NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 11 FALL 2014 NUMBER 2

# A MATTER OF APPEARANCES: ARBITRATOR INDEPENDENCE AND IMPARTIALITY IN ICSID ARBITRATION

PETER HORN*

*This Note analyzes challenges to arbitrators in arbitration governed by the ICSID Convention. To date, there have been only four successful challenges on the grounds provided by the ICSID Convention—with three of these decided since late 2013. Starting with* Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela *("*Blue Bank*"), these three cases may have changed the landscape for challenges to arbitrators under Article 14(1) and Article 57 of the Convention. This Note considers* Blue Bank *and subsequent decisions in the context of the broader ICSID jurisprudence on challenges. Challenges have historically been rare and have appeared to set a relatively high burden of proof for the challenging party: a "manifest" lack of independence or impartiality. Recent disqualifications have relied on the "appearance" of a "manifest" lack of independence or impartiality, which arguably represents a lower burden of proof. This standard could be said to indicate a change in terms of the success of challenges and the substantive interpretation of Articles 14 and 57. The standard for disqualification seems to have settled for the time being, but the full impact of* Blue Bank *remains to be seen.*

 Law Clerk (not yet admitted to practice), Skadden, Arps, Slate, Meagher & Flom LLP (New York), International Litigation and Arbitration Department; J.D., 2014, New York University School of Law; B.A., 2008, Vassar College. The views expressed herein are my own and not necessarily those of Skadden or its clients. I would like to thank Timothy G. Nelson, Professor Franco Ferrari, Gunjan Sharma, Jesse Kennedy, Tina Albano and Ikemefuna Stephen Nwoye for their helpful comments on this Note. Any errors are my own.

INTRODUCTION ..... 350
I. ICSID STANDARDS FOR ARBITRATOR INDEPENDENCE AND IMPARTIALITY ..... 354
A. *ICSID Convention* ..... 354
B. *ICSID Jurisprudence* ..... 356
1. *"Manifest" as "Obvious," "Evident" or "Highly Probable"* ..... 357
2. *"Reasonable Doubts" About Impartiality and Independence* ..... 363
a. ICSID Arbitration ..... 363
b. International Commercial Arbitration ..... 369
3. *"Manifest" and "Appearances" Before* Blue Bank ..... 371
II. DISQUALIFICATION OF ICSID ARBITRATORS BASED ON "APPEARANCES" ..... 373
A. Blue Bank v. Venezuela ..... 373
1. *Background and Proposals for Disqualification* ..... 373
2. *The Chairman's Decision* ..... 376
B. Burlington Resources v. Ecuador ..... 377
1. *Background and Proposals for Disqualification* ..... 377
2. *The Chairman's Decision* ..... 380
C. Caratube v. Kazakhstan ..... 380
1. *Background and Proposal for Disqualification* ..... 380
2. *The Arbitrators' Decision* ..... 382
D. *Recent Rejections* ..... 383
1. Repsol v. Argentina ..... 384
2. Abaclat v. Argentina ..... 386
3. ConocoPhillips v. Venezuela ..... 387
4. Transban v. Venezuela *and* Koch v. Venezuela ..... 388
5. İçkale İnşaat v. Turkmenistan ..... 389
6. RSM v. Saint Lucia ..... 390
CONCLUSION ..... 393

## INTRODUCTION

Parties to ICSID arbitrations each usually have the right to appoint one of three arbitrators, and to challenge any arbitra-

tors (however appointed) on the grounds specified in the ICSID Convention. Challenges to arbitrators have historically been rare, but seem to have become more common in recent years. At the time of this Note, the author is aware of 47 ICSID cases in which a party has challenged an arbitrator.[1] Some arbitrators have resigned when challenged[2] and others have re-

1. Online Decisions and Awards, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet; KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 455–61 (2012) (listing ICSID Rules Challenge Decisions); LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION Annex III.C (2d ed. 2011) (summarizing challenges to arbitrators in ICSID cases prior to 2010); *Arbitrator Challenges and Recusals*, INV. ARB. REPORTER, http://www.iareporter.com/categories/20090724_6.

2. *See, e.g.*, Victor Pey Casado & President Allende Found. v. Republic of Chile, ICSID Case No. ARB/98/2, Arbitral Award, ¶¶ 35–36 (May 8, 2008) [hereinafter *Pey Casado*]. In *Pey Casado*, Mr. Galo Leoro Franco, appointed by Chile, resigned immediately after Chile proposed to disqualify the entire tribunal. *Id.*; Luke Eric Peterson & Damon Vis-Dunbar, *World Bank President Will Rule on Chile's Effort to Disqualify Tribunal in ICSID Case*, INV. TREATY NEWS (Dec. 14, 2005), http://www.iisd.org/pdf/2005/itn_dec14_2005.pdf. However, the other members of the tribunal—Professor Pierre Lalive and Mr. Mohammed Bedjaoui—did not consent to his resignation on the grounds that he had breached the duties of confidentiality and secrecy of the deliberations. *Pey Casado*, ICSID Case No. ARB/98/2, Arbitral Award, ¶¶ 35–36. The Chairman of the ICSID Administrative Council appointed Professor Emmanuel Gaillard in place of Mr. Leoro Franco. *Id. See also* EDF Int'l S.A., SAUR Int'l S.A. & León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Arbitral Award (June 11, 2012) [hereinafter *EDF*]; *Argentina Liable for Breaches of US-Argentina BIT in Dispute with U.S. Water Firm*, INV. TREATY NEWS (July 19, 2006), http://www.iisd.org/pdf/2006/itn_july19_2006.pdf (discussing Dr. Fernando de Trazegnies Granda resigning); Electricidad Argentina S.A. & EDF Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/03/022 (nonpublic) [hereinafter *Electricidad v. Argentina*] (discussing Dr. Trazegnies Granda resigning); *Electricidad v. Argentina*, Procedural Details, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/03/22&tab=PRD; Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (Nov. 12, 2013) [hereinafter *Blue Bank*] (discussing Dr. Santiago Torres Bernárdez resigning when challenged, as described further in Part II-A(1)). *See also* Murphy Exploration & Prod. Co. v. Republic of Ecuador, UNCITRAL, PCA Case No. AA434 (discussing Dr. Guida Santiago Tawil and Professor Brigitte Stern resigning within an hour of one another in case before the Permanent Court of Arbitration), *reported by* Luke Eric Peterson, *Bid by U.S. Oil Company To Claim That Ecuador's 2006 Windfall Levy Breaches Investment Treaty Continues Slow, Torturous Path to Arbitration*, INV. ARB. REPORTER (Mar. 28, 2012), http://www.iareporter.com/articles/20120328_5.

signed without any formal challenge proceedings.[3] Of the cases in which reasoned decisions were issued, arbitrators were disqualified in only four instances.[4]

---

3. *See, e.g.*, Enron Creds. Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 11, 39 (May 22, 2007) [hereinafter *Enron*] (discussing Mr. Héctor Gros Espiell resigning); *Enron* Procedural Details, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet; Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/12 (nonpublic) [hereinafter *Crystallex*], *reported by* Luke Eric Peterson, *Arbitrator Steps Down After Being Challenged in Multi-Billion Dollar Venezuelan Gold Mining Dispute*, INV. ARB. REPORTER (Dec. 12, 2013), http://www. iareporter.com/articles/20131212_3.

4. The first successful challenge was in *Pey Casado*. For discussion, see *supra* note 2. The Chairman of the ICSID Administrative Council, Mr. Paul Wolfowitz, referred the remaining challenges to the Secretary-General of the Permanent Court of Arbitration, Tjaco van den Hout. The Secretary-General decided the challenges as follows: "i. That the proposal to disqualify Professor Pierre Lalive be rejected; and ii. That the proposal to disqualify Minister Mohammed Bedjaoui be accepted." Luke Eric Peterson, *One of Two Arbitrators Disqualified in Pinochet-Era Expropriation Case at ICSID*, INV. TREATY NEWS (Mar. 2, 2006), http://www.iisd.org/pdf/2006/itn_mar2_2006.pdf. Chile had challenged Mr. Bedjaoui based on his position as Foreign Minister of Algeria arguing that serving as arbitrator would conflict with Algerian law and complicate diplomatic relations between Chile and Algeria. *Id.*; Peterson & Vis-Dunbar, *World Bank President Will Rule on Chile's Effort To Disqualify Tribunal in ICSID Case*, *supra* note 2.

As discussed further below in this Note, the other three successful challenges to date were in *Blue Bank*, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (Dec. 13, 2013) [hereinafter *Burlington Resources*], and *Caratube International Oil Co. & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014) [hereinafter *Caratube*].

This Note focuses on cases decided under Articles 14 and 57 of the ICSID Convention. There are at least two other investor-state arbitrations where challenges were upheld, one of which was under the ICSID Convention, but the parties had agreed to apply a different standard for arbitrator challenges. *See* Perenco Ecuador Ltd. v. Republic of Ecuador & Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator (Dec. 8, 2009) [hereinafter *Petroecuador*] (disqualifying Judge Charles N. Brower under the IBA Guidelines of Conflicts of Interest in International Arbitration); *CC/Devas (Mauritius) Ltd. & Others v. Republic of India*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Professor Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30, 2013) [hereinafter CC/*Devas*] (disqualifying Professor Francisco Orrego Vicuña under the UNCITRAL Arbitration Rules).

Of these four, three are very recent decisions—and these may have changed the landscape for challenges to ICSID arbitrators. In 2013, World Bank President Dr. Jim Yong Kim, acting in his capacity as Chairman of the Administrative Council of ICSID,[5] upheld challenges in *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* ("*Blue Bank*")[6] and *Burlington Resources, Inc. v. Republic of Ecuador* ("*Burlington Resources*").[7] Both decisions rest on a particular interpretation of Articles 14 and 57 of the ICSID Convention[8]; the arbitrators were disqualified based upon a "manifest *appearance* of lack of impartiality."[9] Then in 2014, in the first reported occasion in an ICSID arbitration, the two non-challenged arbitrators disqualified their peer in *Caratube International Oil Co. & Mr. Devincci Salah Hourani v. Republic of Kazakhstan* ("*Caratube*").[10] These three cases arguably represent a change in ICSID jurisprudence in terms of both the success of the challenges and the interpretation of the ICSID Convention's standards for evaluating arbitrator impartiality.

This Note addresses the evolving burden of proof for disqualification under the ICSID Convention. In Part I, I discuss the disqualification standards under ICSID and those that commonly apply in commercial arbitration. After providing an

---

5. The President of the World Bank serves as Chairman of the ICSID Administrative Council. For more information, see *New Chairman of the Administrative Council*, ICSID (July 5, 2012), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=casesRH&actionVal=openPage&PageType=announcementsFrame&FromPage=announcements&pageName=announcement107. *See also Current President*, WORLD BANK (2014), http://www.worldbank.org/en/about/president/about-the-office/bio (with biographical information).

6. ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (Nov. 12, 2013).

7. ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 69 (Dec. 13, 2013).

8. ICSID, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (Mar. 18, 1965), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_Englishfinal.pdf (alterations added) [hereinafter ICSID CONVENTION].

9. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 69; *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 80 (emphasis added).

10. ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014).

overview of the challenge provisions of the ICSID Convention in Part I-A(1), I consider the ICSID jurisprudence concerning the "manifest" lack of independence or impartiality as well as the "justifiable doubts" standard more commonly used in commercial arbitration in Part I-A(2). Part II analyzes the *Blue Bank* decision and the standard for impartiality applied in that case in Part II-A. I also discuss *Burlington Resources* in Part II-B and *Caratube* in Part II-C. Then, Part II-D covers seven unsuccessful challenges following *Blue Bank*, and I conclude by briefly evaluating these developments and their significance for the ICSID system.

## I.
## ICSID Standards for Arbitrator Independence and Impartiality

### A. *ICSID Convention*

Created under the 1965 ICSID Convention, the International Centre for the Settlement of Investment Disputes (ICSID) was established as a forum where contracting states could choose to submit future investment disputes with nationals of other contracting states.[11] One stated purpose of ICSID was to promote economic development through international investment.[12] The ability to have disputes decided by an impartial tribunal was perceived as crucial to due process and the success of this multilateral system.[13] Thus, Articles 14, 57 and 58

11. The Convention came into force in 1966. As of April 2014, there are 159 contracting states. *List of Contracting States and Other Signatories of the Convention*, ICSID (Apr. 11, 2014), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English.

