

ISSUE CONFLICTS: A NET CAST TOO THIN?

*Francisco González de Cossío**

ABSTRACT: The possibility that arbitrators entrusted with solving investment disputes have so-called ‘issue-conflicts’ has mustered angry criticism, contentious debate, award-annulments, and fledgling prohibitions. The discussion and state of thought appears to neglect consequences stemming from adopting general prohibitions which are not justified in many cases. This essay calls for calm, sober, analysis which frames the matter objectively and ensures that the measures adopted are not overly- and unnecessarily-prohibitive: a net cast too thin.

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The possibility that an arbitrator be less than impartial because of her exposure to the subject-matter (for instance because of academic endeavors, prior professional activity, or acting concurrently as counsel and arbitrator) has been a source of constant inveighing by investment-arbitration apostates—sometimes even acolytes. In this essay I wish to explore critically the current status of thought on the matter.

* Arbitrator, advocate and professor of arbitration, Mexico (www.gdca.com.mx). Views welcome at fgcossio@gdca.com.mx.

The idea I wish to advance is as follows: the reality of materialization of the concern voiced is overblown. This does not mean that it completely lacks merit but rather that its exceptional nature does not warrant overhaul. Rather, the regime extant on the standard of assessment when faced with an impartiality-concern is wise and sufficiently supple to adroitly address and solve the matter. No additional steps are needed. And some steps that have mushroomed are counterproductive (such as blanket prohibitions).

I. LACK OF IMPARTIALITY BY ANOTHER NAME

'Issue conflict' is the (loose) term of art the arbitration community calls a situation where a relationship between an arbitrator and the subject-matter in dispute provokes a reasonable question as to whether the arbitrator no longer has an open mind. Whether she is (consciously or unconsciously) biased. Originally, the concern was raised in sports and investor-state arbitration. It has now permeated: cases exist where arbitrators have raised questions in commercial arbitration settings.

That a conflict may exist between an arbitrator and a subject-matter is an imprecise expression of the concern, however. Correctly framed, the concern is one of *impartiality*: whether the arbitrator in question lacks the *liberté d'esprit* expected from any adjudicator is the real—and appositely framed—concern. The reasons for this yearn for impartiality differ, however. And whilst different causes of alleged lack of intellectual open mind may be pointed to, two stand out: academic positions and double-hatting. Each deserves separate comment.

A. ACADEMIC WRITING

Let us begin by an apparently innocuous situation: academic writing. It is traditionally accepted that academic endeavors do not trigger reasonable concerns for impartiality. In fact, if anything, they make the arbitrator *more*, not *less*, ideal to sit in a specific case: *she is an expert!* And experts are to be preferred *caeteris paribus* inasmuch as the chances are increased that they will get the answer right to the puzzle they will be faced with.

Recently, however, several challenges have been grounded on academic positions. Except for one case, by and large, all said challenges have been rejected. The maverick case deserves commentary: in *CC/Devas*¹ an arbitrator was successfully challenged for his academic views. The fact-pattern however makes this case unique—of the sort more characterizable as an anomaly rather than representative of a trend.

The matter involved a large telecommunications case stemming from the India-Mauritius bilateral investment treaty. The appointing authority was the President of the International Court of Justice, Judge Peter Tomka. The challenge was lodged against two

¹ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v. Republic of India*, UNCITRAL, Decision on the Respondent's Challenge to the Hon. Mark Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013.

arbitrators for similar grounds: both had shared tribunals in former investment cases where an issue surfaced which was foreseeable to arise in the present arbitration (“essential security interests”). All three cases in which the two challenged arbitrators sat were (partially or totally) annulled. A difference existed, however: one of the challenged arbitrators had written an article defending the views adopted in the annulled awards. The challenge was rejected as regards the former arbitrator but upheld for the latter. It is worth taking the magnifying glass to the decision, for both premise and conclusion are pregnant with lessons.

Judge Tomka’s rationale begins by framing the issue thus:

the basis for . . . [the] challenge . . . “issue conflict” is a narrow one as it does not involve a typical situation of bias directly for or against one of the parties. The conflict is based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own view.

Having set the stage, Judge Tomka made the following statement of principle:

... a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. . . . to sustain any challenge brought on such a basis requires more than simply having expressed any prior view . . .

With said lodestar in mind, Judge Tomka proceeded to analyze the fact-pattern at hand. Upon doing so, he concluded that:

I must find, on the basis of the prior view and other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.²

The finding is explained as follows:³

... being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to [the arbitrator’s] ability to approach the question with an open mind. The later article in particular suggests that, despite having reviewed the analyses of three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept? [the arbitrator] is certainly entitled to his views, including to his academic freedom. But equally the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind. Here, the right of the latter has to prevail.

