

Issue Conflicts as Basis for Challenge of an Arbitrator – A new First in Nordic Arbitration Practice?

Anna-Maria Tamminen¹ & Helen Lehto²

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1 Anna-Maria Tamminen LL.M (NYU) is an attorney qualified to practice in Finland and the State of New York and a Managing Associate at Hannes Snellman Attorneys Ltd specialising in arbitration and practicing both in Finland and Sweden. Ms. Tamminen acted as counsel to claimant in the challenge proceedings discussed in this article.

2 Helen Lehto is an attorney trained on the bench and qualified to practice in Finland and a Senior Associate at Hannes Snellman Attorneys Ltd specialising in arbitration.

This article is inspired by a decision of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC” and “SCC Board”) sustaining the challenge to an arbitrator based on a so-called “issue conflict” in an investment arbitration case brought under a bilateral investment treaty.³ The arbitrator appointed by the claimant was deemed conflicted by the SCC Board based on the respondent’s challenge that the arbitrator acted as counsel for the investor in another investor-state arbitration, where he advocated a position contrary to respondent’s defense in the present arbitration. The respondent argued that a decision favourable to respondent in this arbitration would be prejudicial to the interests of the arbitrator’s clients in the other arbitration and that although the two arbitrations were unrelated, the overlapping issues gave the arbitrator a personal and financial stake in the dispute.⁴

The SCC Board’s decision is a first of its kind⁵ and it raises many interesting legal questions. These questions merit analysis as decisions based on issue conflicts, let alone potential issue conflicts, have become more frequent in investment arbitration but still remain scarce. Although published International Centre for Settlement of Investment Disputes (“ICSID”) decisions on challenges based on issue conflicts have been subject to separate analysis, issue conflicts still remain an anomaly in SCC arbitrations and the Nordic legal sphere.⁶

An arbitrator’s impartiality and independence is a fundamental requirement of national arbitration law and arbitration rules in most arbitral jurisdictions.⁷ However, the definition of impartiality and independence is one formed by both national and international practice. In this article we will first look at the general standards for independence and impartiality set out in national law and the most relevant arbitration rules for Nordic commercial arbitration and investment arbitration as well as any other soft law tools. We will then proceed to analyse what has constituted “issue conflicts” or “inappropriate prejudgment” in existing investment arbitration (predominantly ICSID) case law. While such challenges could conceivably also be presented in other forms of arbitration (such as e.g. sports arbitration or high-value commercial arbitration related e.g. to regulated industries), they have become more and more common in investment arbitration. Due to the more public nature of investment arbitration, such decisions have also been reported and become subject to further academic analysis.

We will then conclude to address the question of how Nordic standards and case law can be reconciled with that of the publically available investment arbitration cases,

3 A summary of the challenge proceedings in SCC arbitration 2014/169 is reported in A. Håvedal-Ipp, *SCC Practice Note, SCC Board Decisions on Challenges to Arbitrators 2013-2015*, p. 9 (“SCC Note”).

4 The description of the respondent’s challenge has been taken from SCC Practice Note in which the challenge decision was published, *see* SCC Note p. 9.

5 A. Håvedal-Ipp, *SCC Practice Note, SCC Board Decisions on Challenges to Arbitrators 2013-2015*, p. 10.

6 For articles and studies analysing predominantly ICSID based issue conflicts, *see e.g.* 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; Baiju S. Vasani and Shaun A. Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, *ICSID Review*, Vol. 30, No.1 (2015), p. 194-216; Michael Hwang and Kevin Lim, *Issue Conflict in ICSID Arbitrations*, *Transnational Dispute Management* Vol. 8, Issue 5 (December 2011).

7 Chapter 7: *Selection and Removal of Arbitrators in International Arbitration* in Gary B. Born, *International Arbitration: Law and Practice* (Second Edition), 2nd edition, Kluwer Law International 2015, p. 129-154, para. 21.

especially analysing whether the standards should be the same or different in commercial and investment arbitration and how the parties to such arbitrations be informed about these differences in analysis. Considering that the SCC is not only the most developed and renowned arbitral institution in the Nordics but also one of the foremost institutions handling both commercial and investment cases, this analysis is especially topical with regard to the SCC.

1 The Applicable Legal Standard – One of Impartiality?

The independence and impartiality of an arbitrator is a fundamental requirement of both national laws as well as arbitration rules and it defines the legitimacy of the arbitral process.⁸ The requirement of independence and impartiality is, however, a very broad and general standard, the content of which is determined in practice through national court case law and reported decisions by arbitrators or arbitral institutions.

In the following, we will set out the legal sources applicable to the assessment of impartiality and independence in the arbitration acts of Sweden and Finland and the rules of the SCC, the Arbitration Institute of the Finland Chamber of Commerce (“FAI”) and the ICC Rules of Arbitration (“ICC Rules”) as the key arbitration institutes and most commonly used rules in the Nordics. We will also set out the standard applicable in ICSID arbitrations and under the UNCITRAL Arbitration Rules as most of the relevant case law on issue conflicts results from investment arbitration under the ICSID or UNCITRAL arbitration rules.

We will then proceed to set out the standards laid out in the IBA Guidelines on Conflicts of Interest in International Arbitration, which the parties to an arbitration have either agreed to apply to the assessment of the impartiality and independence of arbitrators or which are often used as a soft law tool in arguing that an arbitrator is conflicted or is not conflicted from hearing a dispute.

1.1 The Applicable Law

An assessment of impartiality and independence of arbitrators is often required already on the basis of the national procedural law applicable to the dispute or the applicable international convention. By way of examples from the Nordics, we will take a brief look at the impartiality and independence sections of the Swedish and Finnish Arbitration Acts. We will also discuss the Washington Convention separately in the context of ICSID arbitration in the next section.

Section 8 of the Swedish Arbitration Act (SFS 1999:116, the “SAA”) provides that:

8 Chapter 7: *Selection and Removal of Arbitrators in International Arbitration* in Gary B. Born, *International Arbitration: Law and Practice* (Second Edition), 2nd edition 2015, p. 129-154, para. 21; Chapter 4. *Establishment and Organisation of an Arbitral Tribunal* in Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Sixth Edition), 6th edition, Kluwer Law International; Oxford University Press 2015, p. 229-304, para. 475.

“An arbitrator shall be impartial.

If a party so requests, an arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator's impartiality. Such a circumstance shall always be deemed to exist:

1. where the arbitrator or a person closely associated to him is a party, or otherwise may expect benefit or detriment worth attention, as a result of the outcome of the dispute;
2. where the arbitrator or a person closely associated to him is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect benefit or detriment worth attention as a result of the outcome of the dispute;
3. where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute; or
4. where the arbitrator has received or demanded compensation in violation of section 39, second paragraph.”⁹

Similarly, section 9 of the Finnish Arbitration Act (967/1992) stipulates the following:

“(1) An arbitrator shall be impartial and independent in his or her duties.

(2) When a person is asked to consent to appointment as an arbitrator, he or she shall, unless he or she refuses to accept the appointment, immediately disclose any circumstances likely to endanger or give rise to justifiable doubts as to his or her impartiality and independence as an arbitrator.