12. Christoph H. Schreuer, The ISCID Convention: A Commentary 5 (2d ed. 2009).

13. *See* Reed, Paulsson & Blackaby, *supra* note 1, at 4 (stating that the basic goal of ICSID was "to promote much-needed international investment by offering a neutral dispute resolution forum both to investors that are (rightly or wrongly) wary of nationalistic decisions by local courts and to host states that are (rightly or wrongly) wary of self-interested actions by foreign investors"); Audley Sheppard, *Arbitrator Independence in ICSID Arbitrations*, *in* Christina Binder et al., International Investment Law for the Twenty-First Century: Essays in Honour of Christoph Schreuer 131 (2009) (emphasizing that arbitrators' independence and impartiality is fundamental to investment treaty arbitration). *See also* Christopher Harris, *Arbitrator Challenges in International Investment Arbitration*, 5 Transnational Dispute Man-

of the ICSID Convention create a means for either party to an arbitration, should it feel one or more of the arbitrators is biased, to challenge the arbitrator(s).[14] First, Article 14(1) states:

> Persons designated to serve on the Panels shall be persons 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. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.[15]

It has been said that Article 14 requires "impartiality" as well as "independence."[16]

---

AGEMENT 1 (2008) ("The opportunity to challenge and disqualify an arbitrator is fundamental to the integrity of the international arbitral process, as it is the only tool by which the parties can attempt to ensure that their dispute is determined by an independent and impartial tribunal.").

14. The ICSID Arbitration Rules also play a role in disqualification proceedings. Under the Rules, arbitrators have a continuing duty to disclose information that may cause a party to question their independence. Although the ICSID Convention does not address disclosure, the ICSID Arbitration Rules contains the standard for this basic duty of the arbitrators. The arbitrator must sign a declaration stating that "[t]o the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal" and that "I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the . . . [ICSID Convention] and the Regulations and Rules made pursuant thereto." ICSID, RULES OF PROCEDURE FOR ARBITRATION PROCEEDING Rule 6(2) (2006), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID ARBITRATION RULES]. In particular, the arbitrator must include a statement of "(a) my past and present professional, business, and other relationships (if any) with the parties and (b) any other circumstances that might cause my reliability for independent judgment to be questioned by a party." *Id.* The arbitrator has a continuing duty to disclose to the ICSID Secretary-General "any such relationship or circumstance" that may arise during the proceeding. *Id.*

15. ICSID CONVENTION, *supra* note 8, art. 14(1).

16. For instance, the Spanish version of the Convention requires "imparcialidad de juicio" (impartiality of judgment). ICSID CONVENTION, *supra* note 8, art. 14(1); *see also* Convenio Sobre Arreglo de Diferencias Relativas a Inversiones Entre Estados y Nacionales de Otros Estados, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc-spa/CRR_Spanish-final. pdf. *See, e.g.*, Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 28 (Oct. 22, 2007) [hereinafter *Suez*] ("Since the Treaty by its terms makes

Second, Article 57 creates the standard relating to the qualities in Article 14:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.[17]

Article 57 has an evidentiary function—it essentially creates a burden of proof because a challenge will only be upheld when the challenging party proves a *manifest* lack of the qualities required by Article 14.

Article 58 establishes the procedure and decision-making power for challenges. Under Article 58, "[i]f it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced . . . ."[18] If the challenge is to a single arbitrator among a panel, the other members of the tribunal decide on the proposal to disqualify.[19] If a majority of arbitrators are challenged, the Chairman of the ICSID Administrative Council decides.[20]

### B. *ICSID Jurisprudence*

To provide context for *Blue Bank* and other recent decisions, this Part discusses ICSID cases that have interpreted and applied Articles 14(1) and 57. There are three main lines of

---

both language versions equally authentic, we will apply the standard of impartiality and independence in making our decisions."); *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 58 ("Given that both versions are equally authentic, it is accepted that arbitrators must be both impartial and independent."); James Crawford, *Challenges to Arbitrators in ICSID Arbitrations* 1 n.2, *in* CONFRONTING GLOBAL CHALLENGES: FROM GUNBOAT DIPLOMACY TO INVESTOR-STATE ARBITRATION (PCA PEACE PALACE CENTENARY SEMINAR) (Oct. 11, 2013) (observing that impartiality and independence are both required and noting the Spanish language version).

17. ICSID CONVENTION, *supra* note 8, art. 57.

18. *Id.* art. 58.

19. *See id.* ("The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided . . . .").

20. *See id.* ("[I]n the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision.").

cases in this regard.[21] First, there are decisions that have found that "manifest" requires the challenging party to show an "obvious," "evident" or "highly probable" lack of impartiality or independence. This approach sets a relatively high burden of proof.[22] Second, other cases have found that the challenging party need only show "reasonable doubts" as to the arbitrator's independence or impartiality. This standard, at least on its face, is similar to that found in some commercial arbitration rules, as described *infra* at Part I-B(2)(b). Third, an arguably lower burden is found in some cases—including *Blue Bank*—which requires the challenging party to prove only the "appearance" of a manifest lack of independence or impartiality.

1. *"Manifest" as "Obvious," "Evident" or "Highly Probable"*

Article 57 of the ICSID Convention has traditionally set a "high bar" for challenging an arbitrator.[23] The first case to decide a challenge to an arbitrator established just such a threshold under Article 57. In *Amco Asia Corp. v. Republic of Indonesia* ("*Amco*"),[24] Indonesia challenged the claimant-appointed arbitrator based on the facts that he had given tax advice to the person in control of the three claimants (several years prior to the arbitration) and that the arbitrator's law firm and claimant's counsel had a profit-sharing arrangement for many years; they no longer shared profits but they did share premises and administrative services for approximately six months after the

21. For discussion of challenges and reliance on earlier decisions, see Sam Luttrell, *Bias Challenges in Investor-State Arbitration*, *in* BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST 462, 462 (2009) (stating that "the practice of following earlier decisions is increasingly common in ICSID arbitration" and that "it is fair to say that a *jurisprudence constant* is emerging in the area of bias challenges in ICSID arbitration").

22. Professor Schreuer states that the requirement of showing a "manifest" lack of impartiality or independence "imposes a relatively heavy burden of proof" on the challenging party. SCHREUER, *supra* note 12, at 1202. *See also* Sheppard, *supra* note 13, at 155 ("Professor Schreuer's recognition in his treatise of the heavy burden on a challenging party has been a consistent theme throughout challenges in ICSID arbitrations.").

23. REED, PAULSSON & BLACKABY, *supra* note 1, at 134.

24. ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982) (unpublished), *reported in* W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L & COMP. L.Q. 26 (1989); *see also* DAELE, *supra* note 1, at 218; Sheppard, *supra* note 13, at 139 (discussing challenge).

commencement of the arbitration.[25] The two non-challenged arbitrators concluded that Indonesia's challenge did not meet the standard for disqualification, which they described as follows: "the facts referred to in Article 57 have to indicate not a possible lack of the quality, but a quasi-certain, or to go as far as possible, a highly probable one."[26] The decision observed that a party-appointing system presumes some connection between the party and its appointed arbitrator, and consequently, an arbitrator could not be disqualified "for the only reason that some relationship existed between that person and a party, whatever the character—even professional—or the extent of said relations."[27]

Several other tribunals have followed this approach to interpreting Article 57. In *Suez*,[28] the tribunal was faced with two separate challenges by Argentina seeking to disqualify Professor Gabrielle Kaufmann-Kohler—both of which post-dated the issuance of an award adverse to Argentina in another ICSID proceeding where she served as arbitrator, *Compañia de Aguas del Aconquija & Vivendi Universal S.A. v. Argentine Republic* ("*Vivendi*").[29] In the first, which was based on her having decided the *Vivendi* award, the two non-challenged arbitrators[30]

---

25. Tupman, *supra* note 24, at 44.

26. DAELE, *supra* note 1, at 218; *see also* Tupman, *supra* note 24, at 45 (discussing burden of proof).

27. Tupman, *supra* note 24, at 45.

28. The proceedings were consolidated before a single Tribunal for *Suez, Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, and *Suez, Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. Argentine Republic*, UNCITRAL [together hereinafter *Suez*].

29. ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) [hereinafter *Vivendi II*]. Professor Kaufmann-Kohler sat on the second of two tribunals in the *Vivendi* case. The first tribunal issued an award adverse to the claimants (dismissing claims) that was partially annulled. *See* Compañia de Aguas del Aconquija & Compagnie Générale des Eaux v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000); Compañia de Aguas del Aconquija & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) [hereinafter *Vivendi I*]. The tribunal was reconstituted, with Professor Kaufmann-Kohler appointed by claimants. In 2007, it issued an award adverse to Argentina that was subsequently upheld by the annulment committee, albeit with some criticism of her. *See Vivendi II*, Award; *Vivendi II*, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007.

30. Professor Jeswald Salacuse and Professor Pedro Nikken.

rejected the challenge, holding that "'manifest' means 'obvious' or 'evident'"[31] and concluding that Article 57 requires an objective standard of evidence.[32] Seven months later, the tribunal rejected another challenge to Professor Kaufmann-Kohler—this time based on her affiliations with UBS Group.[33] Professor Kaufmann-Kohler had been elected to the board of directors of UBS Group, which was alleged to have stock in two of the claimants (Suez and Vivendi) and to pay part of her compensation as director in UBS stock.[34] In response, Professor Kaufmann-Kohler stated that she was not aware of any business relationship between UBS and the claimants, and did not participate in any individual investment decision.[35] Here, the arbitrators described the burden as requiring proof of "[s]uch facts that would lead an informed reasonable person to conclude that [the arbitrator] clearly or obviously lacks the quality of being able to exercise independent judgment and impartiality."[36] Further, "[i]t is important to emphasize that the language of Article 57 places a heavy burden of proof on the [challenging party] to establish facts that make it obvious or highly probable, not just possible, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment."[37] The arbitrators held that the alleged connection between Professor Kaufmann-Kohler and the claimants was too remote and immaterial to suggest a manifest lack of independence or impartiality.[38]

---

31. *Suez*, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 34 (citing Professor Schreuer).

32. *Id.* ¶ 39.

33. *Suez*, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal. Argentina made a similar claim in its challenge to Professor Kaufmann-Kohler in *EDF*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler. *See infra* Part I-B(2)

34. *Suez*, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 12. UBS Group held 2.38% of the shares and voting rights in Vivendi and 2.13% of the shares in Suez as of March 31, 2007. *Id.* ¶ 14.

35. *Id.* ¶ 14.

36. *Id.* ¶ 29.

37. *Id.*

38. *Id.* ¶ 40. More specifically, the arbitrators evaluated the alleged ties according to four criteria: proximity, intensity, dependence and materiality. *Id.* ¶¶ 35, 40. In addition to the remoteness of her alleged connection, the

In *Participaciones Inversiones Portuarias SARL v. Gabonese Republic* ("*PIP*"),[39] the Secretary-General of ICSID, Ms. Meg Kinnear, rejected the proposal to disqualify the claimant-appointed arbitrator, Professor Ibrahim Fadlallah, and expressly relied on the standard set forth in *Suez* and by Professor Schreuer.[40] This challenge was based on the fact that Professor Fadlallah had been appointed as arbitrator in a different ICSID case against Gabon, *Compagnie d'Exploitation du Chemin*

---

arbitrators held that Professor Kaufmann-Kohler had no interaction with the claimants as a result of UBS, she did not benefit economically from UBS's ownership of claimants' stock, and UBS holdings in the claimants were not material to UBS share price or to Professor Kaufmann-Kohler's compensation. *Id.* ¶ 40.

Professor Kaufmann-Kohler's position at UBS was also at issue before the annulment committee in *Vivendi II*, which upheld the second award in this case. ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007. She had been appointed to the board during the *Vivendi II* proceedings—approximately four months before the final (unanimous) award was rendered in favor of the claimants—but Argentina discovered her position at UBS only after the award was rendered. *Id.* ¶¶ 22, 201–02. Argentina alleged that Professor Kaufmann-Kohler's board position justified annulment on the ground that the second tribunal was "not properly constituted" or that there was "a serious departure from a fundamental rule of procedure." *Id.* ¶ 201 (quoting ICSID CONVENTION, *supra* note 8, arts. 52(1)(a), (d)) (internal quotation marks omitted).