Both the conclusion and the premise are noteworthy. This case was not a naked situation of an intellectual having strongly held academic views. The arbitrator had issued four prior awards where the issue had come up and solved in a certain manner; the said manner had been found wanting in three annulments decisions; and the arbitrator penned an article vigorously defending the said position. Taken together, all of the said

² Id., ¶58.

³ Id. ¶64.

circumstances led the trier of fact (Judge Tomka) to the conclusion that a reasonable bystander could hold justifiable doubts as to the *liberté d'esprit* of the arbitrator on the matter.

The holding of the case is that, as a rule, past experiences and academic writings *per se* do not disqualify a potential arbitrator. More has to exist; such, as to convince a reasonable observer that the questioned arbitrator lacks an open mind.

Understood thus, the holding is apposite.

B. DOUBLE-HATTING

A second scenario advanced as putting into question an arbitrator's freedom of thought is that of practitioners acting both as arbitrators and counsel in investment disputes. The expression of the complaint varies—and ranges from cool-headed to temperamental, sometimes even visceral—but finds as common denominator the concern that 'something' is wrong in allowing advocates to also act as adjudicators. Cases on point are all over the spectrum.

The discussion need start with *Telekom Malaysia v. Ghana*⁴ where an arbitrator was challenged for playing two roles which were alleged to be incompatible: acting as arbitrator and counsel in different cases where the same subject matter was to be discussed. Challenge was brought before the Hague District Court. The Court agreed and decided that the challenge would be allowed if the arbitrator did not resign to one of the cases. The court reasoned that:

... in the capacity of attorney [the arbitrator] will regard it as his duty to put forward all possibly conceivable objections against the RFCC/ Moroccan award [subject to annulment proceedings]. This attitude is incompatible with the attitude [the arbitrator] has to adopt as an arbitrator in the present case, i.e., to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Moroccan award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid the appearance of not being able to keep these two parts strictly separated.

A second challenge was lodged after the arbitrator resigned from the representation and remained acting as arbitrator. It was argued that the past service compromised his impartiality. The challenge was rejected.

The rule stemming from *Telekom Malaysia* is that, while *past* representation was innocuous, *concurrent* representation whilst acting as arbitrator and counsel could prove

⁴ *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, civil law section, provisional measures judge, Challenge No. 13/2004, Petition No. HA/RK 2004.667 (Oct. 18, 2004), reprinted at ASA Bulletin 186, 192 (2005).

problematic. A similar rationale was observed in *Vito Gallo v. Canada* where ICSID's Deputy Secretary General, Mr. Nassib G. Ziadé, instructed an arbitrator to choose between representing a party in a case and acting as arbitrator in another, reasoning that:⁵

By serving on a tribunal in a NAFTA arbitration involving a NAFTA State Party, while simultaneously acting as an advisor to another NAFTA State Party which has a legal right to participate in the proceedings, *an arbitrator inevitably risks creating justifiable doubts as to his impartiality and independence.*

(emphasis added)

In *Blue Bank v. Venezuela*⁶ challenge was brought against an arbitrator given that the international firm he formed part of represented another party against the same defendant. The challenge was upheld. The rationale evinced was that “a degree of connection or overall coordination between the different firms comprising the international firm” existed. As a result, there was a ‘high probability’ that the issues likely to be discussed in both cases would be the same. As a result, “a third party would find an evident or obvious appearance of lack of impartiality”.⁷

The view however is not universally held. In *Raiffeisen Bank v Croatia*⁸ for instance it was stated that “the mere exposure of an arbitrator to the same legal issue in multiple arbitrations is insufficient to disqualify that arbitrator”.⁹ In *Gobain v Venezuela*,¹⁰ albeit the challenge was rejected, it was conceded that concurrent services as advocate and arbitrator could:¹¹

potentially raise doubts as to the impartiality and independence of the concerned individual in his role as arbitrator. It seems possible that the arbitrator in such a case could take a certain position on a certain issue, having in mind that if he took a different position as arbitrator, he could undermine his credibility as counsel as which he is arguing on the same, or very similar, issue.

Recently, the *Eiser v Spain*¹² Annulment Committee set aside an award. Upon performing an “objective assessment of things, assessed by a fair minded and informed third party observer”,¹³ the Committee found that the undisclosed links between an

⁵ *Vito Gallo v. Canada*, UNCITRAL, Challenge Decision, 14 October 2009, ¶31.