(3) Until the conclusion of the arbitration proceedings, an arbitrator is obliged to disclose without delay any circumstances referred to above of which the parties have not previously been informed.”

While the SAA delves into somewhat more detail than the FAA, it only requires that an arbitrator is impartial, whereas the FAA makes references to both impartiality and independence. In Swedish doctrine and jurisprudence, the “impartiality” requirement has been interpreted to include “independence” as included in the UNCITRAL Model Law.¹⁰ The word “independence” has, however, been added to Section 8 of the proposed revisions of the SAA, which may enter into force in 2017.¹¹

The rules on impartiality and independence contained in the procedural laws are, however, very general and do not give any guidance on how an assessment of impartiality and independence should be conducted, or when circumstances

9 Section 39 SAA, second paragraph, states “[a]n agreement regarding compensation to the arbitrators that is not entered into with the parties jointly is void. Where one of the parties has provided the entire security, such party may, however, solely consent to the realisation of the security by the arbitrators in order to cover the compensation for work expended.”

10 Patrick Schöldström, *The Arbitrators*, in Ulf Franke et al. (ed.) *International Arbitration in Sweden: A Practitioner's Guide* (2013) p. 116.

11 *Översyn av lagen om skiljeförfarande* (“Review of the Arbitration Act”) SOU 2015:37 p. 176 available at “www.regeringen.se/contentassets/78c079328bef401abd6b57f90744e504/oversyn-av-lagen-om-skiljeforfarande-sou-201537”.

which may diminish confidence in the arbitrator's impartiality may be held to be present. It is also evident that that none of the laws quoted herein make any mention of the term "issue conflict".

As the arbitration acts seldom delve into any great detail on this issue, the rules on independence and impartiality are applied and further developed through case law. Under Swedish law, the standard for assessing the impartiality of an arbitrator is objective.¹² Accordingly, an arbitrator should be removed if the circumstances of the case would normally lead to doubts as to an arbitrator's impartiality although in the specific case at hand there are no reasons to suspect actual partiality.¹³ The judgments of the Finnish Supreme Court on the topic are also limited in number. The Supreme Court has, however, confirmed in its precedent that also in Finland, the standard for impartiality and independence is objective and the determinative factor is how the impartiality of an arbitrator is perceived.¹⁴

1.2 Institutional Rules

Impartiality and independence is also addressed in institutional arbitration rules. In doing so, arbitral institutions often go into greater details than the applicable law or the applicable Convention in explaining how the impartiality and independence of arbitrator is to be ascertained. The applicable standard and procedures for assessment of impartiality and independence differ between institutes. Practices also vary between institutes with regard to whether and to what extent institutions provide reasons for a decision, or publish such decisions.¹⁵ However, the rules do not necessarily provide more guidance on the

12 Stefan Lindskog, *Skiljeförfarande – En kommentar*, 2nd Edition, para. 4.1.2.

13 See e.g. Judgment of the Swedish Supreme Court, case reference NJA 2010 s. 317 in which the appellant challenged a Swedish arbitration award under Section 34(5) of the Swedish Arbitration Act, alleging that a party-appointed arbitrator's prior appointments by the same law firm raised doubts as to the arbitrator's impartiality. The Supreme Court of Sweden explained that impartiality is judged by an objective standard under Swedish law and that repeat appointments could, in some cases, undermine the appearance of an arbitrator's impartiality. The Supreme Court rejected the challenge, however, finding that the number of repeat appointments was too minimal to undermine the arbitrator's appearance of impartiality. See also Judgment of the Swedish Supreme Court, case reference NJA 2007 s. 481 in which the appellant challenged a Swedish arbitral award, alleging that an arbitrator's consultancy work raised doubts as to his impartiality in violation of Section 8 of the Swedish Arbitration Act. The appellant alleged that the arbitrator had been an employee of the law firm representing the respondent in the arbitration and that the arbitrator was therefore not authorised to decide the dispute. The Swedish Supreme Court concluded that the respondent was a commercially important client for the law firm and that, in such circumstances, loyalties between the client and employees of the firm must be presumed to exist. The Supreme Court agreed that the circumstances objectively undermined the arbitrator's impartiality and set the award aside.

14 Judgment of the Finnish Supreme Court, case reference KKO 2005:14 paras 12-14.

15 For instance, the LCIA gives reasons for its decisions and publishes digests of LCIA challenge decisions, see *LCIA Challenge Digests*, 27 *Arbitration International* 2014(3), p. 315-474, T. Walsh and R. Teitelbaum, *The LCIA Court Decisions on Challenges to*

substantive test to be applied to determine impartiality and independence (which is always also subject to the applicable standard of the applicable law) – rather, the expectation is that published case law will assist in establishing a standard.

In the following, we will first address and compare the procedures according to the rules of the SCC, ICC and FAI as examples of arbitral rules often used in the Nordic countries, before moving on to the investment arbitration-specific ICSID Convention Arbitration Rules and the UNCITRAL Arbitration Rules, which are the most commonly used rules in investment arbitrations alongside the SCC Rules.

1.2.1 SCC

The updated SCC Rules entered into effect on 1 January 2017. One of the main changes from the 2010 version of the SCC Rules is that the 2017 version contains an Appendix III applicable to investment treaty disputes. Appendix III contains four new provisions that supplement the Arbitration Rules;¹⁶ neither of which concerns impartiality and independence. Instead, impartiality and independence is addressed in Article 18 of the SCC Rules (which applies to commercial and investment cases alike), and the procedure for challenge of arbitrators, and their release or replacement, is laid out in Articles 19, 20 and 21 respectively.

According to Article 18, arbitrators must be impartial and independent. A prospective arbitrator must disclose any circumstances that may give rise to justifiable doubts as to the prospective arbitrator's impartiality or independence, and shall submit a statement of, *inter alia*, independence and impartiality once appointed. Furthermore, should circumstances arise during the course of the arbitration, which may give rise to justifiable doubts as to the prospective arbitrator's impartiality or independence, the arbitrator must immediately inform the parties thereof.

Article 19 further states that a party may challenge any arbitrator e.g. “*if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence*”. A written statement asserting such a challenge shall be submitted to the SCC Board within a certain time frame. If the other party agrees to the challenge, the arbitrator shall resign.

When there is a challenge to an arbitrator, with which the counterparty does not agree, and the arbitrator does not voluntarily step down, the issue of whether

Arbitrators: An Introduction, 27 *Arbitration International* 2014(3), p. 283-314; The ICC has since 8 October 2015 provided parties with the opportunity to request a reasoned decision but it does not publish its decisions. See ICC Court of Arbitration, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the 2012 ICC Rules of Arbitration*, paras. 11-12 (“ICC Note”). The SCC has published summaries of challenge decisions every few years. See Lindström, Niklas, *Challenges to Arbitrators – Decisions by the SCC Board during 2008 – 2010*; Felipe Mutis Tellez, *Arbitrators' Independence and Impartiality: A Review of SCC Board Decisions on Challenges to Arbitrators (2010-2012)*; Anja Håvedal-Ipp, *SCC Practice Note, SCC Board Decisions on Challenges to Arbitrators 2013-2015* (“SCC Practice Note”).