Here, the committee members—Dr. Ahmed S. El Kosheri (President), Professor Jan Hendrik Dalhuisen and Ambassador Andreas J. Jacovides—observed that a director's duties are "fundamentally at variance with his or her duty as independent arbitrator in an arbitration involving a party in which the bank has a shareholding or other interest, however small it may be." *Id.* ¶ 218. However, the committee accepted "at face value" Professor Kaufmann-Kohler's declaration that she had no knowledge of the connection between UBS and the claimants until after the award was rendered. *Id.* ¶ 234. The decision appeared not to adopt a particular interpretation of Article 57, but the committee held that the second tribunal was "functional and operated properly in respect of both parties" because, "despite most serious shortcomings, Professor Kaufmann-Kohler's exercise of independent judgment under Article 14 of the ICSID Convention was in the circumstances not impaired." *Id.* ¶ 238.

39. ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator (Nov. 12, 2009) [hereinafter *PIP*]. Ms. Kinnear decided the challenge because the non-challenged arbitrators, Professor Jan Paulsson (President) and Professor Brigitte Stern (appointed by respondent) had reached a deadlock and were unable to rule on the proposal. *Id.* ¶ 1.

40. *See supra* notes 22, 31, 37 and accompanying text.

*Transgabonais v. Republic of Gabon* ("*Transgabonais*").[41] Gabon claimed that Professor Fadlallah should be disqualified because: the *Transgabonais* tribunal rendered an award adverse to Gabon that generated an annulment proceeding (upholding the award); the same defendant was involved in both cases; and there was a risk of prejudgment due to Professor Fadlallah's alleged exposure to similar facts, circumstances, legal questions and political context in the *Transgabonais* case.[42] The *PIP* decision noted that a "manifest" lack suggested a "clear" or "certain" lack of the qualities required by Article 14.[43] Under these facts, the Secretary-General held that neither the existence of an annulment proceeding alone nor an arbitrator's participation in another arbitration involving the same party could establish impartiality.[44] Moreover, the Secretary-General concluded that exposure to similar facts and legal questions did not justify disqualification because the issue of whether termination of a concession contract constitutes expropriation—in dispute in these cases—is a recurring question that depends on the facts of each case and must be decided by each tribunal.[45]

Similarly, in *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ("*Universal Compres-*

41. ICSID Case No. ARB/04/5 [hereinafter *Transgabonais*]

42. *PIP*, ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator, ¶ 15. The award and annulment decision are unpublished, but for discussion of these decisions, see *Hefty Award Against Gabon Will Stand in the Way of Failed Rail Privatization*, INV. ARB. REPORTER (May 26, 2010), http://www.iareporter.com/articles/20100603.

43. *PIP*, ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator, ¶ 22. In original French, the decision stated: "Il est par ailleurs accepté que la notion de défaut manifeste de l'article 57 de la Convention CIRDI s'entend d'un défaut clair ou certain." *See also* Getma Int'l et al. v. Republic of Guinea, ICSID Case No. ARB/11/29, Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades, ¶ 60 (June 28, 2012) (Chairman Zoellick quoting and adopting the definition of "manifest" from *PIP*).

44. *PIP*, ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator, ¶¶ 27–30 (citing *Suez*, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 36).

45. *Id.* ¶ 33 (citing and quoting *Suez*, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 35).

*sion*")[46] the then-Chairman of the Administrative Council of ICSID, Mr. Robert Zoellick, rejected challenges to Professor Brigitte Stern and Professor Guido Santiago Tawil.[47] In terms that could be construed as setting a high bar for disqualification, Mr. Zoellick stated that "it is generally acknowledged that the term 'manifest' means 'obvious' or 'evident,'" and again quoted Professor Schreuer's comments concerning the heavy burden of proof.[48]

The tribunal put the burden in slightly different terms in *Alpha Projektholding GmbH v. Ukraine* ("*Alpha*").[49] First, the non-challenged arbitrators[50] noted that the ICSID Convention im-

---

46. ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators (May 20, 2011) [hereinafter *Universal Compression*].

47. Venezuela's challenge alleged that Professor Tawil had served as co-counsel to Universal with King & Spalding LLP (Universal's counsel) in other ICSID cases and that one of Universal's counsel here was formerly an associate of the firm in which Professor Tawil was a partner. *Id.* ¶¶ 15, 50–53. Universal argued that Professor Stern could not be relied upon because she had been appointed by Venezuela in at least three other ICSID cases, had been exposed to similar legal issues in these other cases, and had been appointed by Curtis, Mallet-Prevost, Colt & Mosle LLP (Venezuela's counsel) in two of those other cases. *Id.* ¶¶ 13, 24–26. The Chairman held that none of these allegations indicated a manifest lack of independence or impartiality for either arbitrator. *Id.* ¶¶ 96, 107. Rejecting the challenge to Professor Stern, the Chairman stated that "[t]he 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," and further, "the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially in another case." *Id.* ¶ 83.

48. *Universal Compression*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 71.

49. ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010) [hereinafter *Alpha*]. Here, Ukraine challenged Dr. Turbowicz on the ground that he and one of Alpha's counsel, Dr. Leopold Specht, had maintained a personal relationship since attending Harvard Law School at the same time—about twenty years prior to the arbitration. *Id.* ¶¶ 10, 40. Ukraine produced no evidence in support of this claim and the non-challenged arbitrators dismissed the remaining arguments based on: their shared educational experience, the failure to disclose this connection, Dr. Turbowicz's alleged lack of arbitration experience, a "brief phone call" from Dr. Specht to Dr. Turbowicz to ask about his availability. *Id.* ¶¶ 40–41, 45, 66, 71, 75.

50. Hon. Davis R. Robinson and Dr. Stanimir A. Alexandrov.

poses a "stringent requirement" of a "manifest" lack of qualities.[51] The term was held to mean "obvious" or "evident," in part by relying on dictionary definitions. The definition of manifest in Webster's Dictionary, as cited, "connotes something that is 'obvious' to one's understanding and that is 'readily perceived by the senses' and 'easily understood or recognized by the mind.'"[52]

Under this line of cases, the challenging party must produce objective facts that actually show that the arbitrator lacks impartiality or independence.[53]

2. *"Reasonable Doubts" About Impartiality and Independence*

a. ICSID Arbitration

A second line of cases has used a standard for "manifest" that resembles the "justifiable doubts" standard common to commercial arbitration.[54] In *Vivendi I*,[55] Argentina challenged the president of the annulment committee, Mr. L. Yves Fortier, based on his law firm's tax advice for Vivendi's predecessor, Compagnie Générale des Eaux. Mr. Fortier asserted that he had not been personally involved in the work.[56] Moreover, the majority of work already been completed and the lead partner in the matter agreed to suspend services until the an-

---

51. *Alpha*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, ¶ 34.

52. *Id.* ¶ 37. Likewise, the Tribunal noted the Shorter Oxford English Dictionary, which defines "manifest" as something that is "'[c]learly revealed to the eye, mind or judgment; open to view or comprehension; obvious.'" *Id.*

53. *See* DAELE, *supra* note 1, at 229 (stating that the challenger must show "facts which lead, readily, with little effort, without deeper analysis, to the conclusion that the challenged arbitrator lacks one of the required qualities").

54. *See, e.g.*, INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 2(b) (2014) (stating that an arbitrator should decline or not accept an appointment if "facts or circumstances exist . . . which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence . . ."); *see also* UNCITRAL Arbitration Rules, art. 12(1), UNITED NATIONS COMM'N ON INT'L TRADE LAW (2010) ("Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.").

55. ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (Oct. 3, 2001).

56. *Id.* ¶¶ 15–16.

nulment proceedings were concluded.[57] The non-challenged arbitrators[58] explained Article 57 in terms of "reasonable doubts." Thus, "[i]f the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member . . . a challenge by either party would have to be upheld."[59] Here, the non-challenged arbitrators found no reason to doubt Mr. Fortier's independence. The firm's relationship with Vivendi was fully disclosed, Mr. Fortier had no personal involvement in the matter—a matter that did not involve general legal or strategic advice and had "nothing to do with the present case"—and the relationship would end as soon as the specific transaction was concluded.[60]

---

57. *Id.*

58. Professor James Crawford SC and Professor José Carlos Fernández Rozas.

59. *Vivendi I*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶ 25 (observing that "the question seems to us to be whether a real risk of lack of impartiality based upon those facts . . . could reasonably be apprehended by either party").

60. *Id.* ¶ 26.

A different annulment committee considered arbitrator independence and impartiality in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (Sept. 1, 2009) [hereinafter *Azurix*]. Argentina had challenged the president of the tribunal, Dr. Andres Rigo Sureda, based primarily on alleged ties between Dr. Rigo Sureda and the counsel for the claimant, Dr. Santiago Guido Tawil. Dr. Tawil was one of the counsel for Azurix while Dr. Rigo Sureda's firm, Fulbright & Jaworski LLP, had appointed Dr. Tawil as arbitrator in a different ICSID case, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28 ("*Duke Energy*"); Dr. Rigo Sureda asserted that he had been but was not presently part of the legal team in the *Duke Energy* case and that he did not participate in appointing Dr. Tawil as arbitrator. *Azurix*, ICSID Case No. ARB/01/12 Decision on the Application for Annulment of the Argentine Republic, ¶¶ 251–52, 256. The non-challenged arbitrators held that Argentina, by filing the proposal eight months after learning the relevant facts, "had not acted with promptness" as required by the ICSID Arbitration Rules and was therefore deemed to have waived its right to request disqualification. *Azurix*, Decision on the Challenge to the President of the Tribunal (Feb. 25, 2005) (unpublished), *described in* ICSID Case No. ARB/01/12 Decision on the Application for Annulment of the Argentine Republic, ¶¶ 35, 269. Further, the non-challenged arbitrators found "no real risk of impropriety" because it would be "stretching any reasonable concept of the power of arbitrators" to assume that Dr. Tawil could exercise authority over Dr. Rigo Sureda in the present case. *Id.* ¶¶ 35, 270.

Before the annulment committee (Dr. Gavan Griffith, Judge Bola Ajibola and Mr. Michael Hwang), Argentina argued that the tribunal below

*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* ("*SGS*")[61] followed this approach. It was thus held that the challenging party "must establish facts, of a kind or nature as may reasonably give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case in which the challenge is made."[62]

In *EDF International S.A. v. Argentina*,[63] the non-challenged arbitrators[64] dismissed Argentina's proposal to disqualify Professor Kaufmann-Kohler while appearing to rely on the "reasonable doubts" standard. Argentina had first challenged its own arbitrator, Dr. Fernando de Trazegnies Granda, who had provided an expert opinion for Duke Energy, a claimant in a different ICSID arbitration against Peru.[65] Dr. Trazegnies Granda resigned from the tribunal.[66]

---

was not properly constituted, asserting that the arbitrators had improperly dismissed Argentina's challenge. The committee dismissed this claim and denied Argentina's request for annulment. *Id.* ¶ 292. The committee held that the arbitrators had not manifestly exceeded their powers in denying Argentina's challenge because the arbitrators had applied the correct law—Articles 14, 57 and 58 of the ICSID Convention. *Id.* ¶ 288. The arbitrators had not departed from a fundamental rule of procedure because Argentina was given a full opportunity to present its case. *Id.* ¶ 289. Further, the committee held that the arbitrators had not failed to state reasons; the Disqualification Decision was 18 single-spaced pages that analyzed the arguments and submissions of both parties. *Id.* ¶ 290.

61. ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Challenge Arbitrator, 8 ICSID REP. 398 (2005) [hereinafter *SGS*].

62. DAELE, *supra* note 1, at 221 (quoting Challenge Decision). *See also* Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Decision on Disqualification of an Arbitrator (Apr. 26, 2008) (unpublished) (agreeing with standard in *Vivendi I*, *SGS* and *Suez*) (discussed in DAELE, *supra* note 1, at 264).

63. *EDF*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler.

64. Professor William Park (President) and Professor Jesús Remón (appointed by Argentina).

65. *Editor's Note*, INV. TREATY NEWS (July 19, 2006), http://www. iisd.org/pdf/2006/itn_july19_2006.pdf. Dr. Trazegnies Granda's confidential legal opinion, apparently for the jurisdictional phase, was filed in *Duke Energy*, ICSID Case No. ARB/03/28, also discussed *supra* note 60.

66. *Editor's Note*, *supra* note 65. Shortly following this resignation, Dr. Trazegnies Granda also stepped down from the tribunal in the sister case to *EDF*, *Electricidad v. Argentina*, ICSID Case No. ARB/03/022 (nonpublic). *See Electricidad v. Argentina*, Procedural Details, ICSID, https://icsid.worldbank.

