudicator's level of commitment to an opinion that she presented in

173. *See supra* Part II.B.2.

174. *Id.*

175. Prosecutor v. Issa Hassan Sesay, *supra* note 48.

176. *See supra* Part II.A.2.

177. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 5.

178. *See supra* Part II.A.2.

her former activities can be difficult to determine. To date, evaluations of issue conflicts have predominantly focused on whether or not the adjudicator "really" shares the view she presented. The aforementioned ICJ cases rejected all allegations of issue conflicts arising out of an adjudicator's prior diplomacy on behalf or her country.[179] With greater detail, the ICTY demanded evidence that Judge Mumba "personally identified with the views" of her government.[180] Similarly, the appointing authority in the dispute between Country X and Company Q noted that there was "no evidence whatsoever of the arbitrator's personal views on the matter."[181]

Such formalistic inquiries are deficient because they focus on evidence of actual bias rather than the appearance of bias. Actual bias is difficult to establish because "to attribute to lawyers and diplomats views pronounced by them in their representative capacity is to misconstrue the nature of representation, which often entails the espousal of views one does not necessarily share."[182] Moreover, absent independent evidence, there does not appear to be any "formula . . . for distinguishing personal from representative advocacy."[183]

However, just as it is assumed that representation does not accurately indicate an adjudicator's views, it is perhaps too quickly assumed that statements in an academic article definitively reveal her position. In fact, the adjudicator may not have thoroughly analyzed or sufficiently articulated such an opinion. When cross-examined about potentially contradictory views expressed in a law review article, one expert witness exclaimed, "I always think my best when I am paid!"[184]

Whether the opinions are found in journals or prior advocacy, focusing on the appearance of bias reduces the importance of inquiries into the adjudicator's role at the time. The broader inquiry is whether the adjudicator is likely to be substantially influenced by the view she presented such that she will not be open to all of the possible outcomes of the disputed issue. Although an adjudicator's individual commitment to her prior opinion is important, her personal involvement with the issue in terms of duration and responsibility also indicates the degree to which she may be influenced.

Involvement with a particular issue over an extended period of time and substantial responsibility for the formulation of policy are important because they may render an adjudicator unable to assess the issue neutrally. Even if an adjudicator's involvement with an issue does not result in prejudgment, the appearance of bias increases with duration and responsibility. Considerations of

179. *Id.*

180. Prosecutor v. Furundzija, *supra* note 52, ¶ 166.

181. Challenge Decision of 11 January 1995, *supra* note 123, at 240.

182. Gordon, *supra* note 4, at 510.

183. *Id.*

184. Discussion regarding expert witnesses at Columbia Law School, in New York, N.Y. (Fall 2005).

duration and responsibility appear to explain the ICC's removal of an arbitrator who had previously worked as a legal advisor for his government and was familiar with certain issues underlying the disputed contract.[185] These considerations also partially justify the District Court of The Hague's decision to sustain the challenge to Professor Gaillard.[186] Although Professor Gaillard may have personally disagreed with the arguments he would have advanced as an investor's advocate, his preoccupation with the deficiencies of the ICSID award led to the reasonable inference that he would be unduly influenced, and therefore unable to objectively evaluate such issues as an adjudicator.

If the adjudicator's involvement with an opinion was substantial in terms of time and responsibility, whether the adjudicator's work was representational in nature is less relevant. The inadequacy of focusing solely on whether an adjudicator's personal views comport with her advocacy may explain the ICTY's extended discussion of Judge Mumba's alleged issue conflict. Although the Appeals Chamber concluded that there was no evidence that Judge Mumba personally identified with the views of the Zambian Government or the UNCSW, it continued to defend its rejection of the appearance of bias on the basis of the Tribunal's purpose to prosecute crime and the qualifications of ICTY judges.[187] This additional analysis was warranted (although it is unpersuasive as discussed in Part IV.A), considering the fact that Judge Mumba had spent three years working with issues related to the dispute.[188]

3. Timing of the Issue Conflict

The passage of time seems to restore an adjudicator's ability to declare law, determine facts, and resolve a dispute and therefore mitigates the appearance of bias arising from an issue conflict. One reason for this is that an adjudicator may change her opinion or even forget the particulars of her position on the issue. Thus, over time, the *depth* of the adjudicator's commitment is expected to wane, and consequently, it is reasonable to conclude that the appearance of bias is reduced.