16 See *2017 SCC Rules – Key changes*, p. 4, available at “sccinstitute.com/media/164883/main_changes_new_rules_2017.pdf (accessed on 22 January 2017)”.

justifiable doubts exist shall be solved by a final decision of the SCC Board. The SCC does not give grounds for the decisions taken by the Board. The Practice Note entitled “SCC Board Decisions on Challenges to Arbitrators 2013-2015” (“SCC Practice Note”) suggests, however, that the SCC may change its practice in this regard in the future.¹⁷ The SCC publishes summaries of challenge decisions every few years.¹⁸

1.2.2 ICC

The Arbitration Rules of the ICC, updated in 2012, do not contain any article with the heading “Impartiality and independence”, but instead addresses this in Article 11.1, under the heading “General provisions” concerning the arbitral tribunal.

The contents of said article do not differ much from the contents of the SCC Rules. The requirement that arbitrators be impartial and independent is largely the same, with Article 11.1 of the ICC Rules stating that arbitrators must “*be and remain*” impartial and independent.

Much like the SCC, the ICC also requires the prospective arbitrator to submit a statement of independence and impartiality, and to immediately disclose any facts or circumstances thereto related which may arise during the arbitration. The ICC International Court of Arbitration also adopted a Guidance Note in 2016 in which the Court recommends that a prospective arbitrator discloses if “*the arbitrator or prospective arbitrator or his or her law firm is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality*”.¹⁹

As laid out in Article 11(4) of the ICC Rules, the Court decides on “*the appointment, confirmation, challenge or replacement of an arbitrator*”, and its decisions shall be final. In the ICC Note, the ICC Court communicated its new policy that on the request of the parties to an arbitration, the ICC Court may communicate the reasons for its decisions on challenges and replacement of arbitrators under Articles 14 and 15(2) of the ICC Rules.²⁰ Parties are, however, to request communication of reasons in advance of the decision in respect of which reasons are sought, and the ICC Court has full discretion to accept or reject a request for communication of reasons.

17 SCC Practice Note p. 5, *infra* note 15.

18 Niklas Lindström, *Challenges to Arbitrators – Decisions by the SCC Board during 2008 – 2010*; Felipe Mutis Tellez, *Arbitrators' Independence and Impartiality: A Review of SCC Board Decisions on Challenges to Arbitrators (2010-2012)*, p. 4; Anja Håvedal-Ipp, *SCC Practice Note, SCC Board Decisions on Challenges to Arbitrators 2013-2015*.

19 ICC Note, para. 20, *infra* note 15.

20 ICC Note paras. 11-12.

1.2.3 FAI

The FAI revised its rules in 2013. Said rules contain highly similar provisions on independence and impartiality of arbitrators as the SCC and ICC Rules, which therefore shall not be repeated here. The requirement of impartiality and independence is contained in Article 20 FAI Rules and the provisions on challenge are contained in Article 22. Article 22(7) of the FAI Rules provides that the Board, having decided on such a challenge, has no obligation to give reasons for its decision. The FAI does, however, publish extracts of other types of procedural decisions on its website.²¹

1.2.4 ICSID

ICSID stands apart from the above listed institutions in that it is an autonomous, multilateral specialized institution that encourages the international flow of investment and mitigates non-commercial risks by a treaty. Its basic text is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention” or “Washington Convention”). ICSID has also issued Institutional Rules, Conciliation Rules and Arbitration Rules. In the following, we will look closer at the independence provisions which flow from the ICSID Convention and the Arbitration Rules.

Notably, these ICSID instruments also differ from those of the above-mentioned arbitral institutes in how the provisions regarding independent are worded. Instead of stating that an arbitrator “*shall be independent and impartial*”, Article 14(1) of the ICSID Convention states that the arbitrator shall be “*of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment*”.²²

According to Rule 6(2) of the ICSID Arbitration Rules²³, before or at the first session of the Tribunal, the arbitrator must sign a declaration attaching a statement of “*past and present professional, business and other relationships (if any) with the parties*” as well as “*any other circumstance that might cause my reliability for independent judgment to be questioned by a party*”. The article further states that by signing the declaration, the arbitrator assumes a continuing obligation to promptly notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during the proceedings.

If a party proposes “*the disqualification of an arbitrator*” pursuant to Article 57 of the Convention, e.g. “*on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14 [of the Convention]*”, the proposal (with reasons therefor) shall promptly be filed with the Secretary-

21 See the FAI website available at “arbitration.fi/category/fai-cases/page/2/”.

22 While Article 14(1) at first glance only requires these characteristics of Panel members, this criterion also applies to arbitrators appointed from outside the Panels, as Articles 31(2) and 40(2) of the Convention require this to be the case.

23 ICSID Rules of Procedure for Arbitration Proceedings “Arbitration Rules” as amended and effective 10 April 2006.

General, who shall then transmit the proposal to the members of the tribunal - or to the Chairman of the Administrative Council, in case the proposal relates to a sole arbitrator or the majority of the members of the tribunal.

The proposal is thus considered (and voted on) either by the non-challenged members of the tribunal, or by the Chairman of the Administrative Council. ICSID publishes decisions of disqualification on its website if both parties agree to the publication of such decisions in accordance with Regulation 22 of the ICSID Administrative and Financial Regulations.²⁴

1.2.5 UNCITRAL Arbitration Rules

Another set of rules often applied to investment arbitrations are the UNCITRAL Arbitration Rules. Again, these rules are also aligned with those of the SCC, ICC and FAI, stating e.g. that “*an arbitrator may be challenged if circumstances exist that may give rise to justifiable doubts as to the arbitrator’s impartiality or independence*”.²⁵

As the UNCITRAL rules are an independent set of rules not attached to any arbitral institution, Article 13(4) of the UNCITRAL Arbitration Rules provides that if all parties do not agree to a challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it by seeking a decision on the challenge by the appointing authority.

1.3 IBA Guidelines on Conflicts of Interest in International Arbitration

Neither the arbitration acts nor the institutional rules quoted above provide much guidance on the substantive test for impartiality and independence. It is thus not surprising that parties often refer to the IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines” or “Guidelines”) when challenging arbitrators, and decision makers often refer to said guidelines when assessing an arbitrator’s impartiality and independence. The IBA Guidelines are, for example, often consulted by the SCC Board in deciding challenges to arbitrators²⁶ and ICSID states on its website that “*While the IBA Guidelines on Conflicts of Interest are not binding, they may serve as useful references in a challenge under the ICSID Convention.*”²⁷ The 2014 version of the Guidelines contains a general affirmation that the Guidelines apply to both commercial and investment arbitration.²⁸

24 ICSID Decisions on Disqualification are made available at “icsid.worldbank.org/en/Pages/Process/Decisions-on-Disqualification.aspx”.

25 UNCITRAL Arbitration Rules, Article 12.1.

26 SCC Practice Note p. 4; Felipe Mutis Tellez, *Arbitrators’ Independence and Impartiality: A Review of SCC Board Decisions on Challenges to Arbitrators (2010-2012)*, p. 4.