Turning to Professor Kaufmann-Kohler, Argentina made an argument similar to that in *Suez* with respect to Professor Kaufmann-Kohler's position on the UBS board. It was asserted that: UBS recommends investing in the parent company of EDF; UBS and EDF have a common interest in two companies not involved in the arbitration; EDF offered shares on the French market with the assistance of UBS Limited; and UBS Investment Foundation lists EDF securities under its foreign obligations in Swiss francs in an amount alleged to be three percent of EDF shares.[67] On Articles 14 and 57, the non-challenged arbitrators stated that "[t]he relevant quality that has been put into question relates to independence. We must consider whether Professor Kaufmann-Kohler 'may be relied upon to exercise independent judgment.' If reasonable doubts exist on this matter, she should cease to serve in these proceedings."[68] Under this approach, the arbitrators held that the facts did not support "justifiable doubts about Professor Kaufmann-Kohler's reliability to exercise independent judgment."[69]

The "reasonable doubts" test was rejected in *Nations Energy Corporation, Electric Machinery Enterprises Inc. & Jamie Jurado v. Panama*.[70] Here, the non-challenged annulment committee members[71] dismissed the challenge, reasoning that "[t]he Claimants fail[ed] by not meeting the exacting standard im-

---

org/ICSID/FrontServlet?requestType=casesRH&reqFrom=ClistCases&caseId=C22&actionVal=viewCase.

Professor Kaufmann-Kohler, too, has been challenged in the parallel case *Electricidad v. Argentina*. Professor Kaufmann-Kohler has furnished explanations but the proposal, which appears to mirror the proposal in *EDF*, remains undecided because the proceeding has been suspended since November 2005. *Id.* For more on arbitrator recusals in the face of challenges, see *supra* note 2.

67. *EDF*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, ¶ 19.

68. *Id.* ¶ 64. The decision also accepted Argentina's argument that a lack of independent judgment becomes "manifest" when it can be "easily understood or recognized by the mind." *Id.* ¶¶ 65, 67 (citing CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 932 (2001)).

69. *Id.* ¶ 133. Regarding UBS, the arbitrators reasoned that Professor Kaufmann-Kohler's non-executive directorship gives her no financial interest in EDF or any of the other claimant companies, and because she would not benefit from an award in favor of the claimants. *Id.* ¶ 71.

70. ICSID Case No. ARB/06/19, Challenge to Dr. Stanimir A. Alexandrov (Sept. 7, 2011) [hereinafter *Nations Energy*].

71. Professor Jaime Irarrázabal and Dr. Enrique Gómez-Pinzón.

posed on them by said Article 57" because they had failed to prove that the relationship between the challenged arbitrator and counsel "would result in a lack of independence which is *manifest*, and not only possible, but highly probable, which means almost certain."[72]

The Tribunal in *ConocoPhillips Co. v. Bolivarian Republic of Venezuela* ("*ConocoPhillips*")[73] observed the similarity between the "reasonable doubts" and "justifiable doubts" standards, and explicitly declined to adopt the former, even though it is found in commercial arbitration. Dismissing the challenge to Mr. Fortier, the remaining arbitrators[74] held that the conflict of interest test in the IBA Guidelines "is significantly different from that in Article 57 of the Convention and is easier to satisfy," as it requires resignation or disqualification if facts "that from a reasonable third person's point of view, having knowledge of the relevant facts, give rise to *justifiable doubts* as to the arbitrator's impartiality or independence."[75]

The "reasonable doubts" test is also relevant to the tribunal's ability to draw inferences from disputed facts. For instance, the *Vivendi I* decision drew its standard, described above, from cases where the facts were established and agreed upon. But in cases in which facts are disputed, the term "manifest," the committee members found, "must exclude reliance on speculative assumptions or arguments . . . ."[76] The *SGS* arbi-

---

72. *Nations Energy*, ICSID Case No. ARB/06/19, Challenge to Dr. Stanimir A. Alexandrov, ¶ 31 (emphasis in original). This quote is from the English translation in Crawford, *Challenges to Arbitrators in ICSID Arbitrations*, *supra* note 16, at 5. In original Spanish: "[L]os Solicitantes pecan en incumplir con el exigente estándar que les impone el mencionado Artículo 57 . . . al no haber podido probar que la relación profesional de Dr. Alexandrov con el abogado . . . resultaría en una falta de independencia manifiesta y no solamente posible, sino altamente probable, es decir, casi segura."

73. ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Feb. 27, 2012) [hereinafter *ConocoPhillips*]. For discussion of the subsequent challenge in *ConocoPhillips*, see *infra* Part II-D.

74. Judge Kenneth J. Keith and Professor Georges Abi-Saab.

75. *ConocoPhillips*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, ¶ 59 (emphasis in original decision).

76. *Vivendi I*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, ¶ 25. The arbitrators elaborated by excluding "assumptions based on prior and in themselves innocuous social contacts between the challenged arbitrator and a party." *Id. See also* DAELE, *supra* note

trators stated that reasonableness is the standard for drawing inferences, noting that "the critical inference must be reasonable in view of the facts from which it springs and should accord with the common experience of the pertinent community of arbitrators and lawyers."[77] And in *PIP*, the ICSID Secretary-General emphasized that the challenging party had to prove the alleged facts of dependence or partiality with objective evidence; a challenge could not succeed on the basis of mere speculation, presumption, or subjective belief on the part of the challenging party.[78]

The recent decision in *Saint-Gobain Performance Plastics Europe v. Bolivarian Rebublic of Venezuela* ("*Saint-Gobain*")[79] illustrates the tension between the "obvious" and "reasonable doubts" approaches to Article 57. The challenge to Mr. Gabriel Bottini (the arbitrator appointed by Venezuela) was based on his employment by the Argentinean government, which, it was argued, created a conflict due to the similarity of the positions adopted by him as advocate defending Argentina against alleged treaty violations.[80] The non-challenged arbitrators[81] observed that there was "no unequivocal answer" as to when the lack of qualities required by Article 14 becomes "manifest" under Article 57.[82] Although several decisions had set a "relatively high bar" by requiring the lack to be obvious

---

1, at 225 (noting that the "reasonable doubts" test has been "frequently applied" in recent years, that this standard "lowers the threshold for making a successful challenge," and that "this is also the standard used in other international arbitration rules").

77. ICSID Case No. ARB/01/13, 8 ICSID REP. 398 (2005); DAELE, *supra* note 1, at 221 (quoting Challenge Decision).

78. ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator, ¶ 22 ("Les faits allégués doivent être avérés, par des éléments de preuves objectifs, et une demande ne peut pas prospérer sur la base d'une simple spéculation, présomption ou croyance de la partie requérante.").

79. ICSID Case No. ARB/12/13, Decision on the Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal Under Article 57 of the ICSID Convention (Feb. 27, 2013) [hereinafter *Saint-Gobain*].

80. *Id.* ¶¶ 15–25.

81. Dr. Klaus Sachs (President) and Judge Charles N. Brower (co-arbitrator).

82. *Saint-Gobain*, ICSID Case No. ARB/12/13, Decision on the Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal Under Article 57 of the ICSID Convention, ¶ 57.

and highly probable,[83] others were unclear because they merely refer to the possibility that the arbitrator might be perceived as partial, and others had stated that an arbitrator should not serve if "reasonable doubts exist" as to her independence or impartiality.[84] The *Saint-Gobain* arbitrators adopted the following test: first, "decide whether the facts (in contrast to speculation and inferences) could lead a reasonable person to conclude that there is a possibility that the challenged arbitrator is not independent and impartial"; if yes, "the further question has to be decided of how probable the lack of independence and impartiality must be."[85] The non-challenged arbitrators only reached the first question. They denied the challenged because the claimant had not presented facts casting a reasonable doubt on Mr. Bottini's impartiality and independence.[86]

b. International Commercial Arbitration

International commercial arbitration rules and national laws generally have a standard of independence and impartiality that, on its face, is distinct from the "manifest" standard set down by the ICSID Convention. For instance, the IBA Guidelines, UNCITRAL Rules and LCIA Rules use a "justifiable doubts" standard.[87] This standard resembles the "reasonable doubts" standard from certain ICSID decisions and may serve as a point of reference for ICSID tribunals despite the text suggesting a formally higher standard in Article 57.[88]

---

83. *Id.* ¶ 58 (citing *Suez*, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on Second Proposal for Disqualification, ¶ 29).

84. *Id.* ¶ 59 (quoting *EDF*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, ¶ 64) (quotation marks omitted).

85. *Saint-Gobain*, ICSID Case No. ARB/12/13, Decision on the Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal Under Article 57 of the ICSID Convention, ¶ 60.

86. *Id.* ¶ 78.

87. The full panoply of institutional rules and national laws is outside the scope of this Note. For discussion of the various standards, including the "justifiable doubts" test under institutional rules and the IBA Guidelines, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 7828-95 (2014).

88. *See* Ikemefuna Stephen Nwoye, *Arbitrator's Impartiality and Independence in ICSID:* Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela *Revisited*, TRANSNATIONAL NOTES, NYU CENTER FOR TRANSNATIONAL LITIGATION, ARBITRATION & COMMERCIAL LAW (Jan. 31,

The IBA Guidelines on Conflicts of Interest in International Arbitration set an objective test for disqualification in General Standard 2(b). An arbitrator should resign or refuse appointment "if facts or circumstances exist or have arisen since the appointment, which, from a reasonable third person's point of view having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence . . . ."[89]

The UNCITRAL Rules and Model Law appear to reflect the same standard. Article 12(1) of the Rules states that an "arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[90] The standard in the LCIA Rules is phrased identically to that of the UNCITRAL Rules.[91]

---

2014), http://blogs.law.nyu.edu/transnational/2014/01/arbitrators-impartiality-and-independence-in-icsid-blue-bank-international-trust-barbados-ltd-v-bolivarian-republic-of-venezuela-revisited. Sam Luttrell argues that the increased acceptance of a "justifiable doubts" or "reasonable apprehension" test in investor-state arbitration can be explained by the "cross-pollination" of international commercial and investment arbitration and arbitrators. *See* Luttrell, *supra* note 21, at 473; *see also* JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 28–119 (2003) (discussing the investment arbitration regime in relation to international commercial arbitration, and noting that "[w]hat is clear is that the characteristics of investment arbitrations are seen in commercial arbitrations and vice versa").

89. INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION 2(b) (2014) [hereinafter IBA GUIDELINES 2014].

90. UNITED NATIONS COMM'N ON INT'L TRADE L., UNCITRAL ARBITRATION RULES Art. 12(1) (2010); UNITED NATIONS COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 12(2) (2006). The explanation to IBA General Standard 2 notes the connection between the IBA and UNCITRAL standards: "In order for standards to be applied as consistently as possible, the test for disqualification is an objective one. The wording 'impartiality and independence' derives from the widely adopted Article 12 of the [UNCITRAL] Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of an arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test')." IBA GUIDELINES 2014, Explanations to General Standard 2(b), *supra* note 89.

91. LONDON COURT OF INT'L ARB., LCIA ARBITRATION RULES, art. 10.1 (2014). For discussion of LCIA challenge decisions, see Thomas W. Walsh & Ruth Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27 ARB. INT'L 283 (2011).

In both *Blue Bank* and *Burlington Resources*, the Chairman of the Administrative Council acknowledged the potential relevance of the "justifiable doubts" standard but declined to apply it. In *Blue Bank*, the Parties had referred to other rules and guidelines in their arguments, such as the IBA Guidelines.[92] The Chairman stated that "[w]hile these rules or guidelines may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention."[93] The decision in *Burlington Resources* used the same language, but also recognized the connection between the ICSID and IBA standards by noting that "[t]he IBA Guidelines, which are not binding in an ICSID challenge, have been recognized as useful guidance in prior cases."[94] Some commentators have argued that this standard should not be mere guidance, but that there should be a unitary standard for commercial and investor-state arbitration along the lines of "justifiable doubts."[95]

### 3. *"Manifest" and "Appearances" Before* Blue Bank

ICSID tribunals had generally held that it is not sufficient to establish the mere appearance of a lack of the qualities re-

---

92. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 62.

93. *Id.*

94. *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 69. *See also* Stefan Kröll, *"Reasonable Doubts" as to the "Manifest Lack" of Independence? The Successful Challenge in* Blue Bank v. Venezuela, TRANSNATIONAL NOTES, NYU CENTER FOR TRANSNATIONAL LITIGATION, ARBITRATION & COMMERCIAL LAW (Mar. 11, 2014), http://blogs.law.nyu.edu/transnational/2014/03/reasonable-doubts-as-to-the-manifest-lack-of-independencethe-successful-challenge-in-blue-bank-v-venezuela/ (observing that "the Chairman appears to have endorsed the difference between the ICSID standard and that under the IBA Guidelines").