It is also possible that the nature of the applicable legal rules and factual conditions may have changed to make the adjudicator's previous opinion less relevant. Usually, the changed circumstances will indicate that the adjudicator's prior commitment does not directly address the disputed issue. Occasionally, the circumstances may change such that the adjudicator's opinion becomes the generally accepted view; that is, the feared prejudgment is rendered irrelevant because the preferred outcome is independently required. In either of these two situations, it is the *proximity* of the adjudicator's opinion about the disputed is-

185. *See supra* Part II.D.2.b.

186. *See supra* Part II.D.2.a.

187. *See supra* Part II.B.2.

188. Prosecutor v. Furundzija, *supra* note 52, ¶ 166.

sue that has been altered by time.

As a result, it is not surprising that the passage of time is invariably mentioned when an issue conflict is asserted. What is astonishing, however, is the District Court of The Hague's determination that an adjudicator's involvement with an issue is not problematic unless it is simultaneous.[189] It is unrealistic to assume, as the District Court apparently did in rejecting a challenge to the ability of Professor Gaillard to neutrally arbitrate the dispute between Telekom Malaysia Berhad and the Republic of Ghana,[190] that the appearance of bias associated with an adjudicator disappears immediately upon the cessation of her involvement with the issue.

B. Proximity, Depth, and Timing and the Appearance of Bias

It must be determined at what point an opinion becomes an issue conflict. Assessments of alleged bias too often focus on the extremes, which are the rare obvious cases. The test for the appearance of bias, however, is at heart one of probability: at some point the possibility that the adjudicator's prior opinion will affect her ability to adjudicate warrants her disqualification.[191] Absent proof of actual bias, at some point the appearance of bias is deemed unacceptable because of the likelihood of partiality. Thus, where the adjudicator's commitment is closely related to the issue in the current dispute, has demonstrated depth, and was formed in recent years, there is an appearance of bias sufficient for disqualification. Three propositions flow from this analysis of the appearance of bias from an issue conflict.

1. Proximity Analysis is Necessary

First, the most important factor in the analysis of an issue conflict is proximity. Regardless of the timing or the depth of the commitment, it is clear that unless the adjudicator's previously-expressed opinion is at least moderately proximate to an issue in dispute, neither actual bias nor the appearance of bias from an issue conflict exists. In contrast, only in obvious cases will the passage of time or the lack of depth independently render an opinion harmless without an assessment of proximity. Therefore, a proximity analysis is *always* warranted and should be the first step. Even if it is only a brief statement that the opinion is both legally and factually irrelevant, and even if reasonable minds differ regarding the nearness of an opinion to a disputed issue, analyses will provide future guidance.

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189. *See supra* Part II.D.2.a.

190. The nature of Professor Gaillard's involvement in the *Consortium R.F.C.C. v. Kingdom of Morocco* dispute prior to his resignation is unclear. I presume that Professor Gaillard had already engaged in analyzing the issue of indirect expropriation.

191. *Cf.* Abramson, *supra* note 11, at 65 (stating that American law "has always endeavored to prevent even the probability of unfairness").

2. Representation can Provide an Appearance of Bias

Second, a proper inquiry into the depth of an adjudicator's prior commitment to an issue should focus on the duration and the responsibility of the adjudicator's involvement with the issue. In addition to determining whether an adjudicator's prior involvement within the field of law relating to the disputed issue will *necessarily* impact her adjudication, such an inquiry will focus on whether that involvement will *likely* and *impermissibly* influence her adjudication. Accordingly, it is insufficient to rely solely on the lack of evidence that an adjudicator personally identified with an opinion that she previously advocated.

3. Timing and a "Concurrency Rule"

Third, as a practical matter, there may be cases where no amount of time will change the adjudicator's opinion or render that opinion irrelevant. However, on average, the seriousness of the appearance of bias, resulting from either the proximity or the depth of the adjudicator's commitment, is inversely proportional to the amount of time that has elapsed since the circumstances creating the issue conflict occurred.

The disputes described in Part II indicate the possible emergence of what I refer to as a "concurrency rule." The ICJ's Order regarding Judge Elaraby in the *Construction of a Wall in the Occupied Palestinian Territory*, the ICTY's decision in the *Furundzija* appeal, and the Dutch Court's decisions in the dispute between Telekom Malaysia Berhad and Ghana all suggest that adjudicators should be prohibited from serving simultaneously as advocates. Indeed, the ICJ Practice Directions now prohibit *ad hoc* judges from serving as advocates within the same three-year period[192] and, as will be discussed in Part V, a similar rule has been suggested for international treaty arbitration. Measured against the elements of proximity, depth, and timing, such a rule could be both over- and under-inclusive. The concurrency rule is unnecessarily over-inclusive to the degree that it precludes an adjudicator from participating in disputes regarding distant or unrelated issues. Such a rule is under-inclusive in that it inadequately accounts for the passage of time: it is irrational to assume that an issue conflict ceases the moment that an adjudicator's involvement with a prior issue ends. The concurrency rule is also under-inclusive because it fails to address current commitments to issues outside of advocacy, such as opinions expressed in articles or lectures.