27 See “icsid.worldbank.org/en/Pages/process/Disqualification-of-Arbitrators.aspx”.

28 See IBA Guidelines on Conflicts of Interest in International Arbitration (2014), p. ii.

Part II of the Guidelines contains non-exhaustive lists of situations likely to occur in today's arbitration practice, designated as the Red, Orange and Green Lists. These lists should provide specific guidance to arbitrators, parties, institutions and courts as to which situations do or do not constitute conflicts of interest, or should or need not be disclosed. The Red List (which is split into a Non-Waivable and a Waivable Red List) includes circumstances thought to give rise to "*an objective conflict of interest ... from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances*"²⁹. The Orange List includes "*situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence*".³⁰ The Green List identifies situations where there is no appearance of conflict and no actual conflict from an objective standpoint.³¹

According to the Foreword of the 2014 version of the IBA Guidelines, "issue conflicts" were carefully considered by the Subcommittee in charge of the revision of the Guidelines, and the new Guidelines reflect its conclusions on the issue.³²

However, even though the Foreword states that the updated guidelines reflect the IBA's conclusion on the issue of issue conflicts, neither the Red, Orange nor Green List contains any explicit mention of the words "issue conflict". However, the Guidelines stress that the Orange List is a non-exhaustive list of examples, and that there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator, and that "[s]uch may be the case, for example, [...] when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised."³³

In legal literature it has also been suggested that concurrently acting as arbitrator and counsel in different investment arbitrations with highly similar issues can even amount to a Non-waivable Red List 1.3 situation, as it may mean that the arbitrator has a significant personal or financial interest in the matter.³⁴

With regards to issue conflicts, it should be noted that the following scenario is described in the Green List, under 4.1.1:

"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)."

As the Green List concerns situations where there is no appearance of conflict from an objective standpoint, the question becomes where the line should be drawn. While a previously expressed legal opinion should not give any grounds

29 IBA Guidelines, Part II, para. 2.

30 IBA Guidelines, Part II, para. 3.

31 IBA Guidelines, Part II, para. 7.

32 IBA Guidelines, p. ii.

33 IBA Guidelines, Part II, para. 6.

34 Bernasconi-Osterwalder, Johnson and Marshall: "*Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel*", Background paper for IV Annual Forum for Developing Country Investment Negotiators (New Delhi, 27-29 October 2010), p. 32.

for concern, if such opinion is expressed while the “*arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised*”, it could presumably be a relevant Orange List concern, while the non-waivable Red List comes into play if the arbitrator has a significant financial or personal interest in the outcome of the case. Thus, the IBA Guidelines do not give green light to an arbitrator who publishes legal opinions in relation to a particular case in which she or he has been involved.³⁵

The IBA Guidelines have also faced criticism, especially in the context of investment treaty arbitration. Prior to the 2014 update, the IBA Guidelines were criticized for offering “*little help in dealing with issue conflict challenges*”.³⁶ More recent criticism has been presented in the context of Article 3.1.5. raising many difficult questions for counsel and arbitrators in terms of timing and disclosure obligations to avoid these types of conflicts.³⁷ The arbitrators having decided challenges in investment treaty cases such as *Tidewater*, *Caratube* and *Urbaser*, have given the IBA Guidelines some weight but simultaneously downplayed their importance, considered them as “merely indicative” or stated that the IBA Guidelines are not part of the legal basis upon which the arbitrators have reached their decision.³⁸

Simultaneously, the IBA Guidelines have been expressly applied as a standard for determining the challenge to an arbitrator in *Perenco v. Ecuador* as a result of the parties’ agreement.³⁹

2 Forms of Conflict of Interest

2.1 Direct Conflict of Interest

As we can see from the legal sources addressed in part 1 of this article, the applicable law, convention or rules do not exemplify what situations result in a conflict of interest. Rather, the standards set out in these legal instruments are vague and broad and must be interpreted separately in each case. Examples of (direct) conflicts of interest have been listed on the Red List of the IBA Guidelines, while the Orange List includes situations which may or may not amount to a conflict, depending on the circumstances of the case.

Typical conflict situations include those where an arbitrator or a person closely associated to him or her has an interest in, or stands to gain or lose

35 See also ASIL-ICCA Report, p. 57.

36 Sophie Nappert, *Bias in International Commercial Arbitration Versus Investment Arbitration: Are There Different Standards? Should There Be?*, in *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers*, p. 146, 152 (2009).

37 ASIL-ICCA Report, para. 55.

38 ASIL-ICCA Report, para. 60; see also Michael Hwang and Kevin Lim, *Issue Conflict in ICSID Arbitrations*, *Transnational Dispute Management* Vol. 8, Issue 5 (December 2011), para. 35.

39 ASIL-ICCA Report. para. 61.

something from the outcome of the dispute,⁴⁰ where the arbitrator has assisted a party in the preparation of its case (for instance acted as expert for one of the parties)⁴¹, and where the arbitrator has had extensive previous dealings- for instance acted as counsel - to one of the parties on multiple occasions.⁴²

In assessing whether a conflict of interest has arisen, the relevant test is not whether the arbitrator *de facto* is independent or impartial, but rather whether “*a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.*”⁴³

2.2 Issue Conflict or Prejudgment of a Case

While some examples exist of situations in which parties have sought to challenge an arbitrator on the basis of her or his legal writing and opinions expressed in such writing⁴⁴, no body of case law exists in commercial arbitration according to which an arbitrator would be considered conflicted on the basis of issue conflicts. It is, however, not inconceivable that such situation would also arise in commercial arbitration within the Nordic legal sphere. This could be the case, for example, in high-value commercial arbitrations if certain regulatory matters were determined in arbitration for the first time or with regard to certain types of standardised contracts. However, due to the private nature of commercial arbitration, parties have less knowledge about an arbitrator’s activities as counsel and consequently less grounds to fear inappropriate predisposition. Challenges based on issue conflicts or alleged prejudgment have been predominantly presented in investment arbitration cases. These challenges have caught the interest of academics and investment arbitration lawyers to the extent that issue conflicts have become the subject of separate investment arbitration studies.⁴⁵

The most comprehensive of such studies is probably the Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration (the “ASIL-ICCA Report” or “Report”). The Task Force consisted of a diverse group

40 See IBA Guidelines, Red list, para. 1.3 and SAA, Section 8.1.

41 See IBA Guidelines, Red list, para.2.1 and SAA, Section 8.1.

42 See IBA Guidelines, Red list, para. 1.4.

43 IBA Guidelines, Standard 2(c).

44 Examples of cases where an arbitrator has been challenged on the basis of scholarly writings or public speaking include, e.g. Oberlandesgericht Frankfurt, Judgment of 4 October 2007, 2008 SchiedsVZ, p. 96, 99 (challenge unsuccessful where presiding arbitrator was co-publisher of DIS Series, in which contribution by counsel for respondents on hypothetical case similar to case at hand was published); Decision in LCIA Ref. No. 5660 of 5 August 2005, 27 Arb. Int’l 371, para. 4.4 (“generally accepted that professional writings relating to legal or commercial issues arising in an arbitration may not lead to the disqualification of an arbitrator”).