95. *See* Sheppard, *supra* note 13, at 155–56 (arguing that "there is no basis for the test for disqualification of ICSID arbitrators to be any more burdensome than the test for challenging an arbitrator in an UNCITRAL or other non-ICSID investment treaty arbitration, or, indeed, in any commercial arbitration" and that the ICSID rules be changed so that the test for disqualification invokes the "justifiable doubts" standard rather than a "manifest" lack of independence); *see also* Nwoye, *supra* note 88 (agreeing with Audley Sheppard and arguing that the ICSID Convention should be brought "in consonance with the standards contained in the IBA Guidelines and UNCITRAL Rules").

quired by Article 14.[96] For instance, in *OPIC Karinum Corp. v. Venezuela*,[97] the arbitrators[98] rejected Venezuela's argument for a lower "appearances" standard. Echoing (but not citing) Professor Schreuer, the arbitrators explained that "[t]here thus exists a relatively high burden" for the challenging party and that the "manifest" requirement "necessitates that this lack be clearly and objectively established. Accordingly, it is not sufficient to show only an appearance of a lack of impartiality or independence."[99]

On the other hand, the unchallenged arbitrators in *Urbaser S.A. y Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* ("*Urbaser*")[100] appeared to embrace the "appearances" test. The remaining arbitrators[101] ultimately rejected the claimants' challenge to Professor Campbell McLachlan, which was based on a statement in a book coauthored by Professor McLachlan, Laurence Shore and Matthew Weiniger that evaluated ICSID tribunals' interpretation of most favored nation clauses in bilateral investment treaties.[102] In one extract, the book characterized the *Salini Construttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*[103] decision as "heretical" and stated that the reasoning in *Plama Con-*

96. *See* DAELE, *supra* note 1, at 229 ("[I]n a number of challenge decisions, including two decisions issued by the Chairman of the Administrative Council of ICSID . . . it has been determined that it is not sufficient to establish an appearance of a lack of the required qualities to meet the 'manifest' language in Article 57.").

97. ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) [hereinafter *OPIC Karinum*.]

98. Professor Doug Jones and Professor Guido Santiago Tawil.

99. *OPIC Karinum*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ¶ 45.

100. ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (Aug. 12, 2010) [hereinafter *Urbaser*].

101. Professor Andreas Bucher (President) and Mr. Pedro J. Martinez-Fraga (appointed by claimants).

102. *Urbaser*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 59.

103. ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 16, 2001).

*sortium Ltd. v. Republic of Bulgaria*[104] was to be "strongly preferred."[105]

The remaining arbitrators found that the "protection [against lack of independence or impartiality] does not require that actual bias demonstrate a lack of independence or impartiality. An *appearance* of such bias from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality."[106] The arbitrators in *Urbaser* rejected the challenge,[107] but the Chairman of the ICSID Administrative Council adopted this view of "manifest" in *Blue Bank* and subsequent decisions.

## II.
## Disqualification of ICSID Arbitrators Based on "Appearances"

### A. Blue Bank v. Venezuela

#### 1. *Background and Proposals for Disqualification*

Blue Bank International & Trust (Barbados) Ltd. initiated arbitration against Venezuela in June 2012.[108] The dispute arose out of an alleged breach of a 1994 Barbados-Venezuela bilateral investment treaty,[109] under which Blue Bank claimed damages of approximately $250 million for the termination of

104. ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005).

105. *See* Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles 254–57 (2008) (discussing the passage at issue in *Urbaser*.

106. *Urbaser*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 43 (emphasis added).

107. *Id.* ¶ 58. The arbitrators emphasized that Professor McLachlan's statement was academic opinion and that disqualification would have a chilling effect on the arbitration and academic communities. *Id.* ¶¶ 45–48. The decision explained that for an opinion to sustain a challenge, the challenging party must show that the opinion "is supported by factors related to a supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator." *Id.* ¶ 45.

108. *Blue Bank*, ICSID Case No. ARB/12/20, Request for Arbitration (June 22, 2012).

109. *Id.* ¶¶ 125–69.

concession contracts for the development and management of two hotels in Venezuela.[110]

Blue Bank appointed Mr. José Maria Alonso as arbitrator, while Venezuela appointed Dr. Santiago Torres Bernárdez.[111] The Parties could not agree on the first five candidates for presiding arbitrator proposed by the Chairman Dr. Kim, but the Chairman then appointed Mr. Christer Söderlund despite Respondent's objections.[112] Blue Bank challenged Dr. Bernárdez based on repeat appointments by Argentina and Venezuela and because of alleged "systematic findings in favor of States."[113] Dr. Bernárdez submitted explanations regarding his independence, but resigned from the tribunal before the Chairman's decision on the challenges.[114]

Venezuela challenged Mr. Alonso based on his role as partner of an affiliate of Baker & McKenzie, a global firm that also represented a claimant investor in a different ICSID arbitration, *Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela* ("*Longreef*").[115] Specifically, Mr. Alonso is the Managing Partner of Baker & McKenzie Madrid S.L.P., a Managing Partner of the Litigation and Arbitration Department and a Member of the Steering Committee of the Global Arbitration Practice Group and the Steering Committee of the Baker & McKenzie International European Dispute Practice Group.[116]

---

110. *Id.*¶ 68 & n.26, ¶ 110 & n.39.

111. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶¶ 5–6.

112. *Id.* ¶ 9. Although Venezuela objected, Claimant did not submit any observations regarding Mr. Söderlund's nomination. *Blue Bank*, ICSID Case No. ARB/12/20, Request for Arbitration, ¶¶ 12–13.

113. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 45. Dr. Bernárdez had been appointed to seven arbitrations; present counsel for Venezuela, Mr. Osvaldo César Guglielmino (Guglielmino & Asociados), had represented the appointing party in five of those arbitrations; and Claimant argued that Dr. Bernárdez had not ruled against the party that appointed him in any published decision on a significant issue. *Id.* ¶ 46.

114. *Id.* ¶¶ 50–54, 70.

115. ICSID Case No. ARB/11/5.

116. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶¶ 22–23; *see also* José Maria Alonso Puig, BAKER & MCKENZIE, http://www.bakermckenzie.com/JoseMariaAlonso/.

Baker & McKenzie represented Longreef through its New York and Caracas offices.[117]

The thrust of Venezuela's argument was that Mr. Alonso had "direct and indirect economic interests in the outcome of these two cases against Venezuela."[118] Venezuela asserted that Baker & McKenzie should be considered as a global legal practice, and that separate offices cannot be considered to be a separate legal person for the purpose of a challenge.[119] Venezuela alleged a conflict on the ground that "part of his remuneration" depends on the global returns of Baker & McKenzie and on the results of the Baker & McKenzie offices involved in *Longreef*.[120]

Blue Bank defended Mr. Alonso's independence on two bases. First, noting that Venezuela had mischaracterized the legal standard for disqualification, Blue Bank submitted that Articles 14(1) and 57 of the ICSID Convention create an objective standard, "presumably reasonableness," under which a challenger must establish a "manifest lack of impartiality or independence" that could not be met in this case.[121] Second, Blue Bank contended that Venezuela had misconstrued the *Verein* structure of the Baker & McKenzie group, and Mr. Alonso's partnership and membership on steering committees.[122] Mr. Alonso's explanations also emphasized the firm's structure. Baker & McKenzie Madrid, New York and Caracas are all members of the Swiss *Verein* Baker & McKenzie International; therefore, he argued, they are separate and independent legal entities so that any profit derived from *Longreef*

117. *Id.* ¶ 22. Longreef filed a request for arbitration against Venezuela on February 23, 2011, and at the time of this writing, the arbitration is ongoing; the tribunal held a hearing on jurisdiction on June 18, 2013. Procedural Details, *Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C1400&actionVal=ViewCase.

118. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 26.

119. *Id.* ¶ 25.

120. *Id.* ¶ 26. Venezuela also stated that Mr. Alonso's interests were adverse to those of Venezuela, and that he would be deciding similar or identical issues to those the firm would be arguing against Venezuela in *Longreef*. *Id.* ¶¶ 26–27.

121. *Id.* ¶ 34 (quoting Claimant's Sept. 19 Observations, at *1) (quotation marks omitted).

122. *Id.* ¶ 35.

would be null or insignificant.[123] He argued that his partnership and positions on the steering committees did not meet the standard for disqualification under either the ICSID Convention or IBA Guidelines.[124]

2. *The Chairman's Decision*

The Chairman upheld Venezuela's proposal to disqualify Mr. Alonso.[125] First, the Chairman found that "Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the *appearance* of dependence or bias."[126] On this point, the Chairman cited the prior disqualification decision in *Urbaser*, discussed *supra* at Part I-B(3).[127] The Chairman noted that "manifest" relates to the ease with which the lack of qualities can be perceived, citing several decisions that have construed "manifest" in Article 57 to mean "evident" or "obvious."[128]

The Chairman held that Mr. Alonso "manifestly lacked" the qualities required by Article 14 for two reasons. First, the Chairman found that there was an implied connection between the different Baker & McKenzie firms based on the same corporate name, the existence of an international arbitration steering committee and Mr. Alonso's statement that his remuneration depended "primarily" but not entirely on the re-

123. *Id.* ¶¶ 39–40

124. *Id.* ¶¶ 38, 43.

125. *Id.* ¶ 71(i).

126. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 59 (emphasis added).

127. *Id.* (citing *Urbaser*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 43 ("An appearance of such bias from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality.")).

128. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 61. On this point, the opinion cited: *Suez*, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ¶ 28; *Alpha*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, ¶ 36; *Universal Compression*, ICSID Case No. ARB/10/19, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators, ¶ 70; *Saint-Gobain*, ICSID Case No. ARB/12/13, Decision on the Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal Under Article 57 of the ICSID Convention, ¶ 55.

sults of Baker & McKenzie Madrid.[129] Second, the Chairman found that it was "highly probable" that Mr. Alonso would be in a position to decide issues relevant to the *Longreef* case because of the similarity of issues in that case.[130] Thus, the opinion held that Venezuela had demonstrated that "a third party would find an evident or obvious *appearance* of lack of impartiality on a reasonable evaluation of the facts in this case."[131]

### B. Burlington Resources v. Ecuador

#### 1. *Background and Proposals for Disqualification*

Approximately one month after the challenge decision in *Blue Bank*, the Chairman of the Administrative Council granted another disqualification proposal in *Burlington Resources*.[132] Here, the challenged arbitrator was Professor Francisco Orrego Vicuña, appointed by the claimant (represented by Freshfields Bruckhaus Deringer).[133] The Tribunal—composed of Professor Orrego Vicuña, Professor Kaufmann-Kohler and Professor Brigitte Stern—had issued a decision on jurisdiction in June 2010 and a decision on liability in December 2012.[134]

On June 8, 2013, Ecuador sent an unsigned letter[135] to Professor Orrego Vicuña inquiring about news reports that he

---

129. *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 67.

130. *Id.* ¶ 68.

131. *Id.* ¶ 69 (emphasis added).

132. *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña.

133. *Id.* ¶ 2.

134. *Id.* ¶ 3. Professor Orrego Vicuña filed dissenting opinions regarding both jurisdiction and liability. *See Burlington Resources*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 342 (June 2, 2010); *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 546 (Dec. 14, 2012) (holding that Ecuador had breached its treaty obligations regarding expropriation, but that the Tribunal lacked jurisdiction for Burlington's umbrella clause claims); *Burlington Resources*, ICSID Case No. ARB/08/5, Dissenting Opinion of Arbitrator Orrego Vicuña (Nov. 8, 2012) (arguing that the investor had additional rights under the umbrella clause, and under the fair and equitable treatment clause with respect to expropriation).

135. During a telephone conference on July 11, 2013, counsel for Ecuador apologized for sending the letter unsigned and mentioned that it had been an administrative mistake. *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 5.

had been appointed multiple times by Freshfields.[136] Ecuador requested that Professor Orrego Vicuña disclose all of his appointments, which he did in a letter on July 12, 2013.[137] On July 24, Ecuador, through its counsel Dechert, proposed his disqualification, citing (1) his several appointments by Freshfields, (2) an alleged breach of his continuing duty to disclose any circumstance that may cause his reliability for independent judgment to be questioned and (3) his alleged display of a "blatant lack of impartiality to the detriment of Ecuador" throughout the arbitration.[138]

Freshfields had appointed Professor Orrego Vicuña as arbitrator in seven other ICSID cases.[139] In one of these cases, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* ("*Rusoro*"), Professor Orrego Vicuña had been unsuccessfully challenged based on this same ground: repeat appointments by the same law firm.[140] In *Rusoro*, a nonpublic decision, Venezuela appeared to allege that Professor Orrego Vicuña was dependent on Freshfields because of multiple appointments and failed to disclose his other appointments by the firm.[141] In February 2013, Venezuela sent a letter that objected to Freshfields's view

---

136. *Id.* ¶ 4. The article cited by Ecuador was *Arbitrator Survives Challenge over Freshfields Appointments*, GLOBAL ARB. REV. (June 20, 2013), http://globalarbitrationreview.com/news/article/31674/arbitrator-survives-challenge-freshfields-appointments/.