C. Issue Conflicts and Other Aspects of Impartiality

Issue conflicts are often presented together with other impartiality objections to a potential adjudicator. Focusing on other bases for challenging a given adjudicator should not blind a tribunal to the three factors of proximity, depth,

192. *See supra* Part II.A.1.

and timing when analyzing an issue conflict allegation. For example, a party may allege that in addition to the adjudicator's commitment to a preferred outcome of an issue, she may have an unrelated party or national interest that will affect her ability to impartially adjudicate the dispute. In such circumstances, the dismissal of weak claims of actual bias, or the appearance of bias, resulting from national allegiance or party interests may, but should not, detract from issue conflict allegations.

Of greater interest, however, are situations where the circumstances that give rise to an issue conflict allegation simultaneously give rise to a national or party conflict. For example, in the aforementioned ICTY dispute, before challenging Judge Mumba on the basis of an issue conflict, the appellant unsuccessfully challenged her relationship with the Prosecutor and three authors of one of the *amicus curiae* briefs, noting that all of them had participated together in a meeting in furtherance of the work of the UNCSW.[193] In this scenario, the allegation should be reviewed under each head independently. Considering the unique factors relevant to the analysis of issue conflicts, the likelihood of an adjudicator being unduly influenced by a single past opinion or experience is not increased by the fact that it can be framed under an additional rubric: a weak claim of a party affiliation or national loyalty combined with a weak assertion of an issue conflict does not unite to provide an appearance of bias. This analysis was applied by the sales dispute between Country X and Company Q under the UNCITRAL Arbitration Rules.[194] Since neither the arbitrator's legal opinion nor his relationship with County A provided an adequate basis for challenging his appointment, the "totality of the circumstances"[195] could not provide a basis for his disqualification.

IV.
THE IMPACT OF CHARACTERISTICS OF INTERNATIONAL COURTS AND TRIBUNALS ON ISSUE CONFLICTS

As discussed in Part III, issue conflicts are of few dimensions; the appropriate inquiry should be limited to the variables of proximity, depth, and timing. However, certain characteristics of international courts and tribunals have also been referred to in issue conflict analyses. These characteristics include qualification requirements and the preference for *ad hoc* adjudicators and could include provisions governing an international adjudicator's outside activities. These characteristics are not relevant to assessing the existence of, and should not be employed to justify a permissive attitude toward, issue conflicts.

193. Prosecutor v. Furundzija, *supra* note 52, ¶ 167. *See supra* Part II.B.2.

194. *See supra* Part II.D.2.a.

195. Challenge Decision of 11 January 1995, *supra* note 123, at 240-41.

A. Issue Conflicts and Qualification Requirements

Issue conflicts, though inherent in adjudication, are made more likely by the political demand for international adjudicators who have specialized expertise. The extent and nature of the demand for expert adjudicators is highlighted by the qualification requirements stated in the rules of international public tribunals, be they "recognized competence in international law,"[196] experience in "international humanitarian law and human rights law,"[197] or demonstrated "expertise in law, international trade and the subject matter of the covered agreements generally."[198] Such qualification requirements restrict the size of the pool of potential adjudicators, increasing the likelihood that any given adjudicator will have an impermissible issue conflict in a particular dispute.

Qualification requirements provide an attractive excuse for ignoring issue conflicts. Rather than assess the impact of an issue conflict, it is easier to disregard an appearance of bias. Moreover, such an approach protects all adjudicators, which is an alluring outcome since the permissibility of an issue conflict is often determined by fellow adjudicators. Finally, some fear that the quality of international law would suffer if the pool of adjudicators were enlarged. In this regard, Professor Edward Gordon declared that strict policing of issue conflicts could disqualify:

> "Diplomats, legislators, and . . . law professors, even ones as distinguished as the late Philip Jessup, Hardy Dillard, and Richard Baxter, all of whom served with distinction as members of the World Court after having led active careers in which they frequently discussed and wrote about issues and legal doctrines of abiding importance."[199]

However, qualification requirements, which are general in nature, do not logically justify the appearance of bias presented by pre-conceived views of a disputed issue in an individual case. As Professor Randall Peerenboom remarked, "[w]hile dedication to human rights advocacy may qualify someone to be a judge, and may not be adequate grounds for removal, having staked out a position on a particular issue crucial to the disposition of the case in question is another matter."[200] Thus, contrary to the ICTY's conclusion,[201] there is nothing intrinsically "odd" about the possibility that a prior opinion or experience that satisfies "an eligibility requirement [may] lead to an inference of bias."[202] Ignoring the appearance of bias in issue conflicts in the name of a qualification requirement harms the high quality of judgments that qualification requirements

196. *See* ICJ Statute, *supra note* 24, art. 2.