45 *Infra* note 6.

of leading experts from a wide range of professional backgrounds, including arbitrators, counsel, members of arbitral institutions and academics. The Report refers to an issue conflict as “*an allegation that an arbitrator is biased towards a particular view of certain issues or has already prejudged them*”⁴⁶ but notes that the term “issue conflict” has no settled definition.⁴⁷ In fact, the authors of the ASIL-ICCA Report suggest that while the term “issue conflict” is often used, it is not helpful in defining the basis for challenge. This is because the term obscures the underlying issue, which is the arbitrators’ impartiality.⁴⁸ Also, similarity of the term “issue conflict” with the notion of a “conflict of interest” suggests that a bright line rule could also be established for issue conflicts when that is not possible according to the authors of the ASIL-ICCA Report. Rather, the questions referred to under the term “issue conflict” go to the arbitrator’s state of mind, which again is dependent on context and cannot be measured with mechanical rules.⁴⁹ The authors of the ASIL-ICCA Report thus refer to the underlying question as “inappropriate predisposition”.⁵⁰ Nevertheless, “issue conflict” is the term of art used in many related academic articles and it will also be used in the analysis below.

The ASIL-ICCA Report correctly identifies the tension between party autonomy and impartiality as one of the key concerns in the debate surrounding issue conflicts. Party autonomy, in the form of the parties’ right to appoint an arbitrator is a unique principle of international arbitration.⁵¹ Additionally, whether an inappropriate predisposition exists becomes a concern in investment arbitration because contemporary international investment law is often marked by diverse views on jurisdictional issues.⁵² This ultimately gives more weight to an individual arbitrator’s view than they would have in most systems of justice.⁵³ The difficulty with “issue conflict” is that no consensus exists as to whether and when an arbitrator’s predisposition regarding a substantive issue or knowledge about certain facts may cross a line so that the arbitrator is no longer considered “impartial”.

The ASIL-ICCA Report contains an analysis of the existing guidance on issue conflict including the United Nations Basic Principles on the Independence of the Judiciary, the Burgh House Principles on the Independence of the International Judiciary, the Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals, Institutional Arbitration Rules, the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes

46 ASIL-ICCA Report No. 3, para. 2.

47 ASIL-ICCA Report No. 3, para. 14.

48 ASIL-ICCA Report No. 3, para. 15.

49 ASIL-ICCA Report No. 3, para. 15.

50 ASIL-ICCA Report No. 3, para. 18.

51 ASIL-ICCA Report No. 3, para. 22; *see also e.g.* Chapter 7: Selection and Removal of Arbitrators in International Arbitration in Gary B. Born, *International Arbitration: Law and Practice (Second Edition)*, Kluwer Law International 2015, p. 129-154, para. 1.

52 ASIL-ICCA Report No. 3, para. 25.

53 ASIL-ICCA Report No. 3, para. 26.

and the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration.⁵⁴

The ASIL-ICCA Report also contains a comprehensive listing of existing case law from international tribunals and challenge decisions in investment arbitration cases between investors and states. The Report goes on to note that although there is a growing body of publically available case law regarding challenges based on some form of issue conflict, it is still very modest.⁵⁵ Analysing the existing decisions is also complicated as the decisions are based on a substantial variation of applicable standards and procedures for assessing challenges. The Report further notes that some of the analysed decisions are unreasoned, and that the decisions do not distinguish between an arbitrator's independence and impartiality.⁵⁶

Despite the challenges presented in analysing the body of case law subject to the ASIL-ICCA Report's study, the writers of the Report have been able to identify three types of arbitrator behaviours where the arbitrator's connections with the material issue have not been considered to amount to inappropriate predisposition.⁵⁷ These categories are (i) scholarly or professional writing and speech, (ii) prior service as counsel or advocate addressing similar issues, and (iii) concurring in prior opinions addressing issues presented in the current case.⁵⁸

The main conclusions of the report concerning different types of challenges based on issue conflicts are summarized under separate headings below.

2.2.1 Scholarly and Professional Writing and Speech

The authors of the Report conclude that scholarly or professional writing and speech does not create "inappropriate predisposition" having reviewed the decisions in *Urbaser SA v. Argentine Republic*, *Repsol v. Argentina*, *Saipem S.A. v. People's Republic of Bangladesh*, *CC/Devas (Mauritius) Ltd. et al. v. India*, and *Perenco v. Ecuador*.⁵⁹

In *Urbaser*, an ICSID case, Professor McLachlan was challenged due to two academic articles he had written on two issues pending in the case, namely the application of an MFN clause and the defense of necessity.⁶⁰ The unchallenged arbitrators rejected the allegation and concluded that "*a mere showing of opinion, even if relevant in a particular arbitration, is not sufficient to sustain a*

54 ASIL-ICCA Report No. 3, paras. 39-61.

55 ASIL-ICCA Report No. 3, para. 104.

56 ASIL-ICCA Report No. 3, para. 105.

57 ASIL-ICCA Report No. 3, para. 107.

58 *Ibid.*

59 ASIL-ICCA Report No. 3, paras. 108-124.

60 *Urbaser SA v. Argentina*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, dated 12 August 2010, paras. 20-26; see also ASIL-ICCA Report No. 3, para. 109.

*challenge for lack of independence and impartiality of an arbitrator. For such a challenge to succeed there must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (of a party closely related to such party) by a direct or indirect interest of the arbitration in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator.”*⁶¹ According to the Urbaser panel, if a previously expressed legal opinion on the application of the ICSID Convention would be sufficient to constitute prejudgement, this would have negative consequences for the development of international investment law.⁶²

In *Repsol v. Argentina*, Dr. Jim Yong Kim, President of the World Bank and of the ICSID Administrative Council rejected a challenge against Professor Orrego Vicuña based upon his scholarly publications.⁶³ In rejecting the challenge, Dr. Kim stated in relation to the publication in question that “*this publication considers an opinion on a legal provision that is not present in the legal instrument relied on in this case. Similarly, references by a Professor Orrego Vicuña to a publication by a third party do not constitute evidence of the manifest lack of impartiality against Argentina, as requested by Article 57 of the Convention*”.⁶⁴

In deciding upon the enforcement of an arbitral award, a German court has also found that an arbitrator’s scholarly publications did not show inappropriate disposition. The claimant in the arbitration resisted enforcement of fees and costs in Germany on *inter alia* the basis that the presiding arbitrator was biased on a key issue as was reflected in her past writings and opinions on MFN clauses.⁶⁵ The court rejected the claim holding that even if “*a judge has expressed a certain legal view on a particular legal question in several proceeding, and possible also publicly, such as in publications, does not affect his [or her] impartiality with respect to the concrete case to be decided – even if this particular view is crucial to the result.*”⁶⁶

The same type of reasoning was included in the rejection of a challenge to Professor Christoph Schreuer in *Saipem S.p.A. v. People’s Republic of Bangladesh* where the unchallenged arbitrators rejected the challenge and found that “*it is not because a scholar has expressed general and abstract opinion that he or she will not consider the specificities of a given case and may not on such basis, form an opinion different from the one previously expressed.*”⁶⁷

61 *Urbaser*, paras. 44-45.