137. *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 6.

138. *Id.* ¶ 21 (quoting Ecuador's Proposal for Disqualification of Professor Francisco Orrego Vicuña of July 24, 2013).

139. These apparently were: Ampal-American Israel Corp. & Others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11; Eni Dacion B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/04; EVN AG v. Macedonia, ICSID Case No. ARB/09/10; Itera Int'l Energy LLC & Itera Grp. NV v. Georgia, ICSID Case No. ARB/08/07; Pan Am. Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8; Repsol S.A. & Repsol Butano S.A. v. Argentine Republic, ICSID Case No. ARB/12/38 [hereinafter *Repsol*]; Rusoro Mining Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/12/5 [hereinafter *Rusoro*].

140. ICSID Case No. ARB(AF)/12/5, Challenge to Arbitrator Francisco Orrego Vicuña (June 14, 2013) (nonpublic), *reported by* Luke Eric Peterson, *Repeat Appointments by Claimant's Law Firm Were at Center of (Rejected) Challenge to Arbitrator in Venezuela Case, but Less Central in* Repsol v. Argentina *Case*, INV. ARB. REPORTER (Oct. 17, 2013), http://www.iareporter.com/articles/20131017. *See also Arbitrator Survives Challenge over Freshfields Appointments*, *supra* note 136.

141. Peterson, *Repeat Appointments*, *supra* note 140.

of disclosure obligation, but stated that "having considered all the circumstances of which we are aware at this point, we have no current objection to the appointment of Prof. Orrego Vicuña or of any other member of the Tribunal."[142] Venezuela submitted a proposal to disqualify Professor Orrego Vicuña one month later, when he disclosed that he had been appointed in *Repsol S.A. & Repsol Butano S.A. v. Argentine Republic* ("*Repsol*").[143] Based on this letter, the non-challenged arbitrators[144] held that Venezuela had waived its right to challenge Professor Orrego Vicuña on his prior appointments—including those he failed to disclose—because Venezuela was aware of those appointments at the time of the letter.[145]

Turning back to *Burlington Resources*, Ecuador grounded its challange to Professor Orrego Vicuña on his explanations to the challenge, conveyed by letter on July 31.[146] Burlington argued that repeat appointments, without more, could not meet the high standard for disqualification under Article 57, and in any case the proposal was not timely because all of Professor Orrego Vicuña's appointments were publicly disclosed months before Ecuador's challenge in July.[147] Burlington asserted that any claims based upon Professor Orrego Vicuña's explanations of July 31 were unfounded because "he simply exercised his right to respond under the ICSID system."[148] With the remaining arbitrators unable to reach a decision on the challenge, the matter was referred to the Chairman in October 2013.[149]

---

142. *Id.*

143. *Id.*; *Repsol*, *see infra* Part II-D(1).

144. Judge Bruno Simma and Mr. Juan Fernández-Armesto.

145. Peterson, *Repeat Appointments*, *supra* note 140.

146. *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶¶ 13, 32, 61, 79–80.

147. *See id.* ¶¶ 39–51, 53–55 (discussing Burlington's arguments). The ICSID Convention and Arbitration Rules do not specify a time frame in which proposals must be made, but Rule 9 states that a challenging party shall "promptly" file its proposal. ICSID ARBITRATION RULES, *supra* note 14, Rule 9(1); *see also Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 73 (observing that the Rules do not specify a time period and that the timeliness must be evaluated on a case by case basis).

148. *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 52.

149. *Id.* ¶ 16.

2. *The Chairman's Decision*

The Chairman agreed with Burlington that the challenge was timely. All of Professor Orrego Vicuña's other appointments had been publicly available before or by March 7, 2013, and the proposal was dismissed to the extent that it relied on these grounds.[150] But the Chairman upheld the challenge on the basis of one paragraph in the July 31 letter.[151] In closing, Professor Orrego Vicuña addressed certain "ethical grounds"; he explained that it was not the case that he had to resign based upon ethical considerations, and rather, "the real ethical question seems to lie with Dechert's submissions and the handling of confidential information" regarding "disclosure and other matters" in another ICSID case, *Pan American Energy LLC v. Plurinational State of Bolivia*.[152] The Chairman found that these comments served no purpose in addressing the challenge or explaining relevant circumstances.[153] Thus, the Chairman held that "a third person undertaking a reasonable evaluation of the July 31 explanations" would find that this paragraph "manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel."[154]

## C. Caratube v. Kazakhstan

1. *Background and Proposal for Disqualification*

*Caratube* involved a challenge to the respondent-appointed arbitrator, Mr. Bruno Boesch. Kazakhstan's counsel, Curtis, Mallet-Prevost, Colt & Mosle ("Curtis") appointed Mr. Boesch as arbitrator in September 2013. The claimants objected to this appointment through letters in October and November.[155] The other co-arbitrators[156] (rather than the Chair-

150. *Id.* ¶¶ 74–75.

151. *Id.* ¶¶ 79–80.

152. ICSID Case No. ARB/10/8 (discussed at *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶¶ 61, 79).

153. *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 79.

154. *Id.* ¶ 80. The Chairman did not cite *Blue Bank* or any other case for the "appearances" standard or this holding.

155. *Caratube*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶¶ 6–7.

man of the Administrative Council) decided the objection because only Mr. Boesch was challenged.[157]

The claimants based their challenge on two basic grounds. First, they submitted that Mr. Boesch manifestly lacked impartiality and independence in this case because he served as the Curtis-appointed arbitrator in the case of *Ruby Roz Agricol v. Kazakhstan* ("*Ruby Roz*").[158] Although that case was dismissed for lack of jurisdiction, claimants argued that there were substantial similarities between *Ruby Roz* and the present case: the 1994 Kazakh Foreign Investment Law was the basis for the *Ruby Roz* claim and was also relied on in the present case; the cases involved essentially the same factual allegations relating to Kazakhstan's conduct; and Ruby Roz's owner held eight percent of the shares in Caratube and was also the brother-in-law of one of the claimants here.[159] Along these lines, the claimants asserted that Mr. Boesch's participation in *Ruby Roz* resulted in an "imbalance" in the tribunal and risk of prejudgment.[160] This imbalance was aggravated, the claimants noted, because Mr. Boesch "knowingly concealed" his knowledge of the *Ruby Roz* case from the other members of the tribunal.[161] Second, the claimants submitted that Mr. Boesch was unfit to serve as arbitrator because of his multiple appointments by Curtis. Mr. Boesch disclosed two appointments by Curtis, in 2010 and 2011 (one of which was on behalf of Kazahkstan) but did not disclose another appointment by Curtis for an arbitration that was active until August 2010.[162] The claimants asserted a "reasonable doubts" standard under Arti-

156. Dr. Laurent Lévy (President) and Professor Laurent Aynès (appointed by claimants).

157. ICSID CONVENTION, *supra* note 8, art. 58.

158. SCI:3471053 II (UNCITRAL) (Aug. 1, 2013) (*ad hoc* tribunal).

159. *Caratube*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶¶ 24–27.

160. *Id.* ¶ 27.

161. *Id.* ¶ 29.

162. *Id.* ¶ 30. Although an arbitrator's disclosure obligations are limited to three years, Mr. Boesch's failure to disclose was allegedly in violation of Rule 6 of the ICSID Arbitration Rules, requiring an arbitrator to disclose "any other circumstance that might cause [one's] reliability for independent judgment to be questioned by a party." ICSID, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS Rule 6; *Caratube*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 30.

cle 57, while Kazakhstan argued that there must be "clear evidence" of a lack of independence or impartiality.[163]

2. *The Arbitrators' Decision*

The non-challenged arbitrators upheld the challenge to Mr. Boesch[164]—the first reported occasion in which ICSID arbitrators have disqualified their colleague.[165] The arbitrators endorsed the standard from the Chairman's decisions in *Blue Bank* and *Burlington Resources*,[166] that "Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias."[167] The challenger must show that "a third party would find that there is an evident or obvious appearance of impartiality or independence based on a reasonable evaluation of the facts of the present case."[168]

---

163. *Caratube*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶¶ 21–22, 56.

164. *Id.* ¶¶ 90, 110–11.

165. For a discussion of *Pey Casado* and cases in which arbitrators have resigned with and without formal challenge proceedings, see *supra* notes 2–4. *See also* Chiara Giorgetti, *Towards a Revised Threshold for Arbitrators' Challenges Under ICSID?*, KLUWER ARB. BLOG (July 3, 2014), http://kluwerarbitrationblog.com/blog/2014/07/03/towards-a-revised-threshold-for-arbitrators-challenges-under-icsid/ (noting that this disqualification was the first of its kind in ICSID history, and discussing the Article 57 legal standard in *Blue Bank*, *Burlington Resources*, and *Caratube*).

166. The Chairman used the same standards in *Repsol*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify that Majority of the Tribunal, ¶ 71 (original in Spanish); Abaclat & Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on the Proposal to disqualify a Majority of the Tribunal, ¶ 76 (Feb. 4, 2014) [hereinafter *Abaclat*]; and *ConocoPhillips*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 52. For further discussion of these cases, see *infra* Part III-D.

167. *Caratube*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 57 (quoting *Blue Bank*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, ¶ 66; citing *Burlington Resources*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, ¶ 66; *Repsol*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify that Majority of the Tribunal, ¶ 71; *Abaclat*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 76) (quotation marks omitted).

168. *Caratube*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 57.

Under this objective "appearances" standard, the arbitrators first concluded that a reasonable third party would find that Mr. Boesch's objectivity and open-mindedness were tainted because of the similarity of issues and facts with the *Ruby Roz* case.[169] The decision explained that an arbitrator "cannot reasonably be asked to maintain a 'Chinese wall' in his own mind."[170] Second, the unchallenged arbitrators held, based on Mr. Boesch's repeat appointments by Curtis, that a third party would find an "evident or obvious appearance of imbalance within the Tribunal."[171] Whether this could constitute an independent ground for disqualification was left as an open question.[172] The arbitrators did not address whether Mr. Boesch concealed his knowledge of the *Ruby Roz* case from the other members of the tribunal and thereby worsened the imbalance.[173] Venezuela had not squarely briefed the issue, and the remaining arbitrators noted that the two prior appointments by Curtis, without more, did not establish a manifest lack of independence or impartiality.[174]

### D. *Recent Rejections*

Five other decisions since *Blue Bank* suggest that a standard of proof based on "appearances" has gained adherence: these were the decisions by the ICSID Administrative Chairman rejecting challenges in *Repsol*,[175] *Abaclat & Others v. Argentine Republis*,[176] *ConocoPhillips*[177] and the further decisions of the non-challenged arbitrators in *Ĭçkale Ĭnşaat Limited Şirketi v. Turkmenistan* ("*Içkale Ĭnşaat*")[178] and *RSM Production Corp. v.*

169. *Id.* ¶ 90.

170. *Id.* ¶ 75 (quoting EnCana Corp. v. Republic of Ecuador (UNCITRAL), Partial Award on Jurisdiction, ¶ 45 (Feb. 27, 2004)) (quotation marks omitted).

171. *Id.* ¶ 95.

172. *Id.* ¶ 96.

173. *Id.* ¶ 99.

174. *Id.* ¶ 107.

175. ICSID Case No. ARB/13/38, Decision on the Proposal to Disqualify a Majority of the Tribunal.

176. ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal.

177. ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal.

178. ICSID Case No. ARB/10/24, Decision on the Claimant's Proposal to Disqualify Professor Philippe Sands (July 11, 2014) [hereinafter *Içkale Insaat*]

*Saint Lucia* ("*RSM*").[179] In all five, it was stated that Article 57 "do[es] not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias."[180] And although the decisions are not yet public, the Chairman reportedly denied challenges in *Transban Investments Corp. v. Bolivarian Republic of Venezuela* ("*Transban*")[181] and *Koch Minerals SARL & Koch Nitrogen International SARL v. Bolivarian Republic of Venezuela* ("*Koch*").[182]

1. Repsol v. Argentina

*Repsol* involved Argentina's challenge to Professor Francisco Orrego Vicuña, appointed by Repsol, and to Dr. Claus von Wobeser, the President of the Tribunal.[183] Here, Argentina claimed: (1) an apparent bias against Argentina, based on the fact that Professor Orrego Vicuña had served on three tribunals that reached decisions adverse to Argentina, and also wrote an academic article[184] in which he expressed views on certain provisions of the Spain-Argentina BIT not at issue in that case; and (2) earlier work done for the Chilean govern-

179. ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC (Oct. 23, 2014) [hereinafter *RSM*].