197. *See* ICTY Statute, *supra* note 50, art. 13.

198. *See* DSU, *supra* note 80, art. 17.3.

199. *See* Gordon, *supra* note 4, at 510.

200. Randall Peerenboom, *Human Rights and the Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 893 n. 278 (2005).

201. *See supra* Part II.B.

202. Prosecutor v. Furundzija, *supra* note 52, ¶ 205.

seek to ensure. Although adjudicators familiar with a particular area of international law can render a decision more speedily than those with a more general international or domestic legal training, qualification requirements also seek to ensure a high level of reasoning. Typically, an adjudicator trained in an area of law will better understand the nature of the dispute and the established legal contours. However, from an objective point of view, to ensure quality, an otherwise competent adjudicator, who is less familiar with the specific field of law, is preferable to an adjudicator who appears biased.

B. Issue Conflicts and Ad Hoc Adjudicators

Issue conflicts are also multiplied by the political demand for non-permanent adjudicators in certain international dispute systems. At one extreme, members of the ICJ may serve for nine years with one renewal.[203] At the other extreme, *ad hoc* adjudicators in international arbitration and non-appellate trade disputes are appointed only to an individual dispute. Although *ad hoc* adjudicators may not have the same formal qualification requirements, adjudicators in the most demand "speak multiple languages," "boast rich and multi-national educations from the world's most prestigious universities," "have vast experiences working in the highest echelons of diverse legal systems," engage in "rich scholarly research," and have "technical or industry specific expertise."[204] Naturally, such adjudicators are likely to have expressed opinions that may provide a basis for an issue conflict.

The use of *ad hoc* adjudicators does not, in and of itself, justify the rejection of challenges to adjudicators for issue conflicts. There is no reason to assume that parties, by agreeing to submit a dispute to an *ad hoc* adjudicator, waive the right to challenge that adjudicator for having an appearance of bias. In this regard, the District Court of The Hague's assertion that "it is generally known that . . . lawyers frequently act as arbitrators" does little to ameliorate the concern over issue conflicts.[205] This rationale suggests that the parties to international arbitration implicitly agree to permit the appearance of bias resulting from issue conflicts, which inappropriately circumvents the "justifiable doubts" standard in the UNCITRAL Arbitration Rules and the Netherlands Arbitration Act.[206] Likewise, Mexico's suggestion that DSU panelists be deemed impartial "irrespective of any past experience"[207] is ill-founded: no provision of the DSU indicates that the Member States agreed to waive this basis of impartiality.

Additionally, a more lenient standard for the appearance of bias should not

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203. *See* ICJ Statute, *supra note* 24, art. 13.

204. Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 958-59 (2005).

205. *See* Ghana/TMB 2, *supra* note 148, ¶ 11.

206. UNCITRAL Arbitration Rules, *supra* note 104, art. 9; Netherlands Arbitration Act, *supra* note 143, art. 1033.

207. *See* Guatemala–Cement II, *supra* note 88, ¶ 4.41.

be permitted for those *ad hoc* adjudicators selected by one of the parties. It is common in the practice of the ICJ and in international arbitration to permit parties to select one of the adjudicators. In regard to international commercial arbitration it has been suggested that such a distinction may be acceptable.[208] However, the modern trend has been to subject all the arbitrators to the same standard of impartiality. As Professor Andreas Lowenfeld explains, "[w]hile he or she is expected to be receptive to the position of the party that appointed him or her, an arbitrator is not supposed to approach a controversy with mind made up."[209] Indeed, it does not appear that the District Court of The Hague's conclusion considered the possibility that, since Professor Gaillard was nominated by the investor, he may have had a pro-investor attitude generally or an attitude specifically favorable to the party that appointed him. Similarly, there is no reason to differentiate between judges *ad hoc* and members of the ICJ. As Sir E. Lauterpacht noted in *Application of Genocide Convention*, "the fact that [a judge *ad hoc*] is appointed by a party to the case in no way reduces the operative force" of his duty to "exercise his powers impartially and conscientiously," and therefore a judge *ad hoc* cannot be "precommitted to the position that [the state that appointed him] may adopt."[210] The same principle should apply to the issues within the dispute.