62 *Urbaser*, para. 48.

63 *Repsol v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Request for Disqualification of the Majority of the Tribunal, dated 13 December 2013.

64 *Repsol v. Argentine Republic*, para. 79.

65 *Republic of Bulgaria v. ST-AD GmbH*, Decision of Higher Regional Court of Thüringen, Case reference 1 Sch 7/13, dated 20 November 2013, p. 5.

66 *Ibid*, p. 9.

67 Christoph Schreuer et al., *The ICSID Convention: A Commentary*, 2nd Ed. 2009, p. 1205-06.

On the basis of the above referenced decisions the authors of the ASIL-ICCA Report conclude that “*such decisions lend substantial support to the proposition that scholarly expressions of views that do not address a specific case, standing alone, are not normally cause for removal.*”⁶⁸

The Report does, however, also note that a recent decision by the then President of the International Court of Justice cautions that in some circumstances scholarly publication can be weighed in, along with other factors in assessing a challenge alleging inappropriate prejudgment.

In *CC/Devas (Mauritius) Ltd. et al. v. India*, two members of the panel were challenged by the respondent state.⁶⁹ Peter Tomka, then President of the International Court of Justice decided the challenge as the appointing authority. Marc Lalonde (chair) and Professor Orrego Vicuña (claimant’s appointee) were challenged because they had served together on two investment arbitration tribunals that took a position on a legal issue (the “essential security interests clause”) expected to arise in the current proceedings.⁷⁰ Respondent’s challenge was additionally founded on Professor Orrego Vicuña’s participation in a third award dealing with the same issue, and the fact that he had discussed the issue in a separate article.⁷¹ Respondent also put emphasis on the fact that all three awards were subsequently annulled in whole or in part.⁷² Judge Tomka accepted the challenge against Professor Orrego Vicuña but rejected the challenge against March Lalonde, the arbitrator appointed as chairperson. He found that “*being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions could raise doubts for an objective observer as to Professor Orrego Vicuña’s ability to approach the question with an open mind*”.⁷³

In this context the authors point out, however, that the challenge was accepted although the issues in the awards referred to in the challenge and in the case in question were not identical because the relevant provision of the India-Mauritius treaty did not contain a necessity clause to which Professor Orrego Vicuña’s previous views related.⁷⁴ The Report also outlines cases where arbitrators may have put themselves at risk by making public comments ranging from generalities to specifics.⁷⁵

68 ASIL-ICCA Report No. 3, para. 109.

69 *CC/Devas (Mauritius) v. The Republic of India*, PCA Case No. 2013-09, Decision on the Respondent’s Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, dated 30 September 2013.

70 *CC/Devas*, para. 3.

71 *Ibid.*

72 *Ibid.*

73 *CC/Devas*, para. 64; *see also* ASIL-ICCA Report, paras. 120-121.

74 ASIL-ICCA Report, para. 122.

75 ASIL-ICCA Report, para. 123.

2.2.2 Past or Present Service as Counsel or Advocate

Another group of decisions based on issue conflict identified by the ASIL-ICCA Report is an arbitrator's service as counsel or advocate, either prior to the beginning of the arbitration or concurrently with the arbitration.

The Report concludes that generally previous professional advocacy has not been considered as an indication of inappropriate partiality.⁷⁶

This view was adopted, for example, by the non-challenged arbitrators in *St. Gobain Performance Plastics v. Venezuela*, who found that a third member's previous and potentially future professional advocacy against Argentina on a similar or the same issue did not amount to a conflict.⁷⁷ The panel took the view that as a legal professional, in the absence of any specific facts to the contrary, the challenged arbitrator was capable of distancing himself from the issues.⁷⁸

This same view was adopted by the Hague District Court in rejecting a second challenge to Professor Emmanuel Gaillard in *Telekom Malaysia Berhad v. Ghana*, who had stepped down as counsel from seeking the annulment of an award addressing indirect expropriation under the Ghana-Malaysia BIT while he was concurrently acting as arbitrator in another case where Ghana relied on that award. Considering that Professor Gaillard had stepped down as counsel, the court saw "no more ground for challenge ... in the fact that prof. Gaillard, until recently, was actually involved as an attorney in the said annulment action and, thereby, adopted a position as a lawyer that was contrary to that of petitioner in the pending arbitration. (...) Save in exceptional cases, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before."⁷⁹

The authors of the report note, however, that *concurrently* acting as counsel and arbitrator has been considered more problematic.⁸⁰

This was the case, for example, when the Dutch courts first dealt with a challenge against Professor Gaillard in *Ghana v. Telekom Malaysia Berhad*.⁸¹ Ghana challenged Professor Gaillard on the basis that he was concurrently acting as counsel in attempting to set aside an award on which Ghana was relying. Applying Dutch law, the court concluded that the challenge would be accepted

76 ASIL-ICCA Report, para. 126.

77 *Saint-Gobain Performance Plastics v. Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, dated 27 February 2013, para. 80.

78 *Ibid.*, para. 81.

79 District Court, the Hague, Challenge No. 17/2004, Petition No. HA/RK 2004, 5 November 2004, para. 11.

80 ASIL-ICCA Report, para. 128 *et seq.*; see also Michael Hwang and Kevin Lim, *Issue Conflict in ICSID Arbitrations*, Transnational Dispute Management Vol. 8, Issue 5 (December 2011), paras. 40-42.

81 *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, dated 18 October 2004, p. 6.

if Professor Gaillard did not step down as counsel.⁸² In its decision, the court put emphasis on Professor Gaillard's need to keep an open mind as to the merits of the exact award which he was seeking to set aside as counsel.⁸³

In *Vito Gallo v. Canada*, the claimant challenged Canada's appointee as he was simultaneously acting as counsel for Mexico. The Deputy Secretary General of ICSID deciding on the challenge found that although an arbitrator had the right to act simultaneously as counsel and arbitrator "*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.*"⁸⁴

Also the President of the ICSID Administrative Council upheld another challenge involving concurrent overlapping roles as arbitrator and counsel in *Blue Bank v. Venezuela*.⁸⁵ Although the decision in relation to Mr. Alonso (who did not step down) is criticized by the ASIL-ICCA Report for being brief and not clearly explained, the decision puts weight on the interconnectedness of the issues in the dispute in which the challenged arbitrator was acting as well as the case of *Longreef v. Venezuela* in which his partners were acting, finding that "*given the similarity of the issues likely to be discussed [...] and the fact that both cases are ongoing, it is highly probable that Mr. Alonso would be in a position to decide issues that are relevant in Longreef v. Venezuela if he remained an arbitrator in this case.*"⁸⁶

In *Saint Gobain v. Venezuela*, the panel rejected the challenge but still held that "*this constellation can potentially raise doubts as to the impartiality and independence of the concerned individual in his role as arbitrator. It seems possible that the arbitrator in such 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.*"⁸⁷

The decisions discussed in the report would suggest that concurrently acting as arbitrator and counsel is problematic as an arbitrator's ability to keep an open mind could be jeopardized if an arbitrator had to simultaneously argue against a decision which was relevant to the arbitration in which she or he was acting as arbitrator, or any decision taken as arbitrator would undermine such arbitrator's credibility as counsel. In any event, it is clear that impartiality is jeopardized if an arbitrator is able to decide issues that could possibly be relevant for a case where she or he acts as counsel.