180. *Repsol*, ICSID Case No. ARB/13/38, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 71 (The original is in Spanish: "Los Artículos 57 y 58 del Convenio del CIADI no requieren evidencia de dependencia o predisposición real, sino que es suficiente con establecer la aparencia de dependencia o predisposición."); *Abaclat*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 76; *ConocoPhillips*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 52; *İçkale İnşaat*, ICSID Case No. ARB/10/24, Decision on the Claimant's Proposal to Disqualify Professor Philippe Sands, ¶ 117; *RSM*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, ¶ 66.

181. ICSID Case No. ARB/12/24, Decision on Challenges to Arbitrators David Caron and Santiago Torres Bernárdez (May 13, 2014) (nonpublic) [hereinafter *Transban*].

182. ICSID Case No. ARB/11/19 (Feb. 24, 2014) (nonpublic) [hereinafter *Koch*].

183. *Repsol*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 18. The proposal was decided the same day as that in *Burlington Resources*, where the Chairman disqualified Professor Orrego Vicuña. *See supra* Part II-B.

184. Francisco Orrego Vicuña, *Softening Necessity*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 741–51 (M.H. Arsanjani et al. eds., 2011) (discussing essential security clause and the necessity defense under customary international law).

ment, as well as a 1998 legal opinion opposing the extradition of Augosto Pinochet from the U.K. to Spain.[185] Argentina objected to Dr. von Wobeser because he had previously been appointed by an investor in another ICSID case against Argentina[186] and also because of his alleged ties to Freshfields, Repsol's counsel in the present case.[187]

Regarding Professor Orrego Vicuña, the Chairman found that the nullified decisions dealt with separate legal issues and arose in different circumstances; the article involved his opinion on legal issues not present in this case.[188] Vicuña's work for the Government of Chile had no relation to this case, "neither temporally or materially," and therefore was no basis for challenging him.[189] Similarly, the Chairman found Dr. von Wobeser sufficiently independent and impartial because the other Argentina case dealt with different facts and a different treaty, while the arbitrations involving Freshfields were either concluded (the ICC case) or had no relation to the instant

185. *Repsol*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶¶ 24, 41. Regarding General Pinochet, Argentina argued that Professor Orrego Vicuña issued a legal opinion in which he made several legal arguments against the extradition of General Pinochet; this, combined with his official duties (including ambassador) in the de facto Pinochet government, amounted to a defense of a "dictator and systematic violator of human rights" that made Professor Orrego Vicuña unfit to serve as arbitrator. *Id.* ¶ 34.

186. CIT Grp., Inc. v. Republic of Argentina, ICSID Case No. ARB/04/9 (initiated in 2004).

187. *Repsol*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶¶ 49, 54–56. Dr. von Wobeser had served as counsel with Freshfields in a 2004 ICC arbitration and was appointed by Freshfields in two other ICSID cases. *Id.* ¶¶ 54–56.

188. *Id.* ¶¶ 77–79. For discussion of challenges based on academic writings, see Stephan W. Schill, *Editorial*, *in* 15 J. OF WORLD INV. & TRADE 3–8 (2014). Dr. Schill endorses the decisions in *Repsol* and *Urbaser*. He contrasts *Repsol* with the decision in *CC/Devas (Mauritius) Ltd. & Others v. India*, an arbitration under the UNCITRAL Arbitration Rules where Professor Orrego Vicuña was disqualified based upon the same article, but where the defense of "essential security" was actually at issue. *CC/Devas*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Professor Francisco Orrego Vicuña as Co-Arbitrator, ¶¶ 64–65.

189. *Repsol*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶¶ 80–81.

case (the ICSID cases against Guatemala and Equatorial Guinea).[190]

2. Abaclat v. Argentina

*Abaclat* dealt with Argentina's proposal to disqualify Professor Albert Jan van den Berg, appointed by the claimants, and Professor Pierre Tercier, the President of the tribunal.[191] The decision post-dated their issuance of a lengthy jurisdiction/admissibility decision that was adverse to Argentina—these two arbitrators comprised the majority of that tribunal (the other arbitrator dissented).[192] They had also (again by a 2-1 vote, with a vigorous dissent) set an extensive procedural order, dividing the merits proceedings into three main phases and providing for an independent expert (appointed by the tribunal) to verify the claimants' database.[193] This timetable preserved Argentina's ability to make further arguments about jurisdiction and admissibility.[194] When, however, the two arbitrators refused Argentina's request for an extension to file its rejoinder memorial, Argentina sought the disqualification of both arbitrators.[195] Argentina argued that the tribunal's decisions on the briefing schedule demonstrated an "absolute lack of equality in the treatment accorded to the parties to the detriment of the Argentine Republic," which allegedly prevented

190. *Id.* ¶¶ 83–86.

191. *Abaclat*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶¶ 3, 45. The original tribunal consisted of Professor van den Berg, Dr. Robert Briner (President, who resigned for health reasons) and Professor Georges Abi-Saab (appointed by Argentina, who dissented to the tribunal's decision on jurisdiction and subsequently resigned). *Id.* ¶¶ 3–5.

192. Dr. Santiago Torres Bernárdez (appointed by Argentina) dissented to several procedural orders, disagreeing with the database verification process—including the appointment of Dr. Norbert Wühler as the sole expert—and arguing that the claimants should not be given the last opportunity to file a rejoinder on jurisdiction. *See id.* ¶¶ 18–43 (discussing procedural history and dissents).

193. *Id.* ¶¶ 12–15.

194. *Id.* ¶ 16.

195. Argentina argued that, because of the database verification schedule, the claimants had 314 days to prepare a rejoinder on jurisdiction while Argentina had only 10.5 weeks. *Id.* ¶ 43 (quoting a letter from the tribunal on November 13, 2013 that which rejected Argentina's request).

the challenged arbitrators from being relied upon to exercise independent and impartial judgment.[196]

Rejecting this challenge, the Chairman recognized that Argentina's challenges were based on an adverse procedural ruling.[197] The Chairman held (as have previous ICSID tribunals) that the "mere existence of an adverse ruling" is insufficient to demonstrate a manifest lack of the qualities required by Article 14.[198]

3. ConocoPhillips v. Venezuela

In *ConocoPhillips*, the Chairman denied Venezuela's proposal to disqualify the majority of the tribunal after the tribunal had issued its decision on jurisdiction and merits.[199] The majority—Judge Kenneth Keith (President) and Mr. L. Yves Fortier (appointed by the claimants)—found against Venezuela on jurisdiction and merits, with Professor Abi-Saab (appointed by Venezuela) dissenting.[200] Venezuela sought reconsideration of this ruling; the majority denied the request, with Professor Abi-Saab dissenting.[201] Venezuela then challenged Judge Keith and Mr. Fortier based upon their refusal to entertain a request for reconsideration. More specifically, the proposal argued that they lacked independence and impartiality because of a "general attitude vis-à-vis the Respondent," they presumed that Venezuela did not hesitate to violate its obligations, and they relied almost exclusively and uncritically on the claimants' representations during the proceedings.[202]

The Chairman found that the majority's decision on reconsideration could not warrant disqualification.[203] He observed that in denying Venezuela's request for reconsideration and a hearing, "the Tribunal adopted a reasonable procedure

196. *Id.* ¶ 48 (quoting Proposal for the Disqualification of President Pierre Tercier and Arbitrator Albert Jan van den Berg, ¶ 2 (Dec. 19, 2013)).

197. *Id.* ¶¶ 79, 81.

198. *Id.* ¶ 80.

199. *See ConocoPhillips*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶¶ 5–10 (discussing procedural history and disqualification proposal).

200. *Id.* ¶ 5.

201. *Id.* ¶¶ 6–9.

202. *Id.* ¶ 17 (quoting Memorial in Support of Proposal to Disqualify Arbitrators, ¶ 3 (Mar. 21, 2014)) (quotation marks omitted).

203. *Id.* ¶ 55.

that was within its discretion to regulate the conduct of the proceeding."[204]

4. Transban v. Venezuela *and* Koch v. Venezuela

In three decisions that are not yet public, the Chairman dismissed proposals to disqualify arbitrators in *Transban*[205] and in *Koch*.[206] In *Transban*, Venezuela sought to disqualify Professor David Caron (appointed by claimant) while the claimant sought to disqualify Professor Santiago Torres Bernárdez (appointed by Venezuela).[207] Venezuela based its challenge on Professor Caron's role as an expert witness in an earlier ICSID case against Venezuela, *Brandes v. Bolivarian Republic of Venezuela*.[208] The claimant argued that Professor Torres Bernárdez's ties with Venezuela and its counsel, Guglielmino y Asociados, made him unfit to serve on the tribunal.[209] Both proposals were rejected. The reasoning is unclear at this point, but it appears that the challenge to Professor Caron was denied because his expert opinion was given at least five years earlier, in a dispute that involved jurisdictional issues apparently different than those in *Transban*.[210]

---

204. *Id.* The Chairman's reasoning reflects the unique posture of this challenge—after a decision on the merits—and the deferential review of ICSID awards. In response to Venezuela's proposal, the claimants highlighted this posture and connected it to the requirement for a "manifest" lack of independence or impartiality. The claimants argued that the Chairman was not in the position to conduct "scour the factual record" to determine the extent to which the tribunal relied on certain evidence "and that is precisely why evidence of arbitrator bias must be 'obvious' or 'discerned with little effort or without deeper analysis.'" *Id.* ¶ 33 (quoting Claimant's Reply to Respondent's Proposal to Disqualify Judge Kenneth Keith and Maître L. Yves Fortier, ¶ 21 (Mar. 28, 2014)). Otherwise, the claimants asserted, challenges such as this would be full legal and evidentiary appeals, contrary to the ICSID system. *Id.*

205. ICSID Case No. ARB/12/24, Decision on Challenges to Arbitrators David Caron and Santiago Torres Bernárdez (May 13, 2014) (nonpublic).

206. ICSID Case No. ARB/11/19 (Feb. 24, 2014) (nonpublic).

207. Luke Eric Peterson, *ICSID Rejects Challenges to David Caron and Santiago Torres Bernárdez in* Trasban v. Venezuela Arbitration, INV. ARB. REPORTER (May 14, 2014), http://www.iareporter.com/articles/20140514.

208. *Id.*; Brandes Inv. Partners, L.P. v. Bolivarian Republic of Venez., ICSID Case No. ARB/08/3, Award (May 14, 2012).

209. Peterson, *ICSID Rejects Challenges to David Caron and Santiago Torres Bernárdez*, *supra* note 207.

210. *Id.*

In *Koch*, there were two series of challenges. First, the Chairman rejected a challenge by Venezuela to its own party-appointed arbitrator, Judge Florentino Feliciano. The challenge seemed to be based on his alleged incapacity to perform his functions in the case and came soon after Judge Feliciano resigned in *Crystallex International Corp. v. Bolivarian Republic of Venezuela* ("*Crystallex*"), where Venezuela had signaled that it would seek disqualification.[211] The non-challenged arbitrators— Mr. V.V. Veeder and Mr. Marc Lalonde—were unable to decide on the proposal, apparently because they were "equally divided" over the meaning of the ICSID rules on challenges to arbitrators.[212] The proposal thus came before the Chairman, who appeared to find that the facts arising out of the *Crystallex* case did not justify disqualification here.[213]

In the second wave, Venezuela challenged all three members of the tribunal. The basis for these proposals is not apparent because the proposals, observations and decision are non-public. The result, however, is clear: the Chairman rejected the challenges.

5. Ĭçkale Ĭnşaat v. Turkmenistan

In a challenge resembling that in *Caratube*, the remaining co-arbitrators rejected a proposal in *Ĭçkale Ĭnşaat*.[214] Turkmenistan had appointed Professor Philippe Sands here and in two other pending cases, and its counsel, Curtis, had appointed Professor Sands in two additional cases which occurred at least three years prior to the present case.[215] The claimant argued that Professor Sands should be disqualified based on his appointment by Turkmenistan in *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* ("*Kiliç*").[216] This case,

---

211. Luke Eric Peterson, *Arbitrator Challenge Is Rejected in* Koch v. Venezuela *Case, but Two More Challenges Spring Up in Another Venezuela Dispute*, INV. ARB. REPORTER (Mar. 11, 2014), http://www.iareporter.com/articles/20140212_1; *Crystallex*, ICSID Case No. ARB(AF)/11/12 (nonpublic), *reported in* Peterson, *Arbitrator Steps Down After Being Challenged*, *supra* note 3.