C. Issue Conflicts and Restrictions on Outside Activities

Finally, limitations on outside activities should not be construed as sufficient to reduce the regulation of issue conflicts. As discussed in Part II, the occurrence of issue conflicts may be reduced by provisions regulating the outside activities of adjudicators.[211] However, outside activities permitted under these provisions, such as academic publications, may provide a basis for an issue conflict. In such circumstances, the limited reach of the regulation of outside activities should not be relied upon to justify the appearance of bias in an issue conflict. Although avoiding conflicts of interest is one of the purposes of regulating outside conduct, "this task is often illusive"[212] due to the difficulty of succinctly categorizing inappropriate activities. Moreover, case-by-case determination of a conflict of interest is preferable to broadly insulating international adjudicators

208. *See* CRAIG, PARK & PAULSON, *supra* note 19, at 231 (suggesting that the ICC International Court of Arbitration might be less likely to sustain an issue conflict challenge against a party-appointed arbitrator than a presiding arbitrator).

209. Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L. L. J. 59, 60 (1995).

210. Application of Genocide Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 407, 408-09 (Order of 13 Sept.) (separate opinion of Judge Lauterpacht).

211. *See, e.g.*, Article 16(1) of the ICJ Statute, *supra* note 24; art.7(1) of the ITLOS Statute, *supra* note 23; Art. 13 bis(3) of the ICTY Statute, *supra* note 50.

212. *See* Shetreet, *supra* note 13, at 161.

from the outside world, which can result in "judicial shortsightedness."[213]

V.
HOW FUTURE REGULATION OF ISSUE CONFLICTS COULD BE EFFECTED

Properly identified issue conflicts need to be regulated to increase the legitimacy of international courts and tribunals and also to provide guidance for both concerned parties and international adjudicators. Accordingly, this section reviews potential avenues and obstacles to ensuring that standards of impartiality exist and that they effectively regulate issue conflicts. None of the obstacles are insurmountable and none provide a legitimate basis for discounting issue conflicts.

A. The International Court of Justice and its Statute, Rules, and Practice Directions

At present, the regulation of issue conflicts at the ICJ is incomplete and therefore an analysis focusing on the proximity, depth, and timing of an issue conflict allegation is not possible.[214] Article 17(2) of the ICJ Statute focuses on the adjudicator's involvement with "any case," which results in the exclusion of issue conflicts absent actual bias. Indeed, in his dissent in the *Construction of a Wall in the Occupied Palestinian Territory*, Judge Buergenthal noted the limitations of Article 17(2), invoking instead a power "implicit in the very concept of a court of law" to evaluate "whether one of its judges has expressed views or taken positions that create the impression that he will not be able to consider the issues . . . in a fair and impartial manner."[215]

Moreover, it is unlikely that Article 17(2) will ever be modified or interpreted to address the appearance of bias presented by issue conflicts. The opinions of both the majority and Judge Buergenthal in the *Construction of a Wall in the Occupied Palestinian Territory* confirm that Article 17(2) is irrelevant to the appearance of bias from issue conflicts; the World Court has refused to adopt a broad interpretation of the language "advocate for one of the parties" or "in any other capacity" that could cover appearances of bias presented by the opinions of those not affiliated with a party to the dispute.[216] A majority of the Court also chose not to invoke the implicit power argument preferred by Judge Buergenthal.[217] Finally, revising Article 17(2) is unlikely because amendments to the

213. *Id.*

214. If the International Tribunal for the Law of the Sea follows ICJ jurisprudence, its impartiality standards will be similarly inadequate. *See supra* note 23.

215. Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31, at 9-10 (Buergenthal, J., dissenting).

216. *See* ICJ Statute, *supra* note 24, art. 17.

217. *See* Construction of a Wall in the Occupied Palestinian Territory, *supra* note 31.

ICJ Statute require "two-thirds of the Members of the United Nations, including all of the permanent members of the Security Council."[218]

The Practice Directions partially regulate the possibility of issue conflicts for judges *ad hoc*. However, for the reasons discussed in Part III.B.3, and as the Advisory Opinion for the *Construction of a Wall in the Occupied Palestinian Territory* demonstrates, these provisions are under-inclusive: they only regulate issue conflicts arising from advocacy, permitting issue conflicts arising from an adjudicator's other activities and from her advocacy prior to the three-year period.