82 *Ibid*, p. 7.

83 *Ibid*.

84 *Vito Gallo v. Canada*, Decision on the Challenge of Mr. J. Christopher Thomas, QC, NAFTA/UNCITRAL, dated 14 October 2009, para. 31.

85 *Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, dated 12 November 2013.

86 *Ibid*, paras. 68-69.

87 *Saint Gobain*, para. 84.

2.2.3 Prior exposure to similar facts

Also facts learned by an arbitrator in a separate case have been grounds to challenge an arbitrator.

A challenge based on knowledge obtained by an arbitrator in a prior case was accepted by the non-challenged arbitrators in *Caratube v. Republic of Kazakhstan*.⁸⁸ The challenged arbitrator had obtained information about state misconduct in a previous case which was dismissed due to lack of jurisdiction. The unchallenged arbitrators found that “*in the light of the significant overlap in the underlying facts between the Ruby Roz case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that – independently of Mr. Boesch’s intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case, Mr. Boesch’s objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted*”.⁸⁹

In *EnCana Corporation v. Ecuador*, the respondent appointed the same arbitrator in two parallel arbitrations involving similar claims under the same BIT. Although the Tribunal did not consider the grounds sufficient for a challenge under Article 10(1) of the UNCITRAL Arbitration Rules, they found that “*as soon as Dr. Barrera uses information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties.*”⁹⁰

However, where the decision makers have been able to sufficiently differentiate two cases from one another, an arbitrator’s exposure to relevant facts has not been sufficient grounds for a challenge.

In *Participaciones Inversiones Portuarias v Gabon*, an arbitrator was challenged because of his role as presiding arbitrator in another case against the state which was alleged to involve similar factual and legal issues. The challenge was ultimately decided by the Secretary General of ICSID who found that there was insufficient evidence that the two cases involved the same facts except to the extent that both cases were related to the large privatizations of the 1990’s.⁹¹ The Secretary General found that “*the fact that in the Transgabonais case Professor Fadlallah was potentially exposed as an arbitrator to legal questions similar to those in this case – even if proved – is not in this case a ground for challenge under the Washington Convention. The question whether the termination of a license constitutes an expropriation is a recurring issue in*

88 *Caratube v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, dated 20 March 2014, para. 111.

89 *Caratube*, para. 90.

90 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Partial Award on Jurisdiction, dated 27 February 2004, para. 43.

91 *Participaciones Inversiones Portuarias Sàrl v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on proposal to disqualify an arbitration, dated 12 November 2009.

investment law. It mainly depends on the facts of each case and is decided in a collegiate manner by each tribunal."⁹²

Also in *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentina*, the challenge was rejected due to the differences of the cases in terms of facts.⁹³

Similarly, the ASIL-ICCA Report notes that differences between special knowledge of facts relevant to the merits and those relevant to the interpretation of a legal provision have been key in dismissing a challenge to an arbitrator.

That was the case in *İçkale İnşaat Limited Şirketi v. Turkmenistan*⁹⁴ in which the arbitrator appointed by Turkmenistan was challenged on the basis that he had concurred in an award against Turkmenistan in a separate case where the tribunal found no jurisdiction. It was alleged that he had thereby prejudged a material issue to the case and obtained detailed information about relevant facts because according to the claimant, the same provision of the BIT would have to be interpreted to determine the issue on jurisdiction. The challenge was dismissed by the non-challenged arbitrators finding that "*the task of the Tribunal will be fundamentally a legal one of interpreting the Treaty (...) such a task involves the determination of facts that are 'of a general and impersonal character' and not specific to the Parties to this particular case, and is therefore unrelated to facts relevant to the merits.*"⁹⁵

Concurrent appointments in allegedly related cases have also been subject to unsuccessful challenges in *Saba Fakes v. Turkey* (challenged arbitrator appointed by Turkey sitting in another case against Turkey)⁹⁶ and *Electrabel v. Hungary* (arbitrator concurrently appointed by Hungary in another case arising out of similar factual circumstances and legal framework)⁹⁷. The ASIL-ICCA Report concludes that "*the fact that an arbitrator sits in two different cases brought against the same respondent State does not qualify – absent any other objective circumstances demonstrating that the two cases are related in such a manner that the arbitrator's determination in one case would manifestly affect the challenged arbitrator's reliability to exercise independent judgment in the other case.*"⁹⁸

92 *Ibid*, para. 33.

93 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/01/19, Decision on Proposal for the Disqualification of G. Kaufmann-Kohler, dated 22 October 2007, paras. 32-37.

94 *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, dated 11 July 2014.

95 *Ibid*, para. 120.

96 *Saba Fakes v. The Republic of Turkey*, ICSID Case No. ARB/07/20, Decision on Proposal to Disqualify an Arbitrator, dated 26 April 2008.

97 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Claimant's Proposal to Disqualify a Member of the Tribunal, dated 25 February 2008.

98 ASIL-ICCA Report, para. 142; *see also* Michael Hwang and Kevin Lim, *Issue Conflict in ICSID Arbitrations*, Transnational Dispute Management Vol. 8, Issue 5 (December 2011), para. 45.

2.2.4 Prior Opinion Deciding Legal Issues Presented in the Current Case

The final category of challenge cases based on issue conflict is based on appointment of arbitrators in cases involving legal issues of significance which the arbitrator has decided in previous disputes or which are subject to dispute in other arbitrations in which the same person acts as arbitrator.⁹⁹ Such challenge was accepted in e.g. *CC/Devas* where the decision was based on the depth of the arbitrator's commitment to a particular issue.

The authors of the ASIL-ICCA Report emphasize that such challenges have been criticized on the basis that disqualifying an arbitrator due to previous legal decisions would eliminate the arbitrators with the requisite knowledge in many of the complex cases.¹⁰⁰

An example of a case where such challenge was rejected is *Tidewater Inc. et al. v Venezuela* where the non-challenged arbitrators did not accept a challenge to Professor Brigitte Stern on the basis that she was involved in an arbitration against the same respondent state and its investment law.¹⁰¹ In coming to their decision the non-challenged arbitrators agreed with a previously made observation that “*investment and even commercial arbitration would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations*”.¹⁰²

In *Universal Compression Int'l Holdings, S.L.U. v. Venezuela*, the Chairman of the ICSID Administrative Council cited similar reasons rejecting another challenge presented against the same arbitrator also based on her prior participation in similar cases:¹⁰³ “*The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations.*”¹⁰⁴

The authors of the ASIL-ICCA report Report also note that in *CC/Devas* the challenge against the presiding arbitrator did not succeed on the basis of prior involvement of that arbitrator in earlier similar cases. The same was true of the *İçkale* tribunal which found that an earlier exposure to the same legal instrument does not *per se* suffice to disqualify an arbitrator.¹⁰⁵ The authors of the Report suggest that the conclusion that should be drawn is that the very experience that

99 ASIL-ICCA Report, para. 143.

100 ASIL-ICCA Report, para. 144.

101 *Tidewater Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, dated 23 December 2010, para. 64.