212. Peterson, *Arbitrator Challenge Is Rejected*, *supra* note 211.

213. *Id.*

214. ICSID Case No. ARB/10/24, Decision on the Claimant's Proposal to Disqualify Professor Philippe Sands, (July 11, 2014).

215. *Id.* ¶¶ 54, 65.

216. ICSID Case No. ARB/10/1, Decision on Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty (May 7, 2012) (discussed at *Ĭçkale*

according to the claimant, raised the same threshold jurisdiction issues under the same treaty, and Professor Sands would have been exposed to factual and legal matters in that case to which the current tribunal would not have access.[217] The claimant relied directly on *Caratube* to suggest that Professor Sands's impartiality was tainted and the tribunal was manifestly imbalanced, just as Mr. Boesch's impartiality had been tainted by the *Ruby Roz* case.[218]

The other arbitrators were not persuaded. Dr. Veijo Heiskanen (President) and Ms. Carolyn Lamm (appointed by claimant) first cited *Blue Bank* and the "appearances" standard under Article 57.[219] The arbitrators explained that this burden of proof implies that "facts, once established, indicate a 'manifest' lack of independence or impartiality in the sense that such lack can be perceived on the face of the evidence submitted."[220] With this framework, the arbitrators found that this case was unlike *Caratube* because there was "no overlap of facts relevant to the merits of the earlier (*Kiliç*) arbitration," and if any evidence was missing to the disadvantage of the other arbitrators, the tribunal could order the parties to address the issue.[221] Further, the interpretation of Turkey-Turkmenistan BIT was found to be a fundamentally legal, not factual problem; Professor Sands's exposure to certain facts was therefore not relevant to the merits of this dispute.[222] The arbitrators found "no appearance" that Professor Sands had prejudged any relevant issue.[223]

### 6. RSM v. Saint Lucia

Finally, in the most recent decision at the time of this writing, remaining co-arbitrators rejected a challenge in *RSM*.[224]

---

*Ĭnşaat*, ICSID Case No. ARB/10/24, Decision on the Claimant's Proposal to Disqualify Professor Philippe Sands, ¶¶ 67–77).

217. *Ĭçkale Ĭnşaat*, ICSID Case No. ARB/10/14, Decision on the Claimant's Proposal to Disqualify Professor Philippe Sands, ¶¶ 67–77.

218. *Id.* ¶¶ 72–73.

219. *Id.* ¶ 117.

220. *Id.*

221. *Id.* ¶ 119.

222. *Id.*

223. *Id.* ¶ 121.

224. ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC.

In this case, RSM challenged Dr. Gavan Griffith (appointed by Saint Lucia) after the tribunal ordered RSM to post security for costs.[225] The claimant was funded by a third party, and Dr. Griffith had filed an assenting opinion on security in which he criticized the rise of third-party funding in investor-state arbitration.[226] Specifically, Dr. Griffith described "a new industry of mercantile adventurers as professional BIT claims funders" whose "business plan . . . is to embrace a gambler's Nirvana: Heads I win, and Tails I do not lose."[227] Dr. Griffith stated that once it appears a third party is funding an investor's claim, the burden is on the claimant to show why an order for security for costs should not be made.[228] RSM asserted that these comments demonstrated a bias against it as the funded party and that by issuing a separate opinion, Dr. Griffith departed from his role as an impartial and open-minded arbitrator.[229] Further, RSM argued that Dr. Griffith favors respondent parties regardless of the case, based on his comments that a respondent applying for security is not required to establish any position on jurisdiction or the merits at that stage of the case.[230]

The remaining arbitrators, Professor Siegfried Elsing (President) and Judge Edward Nottingham, dismissed the proposal. Discussing the standard for Articles 14 and 57, the arbitrators stated that "proof of bias or dependence must almost always rest on *'appearances'* that is, on circumstantial evidence" because it is "practically impossible" prove a person's actual bias absent a direct admission or declaration.[231] The co-arbitrators then expressly aligned themselves with the co-arbitra-

225. *RSM*, ICSID Case No. ARB/12/10, Decision on Santa Lucia's Request for Security on Costs, ¶ 90.

226. *See id.*, Assenting Reasons of Dr. Gavan Griffith, ¶¶ 10–19.

227. *Id.* ¶¶ 13–14; Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, ¶ 41.

228. *Id.* ¶ 18. *See also* Jarrod Hepburn, *Investor Moves To Disqualify Arbitrator on the Basis of Recent Comments on Third-Party Funding of Arbitration Claims*, INV. ARB. REPORTER (Sept. 10, 2014), http://www.iareporter.com/articles/20140911_1 (discussing challenge and Mr. Griffith's opinion).

229. *RSM*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, ¶ 44.

230. *Id.* ¶¶ 46–47.

231. *Id.* ¶ 66 (emphasis in original). The arbitrators explained further that "the circumstantial evidence demonstrating the appearance of dependence or bias must be plain or obvious to an independent third party on an objective and reasonable evaluation of the evidence." *Id.* ¶ 69.

tors in *Caratube*: "Claimants must show that a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case."[232] Here, the claimant did not meet this burden because Dr. Griffith's views were issued in connection with an application for security on costs—a "*procedural issue*"—but did not deal with the merits of the arbitration, so the co-arbitrators found it "difficult to see" how the comments in the assenting opinion could give rise to an inference about Dr. Griffith's position on the merits.[233] Further, and citing *Abaclat*, the co-arbitrators concluded that an adverse ruling alone could not justify disqualification.[234]

Turning to the substance of the comments, language such as "gambler's Nirvana" and "adventurers" was seen as "radical and perhaps extreme in tone," but insufficient for disqualification because these expressions "serve the purpose of clarifying and emphasizing the point Dr. Griffith purports to make."[235] Finally, the co-arbitrators held that Dr. Griffith's comments did not exhibit a bias against RSM as a funded claimant.[236] His references to BIT arbitrations "might perhaps impair the persuasiveness of the argumentation in substance but cannot affect Dr. Griffith's ability to issue an independent judgment."[237]

---

232. *Id.* ¶ 69 (quoting *Caratube*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 57).

233. *Id.* ¶ 77 (emphasis in original).

234. *Id.* ¶ 80 (citing *Abaclat*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 81). The co-arbitrators also found it irrelevant how scholars and other commentators had perceived Dr. Griffith's opinion: "It is not part of an arbitrator's duties to ensure that his views are well-received or well-perceived among scholars and members of the professions possibly affected by the substance of the decision. Such duty would impair the capacity of an arbitrator to render an independent decision exclusively guided by the facts of the case as submitted by the parties." *Id.* ¶ 81.

235. *Id.* ¶ 84.

236. *Id.* ¶¶ 87, 90.

237. *Id.* ¶ 87. Although the co-arbitrators used the "appearances" test for disqualification, they seemed to reference the "reasonable doubts" standard in closing, observing that Dr. Griffith's arguments and wording "do not cast a reasonable doubt upon Dr. Griffith's capacity to issue an independent and impartial judgment in the present arbitration." *Id.* ¶ 90. For further discussion of this decision, see Luke Eric Peterson, *In Rejecting Challenge to Gavan Griffith, Co-Arbitrators See No Appearance of Bias—And Are Unmoved by Criticisms of "Interested" Third-Party Funders*, INV. ARB. REPORTER (Nov. 23, 2014), http://

## CONCLUSION

This Note has sought to provide an overview of challenges to arbitrators under Articles 14 and 57 of the ICSID Convention. Part I showed that the legal standard for disqualification has historically been a high bar. However, some tribunals have interpreted Articles 14 and 57 to establish a "reasonable doubts" standard, similar to the standard commonly found in commercial arbitration.[238] The result seemed to be a relatively high, but uncertain threshold for disqualification.[239]

As discussed in Part II, *Blue Bank* and subsequent challenge decisions may represent a significant change in challenges to arbitrators under the ICSID Convention. First, the "appearances" standard may set a lower burden of proof for the challenging party, which has resulted in three of only four disqualifications in the history of Article 57 challenges.[240] Second, these recent cases show that the threshold under Article 57 has settled, at least for the time being. Since *Blue Bank* the Chairman of the Administrative Council has consistently analyzed proposals for disqualification with the "appearances" test.[241] Non-challenged arbitrators also adopted this test in *Caratube*, *İçkale İnşaat* and *RSM*.[242]

The question is whether these developments are taking ICSID jurisprudence in the right direction. Some may argue that *Blue Bank* and the subsequent disqualifications turn on a desire to dismiss certain arbitrators rather than a substantively new approach under Articles 14 and 57. In other words, it may

---

www.iareporter.com/articles/20141124; *Co-Arbitrators Give Verdict on Griffith's Funding Comments*, GLOBAL ARB. REV. (Nov. 20, 2014), http://globalarbitrationreview.com/news/article/33182/co-arbitrators-give-verdict-griffiths-funding-comments/.

238. *See supra* Parts I-A(2)(b), B.

239. *See supra* Part I-A(2)(b) (discussing *Saint-Gobain* and the lack of a clear meaning for "manifest" under Article 57).

240. *See supra* note 4 (citing these decisions); *see also* Karel Daele, Saint-Gobain v. Venezuela *and* Blue Bank v. Venezuela*: The Standard for Disqualifying Arbitrators Finally Settled and Lowered*, 29 ICSID REV. No. 2, 296, 305 (2014) ("[I]t definitely lowers the threshold for successfully challenging an arbitrator.").

241. *See supra* Parts II-A, B, D (discussing *Blue Bank*, *Burlington Resources* and subsequent cases); *see also* Daele, *supra* note 240, at 303–04 (noting these recent challenges and the Chairman's continued use of the appearances standard).

242. *See supra* Part II-D.

be asserted that the real developments since *Blue Bank* are the disqualifications themselves instead of a change from "manifest" to "appearance." Others may argue that the "appearances" test serves ICSID arbitration overall. For instance, Professor Stefan Kröll suggests that the relevant "third person" under Articles 14 and 57 "is no longer the third person of 1965 but the third person of 2013 with a critical view of investment arbitration."[243] One might wonder whether the arbitrators in *Urbaser*[244] would have upheld a challenge to Mr. Alonso, or how the *Suez*[245] or *Amco*[246] tribunals would have decided a challenge to Professor Orrego Vicuña. A seemingly less exacting standard may suggest that it will be easier to challenge arbitrators going forward. For instance, repeat appointments have been the basis for recent challenges in *Burlington Resources*, *Rusoro* and *Abaclat*.[247] But the rejected challenges in *Repsol*, *Abaclat*, *ConocoPhillips*, *Transban*, *Koch*, *Içkale İnşaat* and *RSM* illustrate that not every alleged conflict of interest justifies disqualification.[248]

These are open questions, but it appears now that there is a different approach for analyzing dependence or bias under Articles 14 and 57, which has produced a new set of outcomes. A "new" standard might introduce greater certainty as to the approach a tribunal or the Chairman will take when considering a challenge.[249] Indeed, the test has been consistently used since the *Blue Bank* decision. Acceptance of ICSID as a neutral forum is essential to its purposes of promoting economic de-

243. Kröll, *supra* note 94.

244. *Urbaser*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, (Aug 12, 2010).

245. *Suez*, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, (Oct. 22, 200?).

246. ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982) (unpublished), *reported in* W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 INT'L & COMP. L.Q. 26 (1989).

247. *See supra* Part II-B, D (discussing *Burlington Resources* and *Abaclat*).

248. *See supra* Part II-D.

249. The "appearances" test may have also created a more uniform test across investment and commercial arbitration. In lowering the standard, the Chairman has emphasized the point of view of a reasonable third person assessing the facts of the case. *See supra* Parts II-A(2), B(2); *see also* Daele, *supra* note 240, at 302 ("[T]he ICSID Chairman appears to return to the reasonable doubts test as it was applied in the early 2000's.").

velopment by resolving investment disputes; proponents of the *Blue Bank* standard may argue that it serves these ends,[250] but it remains to be seen whether it will result in more predictable outcomes in the long run.

250. *See* Daele, *supra* note 240, at 305 (asserting that the previous standard was "simply too high" when one considers the "fundamental importance of having truly independent and impartial arbitrators to the credibility and survival of international arbitration").