Nevertheless, both the Rules of Court and the Practice Directions could provide a solution.[219] Article 30 of the ICJ Statute authorizes the Court to "frame rules for carrying out its functions."[220] Accordingly, the Court could draft a broader standard of impartiality that could be incorporated into the ICJ Rules or the Practice Directions. This standard could then be interpreted to analyze issue conflicts by focusing on the proximity, depth, and timing of the challenged judge's opinion. Accordingly, such a standard should not follow ICJ precedents refusing to regulate proximate activities performed in a representative capacity, unless the participation was minimal or the passage of time renders the adjudicator's involvement irrelevant.[221]

B. International Criminal Tribunals and the ICTY's Jurisprudence

In contrast to the ICJ, the ICTY's interpretation of its impartiality provision to include issue conflicts is laudable. Other international criminal courts and tribunals, like the Special Court for Sierra Leone, should follow the ICTY's lead in interpreting or amending their own impartiality standards to regulate issue conflicts.

Similarly, the ICTY jurisprudence, though imperfect, has provided some guidance for the proper regulation of issue conflicts in international criminal disputes. In applying its impartiality provision, the ICTY's reliance upon the qualification requirements for adjudicators and the general principles of the U.N. Charter was unsatisfactory, but its discussion of the proximity of an opinion to established law and its implicit acceptance that opinions expressed in a represen-

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218. *See* ICJ Statute, *supra* note 24, art. 69 ("Amendments to the Present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter"); Charter of the United Nations, art. 108.

219. It has been suggested that Article 24 could provide a solution. *See* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, 349 (Andreas Zimmerman et al. eds., 2006). The author of this article, however, believes that this would be inadequate because the President of the Court has never invoked "some special reason" to disqualify adjudicators, as indicated *supra* Part II.A.1, and particularly because it was not used in *Construction of a Wall in the Occupied Palestinian Territory, supra* note 31.

220. *See* ICJ Statute, *supra* note 24, art. 30.

221. *Cf.* Continued Presence of South Africa in Namibia, Advisory Opinion, *supra* note 33, at 324 (Gros, J., dissenting).

tative capacity may not remove the appearance of bias are instructive.[222] Because the ICTY did not adequately address the proximity, depth, or timing of the issue conflict, it is difficult to readily conclude that it arrived at the correct result.[223] Future cases should address these factors more clearly.

C. The World Trade Organization and the Rules of Conduct

In theory, the DSU Rules of Conduct could provide adequate impartiality standards for the regulation of issue conflicts in WTO disputes. The impartiality requirement in the Rules of Conduct that all persons serving as panelists, arbitrators or members of the Appellate Body "shall be independent and impartial [and] shall avoid direct or indirect conflicts of interest"[224] has been explicitly construed for the Appellate Body to include conflicts arising out of both "active interests," which includes organizations with "a declared agenda," and "statements of personal opinion on issues relevant to the dispute in question."[225] This broader definition is commendable and should be applied to panelists; there is no reason why actual bias or the appearance of bias arising from an issue conflict should not be included in those interests that are "likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality."[226]

One potential weakness of the Rules of Conduct, however, is that disqualification depends upon the finding of a "material violation."[227] This term could be construed to limit disqualification only to issue conflicts that evidence actual bias.[228] Given the DSU's questionable enforcement of impartiality in regard to national and party conflicts of interest, this appears to be a real possibility.[229] A better interpretation of the "material violation" standard would be to disregard those issue conflicts that indicate that the adjudicator's opinion is not of sufficient proximity, depth, and timing to provide for an impermissible appearance of bias.

In regard to panelists, another possible problem for regulating issue con-

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222. *See supra* Part II.B.2, III.A, IV.A.

223. *Cf.* Mackensie & Sands, *supra* note 19, at 281.

224. *See* Rules of Conduct, *supra* note 81, Rule II.

225. Working Procedures for Appellate Review, *supra* note 82, at Annex 2.

226. *See* Rules of Conduct, *supra* note 81, Rule III.

227. *Id.*, Rule VIII.

228. Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 546 (2003) (asserting that minor improprieties or "acts that present the appearance of impropriety" are not material violations of the Rules of Conduct).