⁶ *Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Challenge of 12 November 2013, ¶¶67-69.

⁷ Id. ¶69.

⁸ *Raiffeisen Bank international AG and Raiffeisenbank Austria D.D. v Republic of Croatia*, ICSID Case No. ARB/17/34, decision on the Proposal to Disqualify Stanimir Alexandrov of 17 May 2018, ¶91.

⁹ Id. ¶91.

¹⁰ *St. Gobain Performance Plastics v. Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention of 27 February 2013.

¹¹ Id. ¶¶ 77, 80-81.

¹² *Eiser Infrastructure Limited and Energía Solar Luxembourg S.À R.L. v Kingdom of Spain*, ICSID Case No. ARB/13/36, award of 11 June 2020.

¹³ Id. ¶219.

arbitrator and the expert firm were such as to “not be perceived as independent and impartial by a third party observer”.¹⁴ In the Annulment Committee’s view, the circumstances at hand create a “manifest appearance of bias”.¹⁵ In holding thus, the Committee issued the following *obiter*:

Arbitrators should either not sit in cases or be prepared to be challenged and/or disqualified where, on an objective assessment of things, assessed by a fair minded and informed third party observer, they may not be perceived as independent and impartial. The role of a third party observer, when these matters are challenged, in annulment proceedings, is performed by annulment committees. It matters not that [the arbitrator] may not even have been conscious of the insidious effects of this association. What matters is that an independent observer, on an objective assessment of all the facts, would conclude that there was a manifest appearance of bias on the part of [the arbitrator].

What is remarkable about this case is that the links involved not the parties, nor counsel, nor subject-matter, but the expert witness. Said view is expansive, likely to provoke debate, and change existing disclosure practices.

C. INCHOATE CONCLUSIONS

I propose that the conclusions to draw from the above-summarized cases are that:

- (1) **Academic writing** as such does not put an arbitrator into question. Arbitrators need have an *open*, not an *empty*, mind. Absent unusual circumstances, contributing to the knowledge of a field is not problematic.
- (2) **Past activity**: Past publications, advocacy and arbitrator assignments (including decisions: award-issuance) do not *per se* put an arbitrator’s impartiality into question.
- (3) **Double-hatting** is controversial. The weight of authority however can be distilled as follows: (i) naked double-hatting does not, in and of itself, put impartiality into question, (ii) the same issues need be at issue, or foreseeably at issue; and (iii) concurrency and proximity are crucial a factor.

¹⁴ Idem.

¹⁵ Id. ¶220.

II. COMPLAINTS AND RESPONSES

Issue conflict has triggered complaints and responses. I shall briefly mention the former and delve into the latter.

A. COMPLAINTS

Complaints galore have been echoed. Judith Levine does a good job assembling them, thus:¹⁶

- (1) Investor-state arbitration cases involve the interpretation of investment treaties containing similar provisions and therefore a reduced number of legal issues;
- (2) Investment arbitration is subject to enhanced transparency, notably with the publication of its awards;
- (3) The pool of international arbitrators with experience deciding investment disputes is limited;
- (4) Arbitrators perform more of a ‘law-making’ role and the awards have a tendency to serve as precedent;
- (5) Matters of public interest are often at stake; and
- (6) Investment arbitrations deal with small number of legal issues.

B. RESPONSES

The concerns have provoked the several responses. I shall comment them.

1. IBA Guidelines

The *Guidelines on Conflict of Interest in International Arbitration of the International Bar Association* of 23 October 2014 (“*IBA Guidelines*”) include three guidelines which bear on our topic:

- (1) The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, or otherwise (Article 3.5.2).
- (2) The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties (Article 3.1.5).

¹⁶ Judith Levine, *Dealing with Arbitrator “Issue Conflicts” in International Arbitration*, 61 *Disp Resol J*, 60, 65 (2006). Dr Hamish Lal, Brendan Casey and Léa Defranchi also articulate them in *Rethinking Issue Conflicts in International Commercial Arbitration*, *Dispute Resolution International*, Vol. 14 No. 1 May 2020, pp. 11 *et seq.*

- (3) The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case) (Article 4.1.1).

In addition to the above, the IBA Guidelines expressly address double-hatting as a situation which “depending on the circumstances, may need to be disclosed by an arbitrator”. It states:¹⁷

“When an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised”

What is telling from the above is that, whilst the first two are in the “orange” category, item (3) is in the “green” category. The green listing involves situations where no appearance and no actual conflict of interest exists from an objective point of view. In these cases, the arbitrator does not even need to disclose the said facts. The orange pigeonhole refers to situations which, depending on the facts, may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence. In said cases, the:¹⁸

arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to justifiable doubts

So, further to the IBA Guidelines, double-hatting is not repudiated across the board. But it is not aseptically accepted either. It is a situation which may or may not be frowned upon depending on the rest of the circumstances.