102 *Ibid.*, paragraphs 68-68.

103 *Universal Compression Int'l Holdings, S.L.U. v. Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, dated 20 May 2011, paras. 83-84.

104 *Ibid.*

105 ASIL-ICCA Report, para. 150.

makes an arbitrator suitable to determine a dispute should not disqualify that arbitrator from hearing a dispute.¹⁰⁶

3 Discussion

The ASIL-ICCA Report and other studies based on existing case law of investment arbitration challenges demonstrate that although decisions can be grouped under certain headings, the decision in a particular case is always based on an assessment of the facts of that case and therefore, too far-reaching generalisations cannot be made. What seems evident, however, is that unless the dispute resolution system related to investments is completely overhauled (as foreseen, for example, by the Multilateral Investment Court Project of the European Commission¹⁰⁷), challenges based on alleged issue conflicts will be brought against arbitrators based on their previous or concurrent involvement in investment arbitration cases. To better deal with such challenges, it is important that light is shed on these decisions and that distinctions can be made between similar but still different cases.

What the ASIL-ICCA study and other scholarly opinions suggest, is that academic writing as such is not perceived as an issue, and there seems to be widespread consensus that scholarly writing is necessary for the field to develop further. Such academic writing can only give grounds for challenge if it relates to a specific case or if the views are very strongly expressed. The body of case law demonstrates that previous activities as counsel in a dispute related to a similar set of issues has not been considered as grounds for challenge, however, challenges have been successful in cases where arbitrators are concurrently acting in a similar type of dispute where either the facts or legal issues are sufficiently similar. The problem does therefore not seem to be the fact that a person acts as both counsel and arbitrator but rather the issues that arise out of concurrently acting as both. Similarly, an arbitrator's prior exposure to similar facts or issues of law has not been accepted as grounds for challenge, unless other factors have contributed to jeopardizing the arbitrator's impartiality.

So how does all of this compare to the decision in SCC Arbitration 2014/169? The challenge was based on an argument that the arbitrator appointed by the claimant could not maintain his duties as counsel because of defences at least in part similar to those advocated in the cases where the arbitrator concurrently acts as counsel. According to respondent, the similarities between the SCC arbitration in question and the other arbitrations in which the arbitrator acts as counsel gave rise to a concern that a decision favourable to respondent's interests by the tribunal in this SCC arbitration would be prejudicial to the interests of the arbitrator's clients in those other proceedings. Respondent noted that neither the arbitrator nor respondent could be certain that such issues would not arise in this SCC arbitration, and that consequently the overall similarity of the cases would

¹⁰⁶ *Ibid.*

¹⁰⁷ See e.g. European Commission, Dispute Settlement news, dated 21 December 2016, available at: "trade.ec.europa.eu/doclib/press/index.cfm?id=1608".

be sufficient to cause a reasonable third person to question the arbitrator's independence and impartiality. Respondent also relied on the decisions in *Telekom Malaysia v. Ghana*, *Blue Bank*, *Grand River Enterprises v. United States* and *Vito Gallo v. Canada* in making its challenge.

Claimant objected to the challenge on the basis that the legal issue referred to by respondent had not arisen in the dispute in which the challenged arbitrator was acting as counsel and that such hypothetical issue conflict could not form grounds for challenge on the basis of the SCC Rules. In any event, the factual matrix of the case was different from the cases in which the arbitrator was acting as counsel. The dispute in question was brought against a different State, under a different BIT and a different set of arbitration rules and concerning a different set of facts. Finally, the claimant also objected to the challenge on the basis that respondent's challenge was based on a legal argument against which there was established case law and hence, the respondent's argument that any possibility to obtain a favourable decision for his client in the arbitration in which the challenge was brought could not be grounds for challenge as such precedent already existed.

As the SCC Board does not give grounds for its decision, we will never know, on what general or specific grounds the Board considered the arbitrator appointed by claimant to be conflicted. However, it is clear from the grounds presented by the parties that the possibility of the same legal issue arising in the SCC arbitration in question and the arbitrations in which the arbitrator acts as counsel has been a decisive factor. Thus, the decision of the SCC Board falls into the category of concurrent representation as counsel identified above under Section 2.2.2. On a general level, the SCC Board's decision thus seems to be aligned with ICSID and other investment law practice such as the decisions in *Telekom Malaysia v. Ghana*, *Blue Bank* and *Vito Gallo v. Canada*.

However, even though the decisive question can be identified, it would have been interesting to understand to what extent the SCC Board based its decision on a general interpretation of the facts and the law, and to what extent it relied on previous precedent or an interpretation of the IBA Guidelines. Unanswered questions of equal interest are the weight the SCC Board gave to the possibility of the issue in question arising in other arbitrations, the role the political aspects of the specific legal question played (if any), the role any existing decisions on the same issue played (if any) and how much similarity the SCC Board required from the separate cases to consider that an issue conflict exists. As such, without having answers to these questions, the decision suggests that the SCC Board takes a very cautious approach to issue conflict challenges and is more likely to consider an arbitrator conflicted rather than take any risks with the enforceability of an award.

The SCC Practice Note seems to suggest that the SCC Board has not previously had to deal with issue conflicts.¹⁰⁸ Although the rarity of such decisions is only positive, it also creates room for interpretation of a single decision. This is presumably why the SCC states in the Practice Note that “*the*

108 SCC Practice Note, p. 10.

decision should not be seen to indicate an SCC policy for issue conflicts in general, or even in the investor-state context".¹⁰⁹

The authors agree that it would be unwise to draw any further conclusions from this decision on any SCC policy on issue conflicts. Although the decision in SCC arbitration 2014/169 can be interpreted to be aligned with the objective test of impartiality and independence prevalent under Swedish law, the authors submit that there are rarely issues in commercial arbitration that would warrant a similar approach to conflicts as in this case and even in investment issues such questions are limited.

Although the SCC's practice to publish summaries of the challenge decisions every few years is commendable as such, it would also be desirable that the reasons of such decisions are communicated to (at least) the parties. Such communication need not be immediate, and even an additional fee could be requested for such decision but it would be important for the parties to the dispute to understand how the SCC Board weighed the different arguments. Such decisions would also allow the parties, and to the general public (to the extent that decisions are published in a form made available to the general public concurrently or at a later stage) to better understand the nuances of each decision and compare them to other existing case law.

This would also be important to allow counsel to distinguish between commercial and investment arbitration practice under the SCC Rules. Giving grounds in one form or another for challenge decisions, regardless of the type of the dispute, would also benefit the SCC as one of the foremost institutes hosting both commercial and investment arbitration cases. The communication of these decisions would also be in line with the current call for higher transparency in institutional decision making in arbitration.¹¹⁰

109 *Ibid.*

110 *See e.g. White & Case, Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, Executive Summary, p. 2.*