229. *See* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 535 (2000) (summarizing cases that indicate that that the WTO does not take its impartiality requirements seriously). *See also* John A. Ragosta, *Unmasking the WTO – Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?*, 31 LAW & POL'Y INT'L BUS. 739, 740-41, 743-46 (2000); Lori Wallach, *Transparency in WTO Dispute Resolution*, 31 LAW & POL'Y INT'L BUS. 773, 774 (2000).

flicts is the relationship between the Rules of Conduct and Article 8 of the DSU. Article 8.6 suggests that the parties not oppose nominations "except for compelling reasons." Accordingly, it is possible that this (as well as the political ramifications of explicitly rejecting a panelist nominated by another state) may compel State parties to accept, or waive objection to, issue conflicts. While voluntary waiver is not problematic, this same rationale may inappropriately permit the WTO Director-General "in consultation with the Chairman of the [Dispute Settlement Body] and the Chairman of the relevant Council or Committee" to ignore issue conflicts since Article 8.7 authorizes them to determine the composition of panels. Therefore, Articles 8.6 and 8.7 should be interpreted to discourage parties from asserting frivolous allegations but should not be allowed to limit the regulation of issue conflicts.

The DSU authorizes the repeat use of panelists in certain circumstances, but this should not be construed to permit issue conflicts. As Mexico pointed out in *Guatemala–Cement II*,[230] panelists may serve as a DSU adjudicator more than once and occasionally adjudicate multiple disputes simultaneously.[231] Indeed, Article 21.5 of the DSU prefers original panelists to adjudicate disputes regarding compliance measures.[232] However, none of these reasons, nor the fact that the *Guatemala–Cement II* panel included a panelist from *Guatemala–Cement I*, provides a legitimate reason for not regulating issue conflicts in WTO panels. First, as discussed in Part IV.B, the fact that adjudicators may serve more than once does not rationalize ignoring issue conflicts. Second, although panelists may adjudicate multiple WTO disputes, their participation should be conditioned upon the absence of an issue conflict. As has been noticed in international arbitration, the impartiality of an adjudicator assigned to multiple disputes may be affected, or may appear to be affected, if issues in those disputes are similar.[233] Finally, although Article 21.5 of the DSU permits the continued use of the panel adjudicators that originally decided the dispute for the sake of efficiency, Mexico's reliance on this provision was misplaced. Article 21.5 only authorizes an adjudicator who has legitimately analyzed legal and factual issues in a particular dispute to continue to resolve that dispute.

A final concern relates to adjudicator qualification requirements. Issue conflicts in international trade disputes are made more likely because the DSU requires "well-qualified" individuals[234] and permits only "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" to serve on the Appellate Body.[235] As discussed in Part IV.A, this is not necessarily problematic. However, one re-

230. *See supra* Part II.C.2.

231. Guatemala–Cement II, *supra* note 88, ¶ 4.26.

232. *Id.* ¶¶ 4.25, 4.31. *See also* DSU, *supra* note 80, art. 21.5.

233. *See* DERAINS & SCHWARTZ, *supra* note 153.

234. *See* DSU, *supra* note 80, art. 8.1.

235. *Id.* art. 17.3.

form proposal for panelists would exacerbate the situation. The United States and Chile have proposed that Article 8.2 also require that panelists have "expertise to examine the matter at issue in the dispute."[236] Such a requirement could actually encourage the use of adjudicators who have already prejudged legal or factual issues in a dispute.

D. International Arbitration and Courts, Institutions and Associations

Currently, impartiality standards in international arbitration are sufficiently general to provide for the regulation of issue conflicts. One shortcoming, however, is the possible interpretation of the IBA Guidelines. Cases of actual bias will be addressed by the standard requiring disclosure of a public opinion advocating "a specific position regarding the case that is being arbitrated,"[237] but it is uncertain whether this would apply to legal preferences, factual opinions, and the prejudgment of factually and legally similar disputes. Indeed, such an application is unlikely given the presumption that "a general opinion . . . concerning an issue which also arises in the arbitration" is acceptable if "not focused on the case that is being arbitrated."[238] Although these provisions focus on disclosure, not disqualification, to the degree that they influence the evaluation of issue conflict allegations, amending the IBA Guidelines is advisable.

The involvement of domestic courts in international arbitration will likely assist in the regulation of issue conflicts. Arbitral tribunals naturally provide a difficult forum for assessing issue conflicts because such regulation often requires the party alleging the conflict to persuade the third, neutral member of the tribunal. Similarly, arbitral institutions, reluctant to offend the world's leading arbitrators, have a reduced incentive to extend the application of impartiality standards. However, as was demonstrated by the District Court of The Hague, domestic courts can ensure impartiality.[239] Both the arbitral tribunal and the appointing authority selected by the Permanent Court of Arbitration rejected Ghana's challenge to Professor Gaillard's presence on the tribunal before it was accepted by the Dutch court.[240] The potential for as many as three *fora* to examine a challenge to an arbitrator on the basis of an issue conflict will encourage the regulation of issue conflicts.[241]

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236. NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING ON IMPROVING FLEXIBILITY AND MEMBER CONTROL IN WTO DISPUTE SETTLEMENT, 3, TN/DS/W/52 (14 MARCH 2003). *See also* NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING, 5, TN/DS/W/82 (24 OCTOBER 2005).