Whether the said regime reflects the mores, understanding and preferences of the arbitral community is open to discussion. Sophie Nappert and Angelina Petti report that within the members of the IBA Subcommittee which drafted the IBA Guidelines no unanimity of views existed: whilst some preferred a strict approach which included issue conflicts in the Orange List or in the non-waivable Red List, others attached less importance to the matter and likened the situation to that of judges acting under domestic procedures, which therefore did not raise concern.¹⁹

I would propose that focusing on the tree may lose sight of the forest: the purposes of the IBA Guidelines are to *orient* not *regulate*. And the overarching goal on the endeavor is ensuring that arbitrators are and remain impartial and independent.²⁰ Hence the nitty gritty may be done without in favor of an analysis of discernment—as the IBA Guidelines currently do.

¹⁷ IBA Guidelines, paragraph 6, Part II.

¹⁸ IBA Guidelines, paragraph 6, Part II.

¹⁹ Nathalie Voser and Angelina M Petti, *The Revised IBA Guidelines on Conflicts of Interest in International Arbitration*, 33 ASA Bull 31 (Kluwer 2015).

²⁰ General Principle (Article 1 of the IBA Guidelines).

2. ICCA-ASIL taskforce

On October 2013 the (then) President of the International Council for Commercial Arbitration (ICCA), Jan Paulsson, and (then) President of the American Society of International Law (ASIL), Donald Donovan, created a task force which mission was to:

evaluate and report on issue conflicts in investor-state arbitration and make recommendations on best practices going forward

The task force issued its report on March 2016.²¹ It is the most thorough compilation and analysis on the matter. After careful, comprehensive and balanced analysis of cases extant, issues presented, and competing considerations, the ICCA-ASIL Task force did three things I wish highlight, summarize and stress given the purposes of this paper:

(a) *Framing of the issue*

In the view of the ICCA-ASIL Task Force, the question on issue-conflicts boils down to distinguishing from (what they appositely call) ‘unobjectionable predisposition’ and that triggering reasonable concerns about the lack of open mind and bias.²² This, I propose, should be the proper, balanced, and objective framing of the issue. Observable criticisms fail to do so and as a result present the topic in a matter which analytically puts their thumbs on the scale in favor of repudiation and regulation—or, more specifically, in favor of prohibition. They should be done without. The ICCA-ASIL approximation is a much more salutary way to understand and tackle the subject.

(b) *Warnings going forward*

The ICCA-ASIL Task Force identified problems which would ensue should superficial positions and criticisms be accepted, namely:

- (a) A bright-line rule is both unnecessary and counterproductive. This is the type of situation where a hard-and-fast rules on disclosures, endorsements, preclusions and the like (I would add: ‘prohibitions’) are inapposite as situations are highly fact-specific and dependent.²³
- (b) Provoking a chilling effect on scholarship and informed commentary which are integral to academic freedom and the development of arbitration generally; and
- (c) Be superficial. The contours of what is inappropriate prejudgment are elusive in important respects.

²¹ INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *Report Of The Asil-ICCA Joint Task Force On Issue Conflicts In Investor-State Arbitration*, The ICCA Reports No. 3, 17 March 2016.

²² *Rethinking Issue Conflicts in International Commercial Arbitration*, *ob. cit.*, p. 17.

²³ *Id.* ¶183.

Given the above considerations, the ICCA-ASIL Task Force welcomes reasoned decisions on challenges so as to provide insight and guidance.

I wish to echo and second these considerations. The times we are living call for calm, sober and educated analysis of the problems we face, not the superficial, vitriolic and emotional pleas *en vogue*.

(c) *Proposed test*

The ICCA-ASIL Task Force advances a solution: a three-part test to follow as part of the assessment whether the fact-pattern at hand is such as to merit calling into question the impartiality (or appearance thereof) of a putative arbitrator:

- (1) **Degree of commitment:** the character or depth of the arbitrators' commitment to their prior views and their inner conviction need be analyzed to decide whether they could be immune to contrary arguments and evidence.
- (2) **Concurrency, propinquity:** contrary to *prior* professional advocacy, *concurrent* service as an arbitrator and counsel in matters involving the same party or that are otherwise related in some way creates unacceptable risks of bias. Timing is a factor that need be taken into consideration. However, there may be cases where no amount of time will change the adjudicator's opinion. And the passage of time can restore the arbitrator's ability to be impartial.
- (3) **Specificity/proximity to the current case:** the closer the arbitrator's comments or experience come to the specific case at hand, the greater the risk of bias.

3. Prohibitions in new generation investment treaties

International diplomacy has given way to a new generation of investment treaties which take a negative predisposition with respect to our topic. For instance, the Comprehensive Economic and Trade Agreement (“CETA”) indicates that potential arbitrators need disclose “public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same matters.”²⁴ The EU's proposal for the investment chapter of the Transatlantic Trade and Investment Partnership (“TTIP”) contemplates a standing “Tribunal of First Instance” composed of a closed list of individuals designated by the President of the Tribunal to serve on a rotating basis.²⁵ The investment chapter of CETA and that of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (“EU-Vietnam FTA”) establish

²⁴ CETA, Annex 29-B.

²⁵ EU Commission Draft Text, Transatlantic Trade and Investment Partnership (TTIP), Ch. II – Investment, Section 3, Article 9.

a standing tribunal composed of a closed-list of arbitrators, and a permanent appellate tribunal to hear investment claims.²⁶ And upon appointment, tribunal members:²⁷

shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.

Under the TTIP the prohibition is worded thus:²⁸

upon appointment [Judges or Members of tribunals] shall refrain from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.

Tellingly, the title of the article couching the ban in CETA and TTIP is entitled “Ethics”.

More recently, the *Agreement Between The United States Of America, The United Mexican States, And Canada (“USMCA”)* addressed the matter in its investment protection chapter. Paragraph 5(c) of Article 14.D.6 (selection of arbitrators) of Chapter 14 (Investment) provides that:

Arbitrators appointed to a tribunal for claims submitted under Article 14.D.3.1 shall: ... not, for the duration of the proceedings, act as counsel or as party-appointed expert or witness in any pending arbitration under the annexes to this Chapter.

Annex 14-E involves investment dispute resolution between Mexico and the US involving covered government agreements.

4. The ISDS Code of conduct

Calls existed on issuing codes of conduct.²⁹ Katia Fach Gómez dedicated a thorough and thoughtful tome on the matter, concluding that the time had come for a code of conduct.³⁰ In her words “this book makes a case throughout its pages for the elaboration of a new code of conduct for present and future investment adjudicators, considering that this initiative is necessary and would be beneficial in the international investment setting”.³¹ Recently, said calls have mustered response. For instance, section 3(d) of the *Code Of Conduct For Investor-State Dispute Settlement* under Chapter 9 Section B (Investor-

²⁶ CETA Article 8.27 and 8.28.

²⁷ CETA Article 8.30 (Ethics).

²⁸ TTIP Article 11.1 (Ethics).

²⁹ For instance, Nassib G. Ziadé, *How Should Arbitral Institutions Address Issues of Conflicts of Interest?*, in *Festschrift Ahmed Sadek El-Kosheri*, Wolters Kluwer, Kluwer Law International, The Netherlands, 2015, p. 211.

³⁰ Katia Fach Gómez, *Key Duties of International Investment Arbitrators. A Transnational Study of Legal and Ethical Dilemmas*, Springer Nature Switzerland, 2019.

³¹ *Id.* p. 203.

State Dispute Settlement) of The Comprehensive and Progressive Agreement for Trans-Pacific Partnership provides that:

Upon selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or any other international agreement.

On May 2020 a draft *Code of Conduct for Adjudicators In Investor-State Dispute Settlement* (“ISDS Code”) was made public. It is the current status of years of work by UNCITRAL Working Group III. Draft Article 6 addresses our topic as follows:

Limit on Multiple Roles

Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/or] [the same treaty].

The commentary to said draft provision explains that the text stems from the concern that ISDS adjudicators acting in different roles may lack sufficient independence and impartiality precisely because of the multiple roles played.³² Hence the Code’s tackling of the matter. Upon doing so, however, questions surfaced. Namely: Should a ban be imposed? Should disclosure obligations be imposed?

Whilst a ban was considered easier to implement,³³ it could have the unfortunate effect of excluding a larger number of persons than necessary to avoid conflicts of interests. This would hamper the freedom of choice of adjudicators by both States and investors. It would also make entry by newcomers more difficult. It makes the (apposite) remark that:³⁴

many arbitrators receive only one ISDS case in their career and requiring them to abandon their other sources of income to accept a case would be a barrier to entry. This may be especially relevant for younger arbitrators (new entrants) and arbitrators who bring gender and regional diversity.