237. IBA Guidelines, *supra* note 8, at 3.5.2.

238. *Id.* at 4.1.1.

239. *See supra* Part II.D.2.a.

240. *Id.*

241. Of course, the potential for three *fora* to challenge arbitrators is an arguably inefficient system for ensuring impartiality.

Investment treaty arbitrations pose unique concerns. Such arbitrations "often involve the interpretation of BITs containing similar, if not identical, provisions and therefore similar legal issues" and "the application of an evolving body of international law."[242] As a result, some recent commentators have advocated the concurrency rule for such arbitrations.[243] For example, ICJ Judge Buergenthal commented that lawyers should not simultaneously serve as arbitrators and counsel "in order to ensure that an arbitrator will not be tempted, consciously or unconsciously, to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel."[244]

Although a concurrency rule for investment treaty arbitrations would be under-inclusive,[245] given the small scope of disputed legal issues, it appears that it may not be too over-inclusive. The proximity of the similar legal issues, the depth of commitment required for advocacy, and the simultaneity of the timing, all suggest that the appearance of bias is inescapable. Employing a concurrency rule for investment arbitrations would be a considerable change for international arbitration. Because a would-be arbitrator cannot guarantee her appointment to a dispute, even some individuals that are frequently selected as arbitrators continue private practice. Under a concurrency rule, practitioners seeking to arbitrate investment treaty disputes would be forced to retire from advocacy or practice outside of their expertise.

In conjunction with a concurrency rule, the increased regulation of issue conflicts may result in international investment tribunals comprised of arbitrators who lack current specialized expertise in international investment law. Not only would practitioners have difficulty being appointed, but academics specializing in international investment law would also be subjected to closer scrutiny.

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242. *See* Levine, *supra* note 18, at 62.

243. *See, e.g.*, Howard Mann et al., *Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration,"* § 4.6, (Dec. 2004), *available at* http://www.iisd.org/pdf/2004/investment_icsid _response.pdf (advocating a concurrency rule and a roster of arbitrators, similar to the roster used for WTO panelists); Fiona Marshall & Howard Mann, *Revision of the UNCITRAL Arbitration Rules, Good Governance and the Rule of Law, Express Rules for Investor-State Arbitrations Required* (Sept. 2006), *available at* http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf.

244. Buergenthal, *supra* note 5, at 498. Before his appointment to the ICJ, Judge Buergenthal served as an arbitrator under the ICSID Arbitration Rules. *See also* Peterson, *ICSID Tribunals Diverge over Independence of Arbitrator to Hear Argentine Claims*, *supra* note 156; Peterson, *Challenge to Arbitrator Schwebel rejected by Belgian Court, Poland seeks appeal*, INVEST-SD: INV. L. & POL'Y WEEKLY NEWS BULL., Jan. 17, 2007, *available at* http://www.iisd.org/pdf/2007/itn_jan17_2007.pdf (noting that Poland objected to Judge Stephen M. Schwebel's continuing role as arbitrator in the Eureko arbitration because he subsequently relied on the arbitration's partial award as an advocate in a different ongoing investment treaty arbitration).

245. *See supra* Part III.B.2.

VI.
CONCLUSION

Sometimes a judge "knows" too much: her opinion, regardless of its intellectual value, warrants her disqualification. Accordingly, this Article has assessed impartiality standards of the main international courts and tribunals and discussed the appropriate and inappropriate factors for considering issue conflicts arising from adjudicator's prior activities or expressed opinions. International courts and tribunals seem to prefer simple, bright-line rules, such as the concurrency rule or a rule exonerating prior advocacy and diplomacy, but these cannot ensure impartiality. Moreover, features that shape international courts and tribunals, such as qualification requirements, *ad hoc* adjudicators, and provisions regulating outside activities, should not be used to excuse an adjudicator's apparent partiality. Instead, the analysis of issue conflicts, both for bias and the appearance of bias, should focus on three factors: the proximity of the commitment, the depth of the involvement, and the timing of the opinion. In addition to improved standards, analyses of issue conflicts that consider these factors will be more persuasive, provide guidance to parties and adjudicators, and enhance impartiality in international adjudication. The hortatory language that it is an "elementary requirement" that international adjudicators "should come to the case with an open mind" will be enforced.[246]

246. SINGH, *supra* note 3, at 191.