This concern is coupled by other challenges and unintended, regrettable, consequences. For instance:

- (1) **Matters of definition:** identification of the precise roles giving place to repudiation would need to be carefully analyzed as some adjudicators involved in ISDS proceedings also act as experts. Would it include mediators and conciliators? What about ICJ members possible sitting with counsel as arbitrators?

³² ISDS Code ¶65.

³³ ISDS Code ¶67.

³⁴ ISDS Code ¶68.

- (2) **Scope:** should the prohibition or regulation be applied to same issues, parties or facts? A combination? Should it include all international disputes or only investment cases?
- (3) **Option Erosion:** The prohibition would result in a significant number of highly expert persons already nominated to ICSID not being appointed.³⁵
- (4) **Temporal limits:** Should temporal limitations be considered? Perhaps double-hatting could be confined to simultaneous role-duplicity and within a certain time. A ‘phased approach’ was considered but also found wanting.³⁶
- (5) **Permanent bodies:** What about standing bodies or mechanisms? Now that some treaties start providing for them, will they allow sitting in other cases? If the answer be negative, should the compensation reflect the fact that no other work can be taken?

C. TAKING STOCK FROM THE RESPONSES

As one thinks about the dilemmas cited at the end of the preceding section, a thought inevitable comes to mind: the regime extant is praiseworthy in as much as these dilemmas are done without. This thought hardens as one thinks of the merits of the diverse responses extant. Of these, the ICCA-ASIL Task Force approach is in my opinion the most thorough, balanced and apposite solution to the puzzle thus far existing. The proposed test effectuates an exercise of discernment. Such type of tests are to be preferred when the matter is not prone to hard and fast rules. Given that experience demonstrates that dual-hatting may be frowned upon *only when other narrow circumstances are present*, and they often are not, facile, quick and easy, solutions should give way to tests where triers of fact can assess the entire set of circumstances and reach an intelligent conclusion. This is precisely the case of so-called ‘issue-conflicts’.

III. COMMENTARY

The more clear-headed thought is devoted to the matter the more the conclusion becomes apodictic: double-hatting *may* pose a problem, but it does not always do so. In fact, it is rather exceptional: of the corpus of cases, parties, arbitrators, counsel and subject-matter involved, only a handful of fact-patterns trigger a legitimate concern.

Why is it then that the practice musters so much uproar?

I avow I do not have a definitive answer. I suspect however that it may stem from the fact that folks sometimes use criticism to nurse their wounds—to feed their feelings—instead of making constructive suggestions to improve something. This is

³⁵ ISDS Code ¶69.

³⁶ Further to which adjudicator overlap may be tolerated at the beginning of a career only. However, for some this still created conflict of interest.

unfortunate: criticism is necessary; criticism is valuable. Criticism is what makes all of us part of something larger, capitalizing our individual intelligence and experiences. It is a way to make our world a better place. However, when visceral in lieu of rational, criticism fuels problems instead of correcting them.

As to our topic, I would advance three considerations to bear in mind when assessing the matter, and which I believe need be factored into whatever solution we opt for, on pain of arriving at backward solutions—of the type leading to consequences which will force us to revisit the matter again for having not devised a solution that considers all aspects of the matter.

A. PROBLEMS AND INTERNATIONAL LAW

I wish we lived in Utopia. I wish we inhabited a world where international law was given its proper place. A place where business-people were not dodgy and public officials not arbitrary. That world however is not the one we live in. In our world, problems abound, advantages are sought, power abused, perverse incentives brim, corruption persists, interest groups influence, ignorance is tapped-into to achieve nefarious outcomes. But in such a world, decency also exists: honest business-persons wishing to compete by creating and delivering value coexist with idealistic service-oriented officials desirous of making their society a better place.

Naturally, problems arise. Somebody needs to solve them. The task *may* be entrusted to a fixed organism—no quarrel on principle exists about this. But experience teaches—especially current events—that the desire to devote *less* rather than *more* resources to the international polity is the visible paradigm: political will to collaborate internationally has diminished. And other more pressing problems need be prioritized.³⁷ Unfortunately, this occurs precisely when we need it most. This is a serious problem. And one which promises to *exacerbate*, rather than *recede*, in the near future: as the world becomes more and more integrated owing to technology, the simple yet often overlooked fact is that the problems we face need be tackled together. Through collective action. In a phrase: we will need global solutions to global problems. This calls for international adjudication.

B. INTERNATIONAL ADJUDICATION

The world described in the prior section needs more, not less, adjudication.

Conflict theory teaches that problems are not inherently reproachable. Of essence, problems (disputes) are collisions of interests. And divergence of interests exists always. It is by conflict resolution that said clash is channeled intelligently and solved in

³⁷ This point merits consideration. In our scarcity-ridden world, *ad hoc* solutions are optimal in that they avoid unnecessarily distracting resources urgently needed on other endeavors, as well as swelling international bureaucracy. Permitting *ad hoc* solutions allows tapping into private resources to solve public problems.

a principled manner. Thus understood, if anything, conflict-resolution should be celebrated, not repudiated: absent the same, what determines outcomes is the law of the jungle.

The above paradigm has however not seeped through the fabric of international relations. History of international law teaches that the *politik* does not wish to take mandatory dispute resolution seriously. The reason in a nutshell appears to be that mandatory dispute resolution curtails power—something no ordinary power-seeker (by definition, the profile of those wielding power) is not prone to accepting. And whilst the last four decades displayed a *belle époque* of adroit use international adjudication—a gilded age of international law where international law was given a more pronounced role in solving international dilemmas, said zeitgeist is dwindling: it is becoming accepted to question international adjudication in a manner displaying diminished faith in the benefits of abiding by international law.

International adjudication need be taken more seriously. Absent an effective dispute resolution mechanism, words are not worth the paper they are printed in. Without them, **progress-enhancing outcomes are dissuaded**. And given that international mandatory adjudication is a long distance from becoming a reality, *ad hoc* solutions are the (second-best but desirable, and often optimal) way to substitute for lack of idealism. Our lack of institutionalism. This is where investment arbitration fits in.

C. ADJUDICATION THROUGH INVESTMENT AGREEMENTS, TREATIES AND ARBITRATION

Investment contracts, investment treaties and investment arbitration are *ad hoc* solutions that seek to attain what we need in order to procure progress, bridging the gap between the lack of political will to strive for what said outcome needs: mandatory international adjudication.

The political process needs neutral and specialized dispute resolution. Problems hailing from political process are often addressed politically. But for such workings to continue, political actors need dialogue and negotiate on the shadow of the law. And if said efforts fail, leaders are aided in knowing that they can channel their differences to a sphere outside the political process. A place where neutral specialists will solve the matter in a principled manner—by applying international law. This is the value that investment treaties, investment agreements and investment arbitration provide: neutral, specialized, principled-based problem solving.

Having clarified that (i) *conflicts of interest* always occur, which leads to *disputes* (as the materialization of conflicting interests); (ii) dispute resolution is not only not reproachable but inherently plausible as it solves the clashes of interests in a principled manner; but (iii) the current status of the matter is diminished desire to adhere to a mandatory international system with adjudicative powers, the result is a no-man's land; *a terra nullius* which invites **rudimentary problem-solving**: something akin to the medieval thought that, when faced with a problem, parties should battle and God will grant victory

to the party whose case is more fair. This outcome is inherently incoherent (contradictory in fact) with the (increasingly complex) world we are living in—which needs certainty and predictability.

As the world becomes more and more complex, problems needlessly become more complex. Those solving them need specialized knowledge: the field is necessarily specialized. And specialization needs specialists. Absent specialized knowledge, less than desirable decisions ensue. And erroneous decisions are costly, privately and socially.

Specialization implies a reduced field of persons. By definition, the narrower a discipline is, the less specialists there are. If artificial barriers are created, less people are available to act. The pool of intellectual capital becomes ever more circumscribed; and options available to participants reduced.

Adopting barriers (such as double-hatting prohibitions) *may* be necessary. But we need to ensure that it is *in fact* necessary. Not overly burdensome. Should a problem be generalized, the appropriate solution may be a general prohibition. But should a problem not be generalized, prohibiting something may over-prohibitive. Deleterious. Given that (as shown in §II, *supra*) situations where problems ensue are exceptional and subject to several variables which may or may not be present, they may be adequately addressed by a *standard*. By discernment performed by persons with their finger on the pulse of the mores and sensitivities of the international community. As regards ‘issue-conflicts’, such outcome is achieved by the regime at hand—which allows for a challenge when the circumstances raise justifiable doubts as to the impartiality and independence of arbitrators. **A blanket ban is therefore overly-prohibitive.** A blunt and inexact measure to address the matter. A net cast too thin.

Three ancillary insights come to mind.

1. From natural to inappropriate predispositions

When do predispositions naturally held by specialized professionals surpass a certain threshold and become inappropriate predispositions calling into question the duty to have an open mind—part of the duty of impartiality—is a subject which need concern us, but not distract us. Much less force our hands into adopting overly cumbersome solutions. It is one more of the many situations which the (varied and dynamic) reality displays and which are appositely addressed by the system extant: challenges upheld or denied by the *in casu* determination by specialized and well-meaning individuals taking cognizance of the same. Said solution is the adequate mean between the extremes: laxity and prohibition. Initiatives taking the opposite view should not be adopted on pain of triggering both unintended and undesired consequences.

2. Mischief tolerated in the name of the game

Impartiality is key; nobody disputes this. However, many pay lip service to the principle only to forget it when it is *their* interest at stake. When it is *they* who stand to gain or lose

from a case, their focus is finding and designating an arbitrator who will increase the most the likelihood of *their* success—sometimes to the point of callowness: experience teaches that some take the matter to extremes. And given that the focus of the regime is on *proven links* which may not exist (bias does not always shed them), some inappropriately predisposed arbitrators fall through the cracks of the regime, provoking mischief. This in my opinion is the real factor that puts into question the legitimacy of investment arbitration—not many of the superficial excuses that some wrath-consumed losing parties craft. And said factor is not only not in the radar of improvements to instill in the system, but is part of the ‘rules of the game’ that some play and then inveigh when it suits their purpose.

We really must do better.

3. Bias as the (correct) focus

If we are *really* concerned with impartiality and legitimacy, we should be thinking of bias which we all know exists but goes unaddressed given the current state of play.

At the core of the (non-diatribic) criticism of ISDS is a complaint about impartiality (more precisely: lack thereof) by the users of ISDS. The complaint may however be hypocritical. Many actors in the investment arbitration field consciously and actively select their arbitrators not because they are specialized, neutral, intellectuals or specialists, but because they are biased in their favor. And said decision is premised by a compound phenomenon of past-experience, path dependence and ‘astute’ decision-making. This makes the decision of the selection of the chair particularly sensitive—as experience to tackle certain chairs shows.

Industrial Organization has an insight worth tapping into to address this concern—particularly since what the current efforts to change are doing is precisely this: reorganizing an industry: Harvard’s *S-C-P model* (Structure-Conduct-Performance paradigm) explains that the *Performance* of an industry is dictated by *Conduct*, which in turn is dictated by *Structure*. Market participants will adapt to the *structure* of the terrain they face taking it as a given, developing *conduct* which allows them not only to survive, but to thrive. And the said conduct will not only explain, but dictate, the outcome: the overall *performance* of the market. The corollary: if we are worried about the *performance* of an industry, we should focus on its terrain (its *structure*)—as participants will adapt to it and *behave* accordingly.

Taking this notion to our topic: adjudicators, as creatures of *an* industry, adapt to the industry. Not doing so would mean displacement by more adapted actors—Darwin at its best. So, if the architects of said landscape create a certain incentive, the eventual *performance* of the entire industry will be dictated by it.

I query: what are the incentives of the terrain extant? If, hypothetically, treaty-drafters craft a certain landscape and then dispute participants choose the arbitrators by

preferring those who will give them the highest possibility of winning, what incentives are being communicated? And what is the outcome provoked by said incentives?

Impartiality is not only a *deontological* duty, but an *ontological* one: absent the same, the core benefits of the ISDS (as a type of the adjudication *genus*) idea are not reached, and frustration ensues. This, I sense, could be at the heart of the current criticisms (it would explain how viscerally, even aggressively, they are articulated).

Bearing this in mind, I would posit that, if we are *really* concerned with impartiality and legitimacy, we should be thinking of bias instilled in the system through its current workings. Bias which we all know exists but goes unaddressed given the current state of play.

This should be the target of our efforts—if we really want to make the world a better place.

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Investment arbitration is an improvised vessel crafted to sail the seas of international law and assist in delivering the gift of progress. If it is to reach port and deliver on its promise, we need to make it sturdy. We must do so with nails crafted through untiring blows of intelligent, learned and principled colloquy, doing without feeble, backward, and complacent complaints.

The sea is choppy; the ship is tattered. If we are to repair it and raise its mast to pierce the blue skies of achievement, we need to sharpen our intellectual axes, hew timbers of ignorance, and take stock of the lessons we have learned, putting them into planks of knowledge. And the nails we use need be made robust through the heat of our discussions, the hammer of our advocacy swinging against the anvil of our principles. And once fixed, we need to stir it relentlessly across wind and wave, keeping our sight in the lodestar of international law. Only then will we allow the promise of progress be delivered by investment arbitration.