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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

Although many useful treatises on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This eighth edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
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Chapter 11

CHALLENGES TO ARBITRATORS UNDER THE ICSID CONVENTION AND RULES

Chloe J Carswell and Lucy Winnington-Ingram[1]

I INTRODUCTION

Following a record year in 2020, during which there were at least 12 decisions on proposals to disqualify arbitrators and ad hoc committee members within the International Centre for Settlement of Investment Disputes (ICSID) context (beating the previous record in 2018), there were just three decision in 2021, only one of which is in the public domain;[2] however, 2022 saw an uptake in challenges with eight decisions issued.[3]

Having regard to the public availability of decisions and this flurry of activity, this chapter focuses on challenges to arbitrators (and committee members) brought under the ICSID Convention. The chapter first sets out the grounds for disqualification under the ICSID Convention and Rules, then briefly details the prevailing legal standard as developed through ICSID jurisprudence. The majority of the chapter is devoted to a discussion of three categories of alleged conflict,[4] concentrating on the reasoning of publicly available decisions published between 2018 and 2022.

II THE RULES

The main grounds for disqualification of arbitrators under the ICSID Convention are prescribed by Article 57, which provides that:

> *[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. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.*

The reference to Section 2 of Chapter IV concerns the nationality requirements for appointment under Articles 38 and 39 of the ICSID Convention.

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1 Chloe J Carswell was a partner until June 2023 and Lucy Winnington-Ingram is a senior associate at Reed Smith LLP.

2 *Bob Meijer v. Georgia*, ICSID Case No. ARB/20/28), Decision on the Proposal to Disqualify Professor Dr. Klaus Sachs (15 July 2021) (*Meijer*).

3 International Centre for Settlement of Investment Disputes (ICSID) 'Decisions on Disqualification', https://icsid.worldbank.org/cases/content/tables-of-decisions/disqualification (accessed 3 May 2023). In this chapter, we address a selection of the publicly available decisions that fall within the categories of alleged conflict on which this chapter focuses.

4 These categories have been selected on the basis of their recurrent appearance in the publicly available disqualification decisions from 2018 to 2022.

A third ground for disqualification is found in Rule 8 of the ICSID Arbitration Rules, which provides for a situation in which an arbitrator becomes incapacitated or unable to perform the duties of his or her office. The most commonly invoked ground for disqualification is a manifest lack of the qualities required by Article 14(1) of the Convention:

> *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.*

It is well settled that although the English text of Article 14(1) refers only to 'independent judgment', this provision also contains a requirement of 'impartiality' (deriving from the equally authentic Spanish text).

In practice, applications for disqualification under Article 14(1) are almost always premised on an alleged lack of independence or impartiality. It is on these types of challenges that this chapter is focused.

Article 57 of the Convention is supplemented by ICSID Rule 9(1), which requires that a proposal for disqualification be filed promptly.[5] The ICSID Convention and Rules do not specify the number of days within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined in each case. In 2020, the disqualification proposal in *Kazimin v. Latvia* was dismissed in its entirety for a delay in filing of 87 to 90 days,[6] and in *Landesbank v. Spain*,[7] one ground for challenge that arose out of facts that occurred between 2017 and 2019 was likewise dismissed.[8]

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5 ICSID Rule 9(1) provides: 'A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor'.

6 *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. Arb/17/5, Decision on the Proposal to Disqualify All Members of the Tribunal (14 October 2020), (*Kazmin*), Paragraph 62.

7 *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Second Proposal to Disqualify All Members of the Tribunal (15 December 2020) (*Landesbank*), Paragraphs 116 to 124.

8 See, further: in *Urbaser SA & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, the tribunal decided that filing a challenge within 10 days of learning the underlying facts fulfilled the promptness requirement (ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010) (*Urbaser*), Paragraph 19); in *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua SA v. Argentine Republic*, the tribunal held that filing a challenge 53 days after learning the relevant facts was too long (ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 October 2007), Paragraphs 22–26); in *Burlington Resources Inc v. Republic of Ecuador*, two grounds for a challenge were dismissed because they related to facts that had been public for more than four months prior to the filing of the challenge (ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013) (*Burlington*), Paragraphs 71–76); in *CDC Group plc v. Republic of Seychelles*, a filing after 147 days was deemed untimely (ICSID Case No. ARB/02/14, Decision on Annulment (29 June 2005), Paragraph 53); in *Cemex Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, six months was considered too long (ICSID Case No. ARB/08/15, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal (6 November 2009), Paragraph 41); in *Fábrica de Vidrios Los Andes, CA and Owens-Illinois de Venezuela, CA v. Bolivarian Republic of Venezuela*, a challenge filed 45 days after the latest fact on which it was based was considered untimely (ICSID Case No. ARB/12/21,

III THE LEGAL STANDARD UNDER THE ICSID CONVENTION

The legal standard for disqualification in the ICSID context has been closely considered in decisions on disqualification proposals and scholarly commentary. The authors do not propose to rehearse that commentary here in full but rather note that recent decisions suggest a welcome shift in the direction of a consistent and predictable standard.

i The applicable legal standard is objective

In determining whether an arbitrator lacks impartiality or independence, it is well established that the test is objective. As put by the chair of the ICSID Administrative Council in *Blue Bank* and *Burlington*:

> *[t]he applicable legal standard is an 'objective standard based on a reasonable evaluation of the evidence by a third party'. As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.*[9]

This has been consistently reaffirmed, including by a number of decisions in 2018,[10] 2019[11] and 2020,[12] and by the one publicly available decision in 2021.[13]

Decision on the Proposal to Disqualify a Majority of the Tribunal (16 June 2015), Paragraphs 44–46; in *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, a number of grounds were found untimely, including two invoked 377 days and 305 days, respectively, after the date on which the challenging party became aware of the factual basis of the proposal (ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal (3 October 2017) (*Interocean*), Paragraphs 78 and 83).

9 See *Blue Bank International & 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 (12 November 2013) (*Blue Bank*) Paragraph 60; *Burlington*, Paragraph 67.

10 See, e.g., *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32, Decision on the Proposal to Disqualify Professor Brigitte Stern (23 April 2018) (*Elitech*), Paragraph 46; *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov (17 May 2018) (*Raiffeisen*), Paragraph 84; *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on the Proposal to Disqualify Mr Gary B Born (16 March 2018) (*Mathias Kruck*), Paragraphs 51–52.

11 See, e.g., *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Decision on the Proposal to Disqualify Gabriel Bottini (Annulment Proceeding) (29 October 2019), Paragraph 37.

12 See, for example, *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Proposals to Disqualify Messrs James Spigelman, Peter Tomka and John M Townsend (16 June 2020), Paragraph 159; *Kazmin*, Paragraph 71; *Hope Services v. Republic of Cameroon*, ICSID Case No. Arb/20/2, Decision on the Proposal to Disqualify Professor Pierre Mayer (21 August 2020) (*Hope Services*), Paragraph 69; *KS Invest GmbH and TLS Invest GmbH v. The Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on the Proposal to Disqualify Prof. Kaj Hobér (15 May 2020), Paragraph 78 (*KS Invest*); *Landesbank*, Paragraph 131; *VM Solar Jerez GmbH and others v. The Kingdom of Spain*, ICSID Case No. ARB/19/30, Decision on the Proposal to Disqualify Prof. Dr Guido Santiago Tawil (24 July 2020) (*VM Solar Jerez*), Paragraph 88.

13 *Meijer*, Paragraph 75.

ii It is sufficient to establish the appearance of dependence or bias

In the case of *Amco*,[14] the very first challenge to an arbitrator brought under the ICSID Convention in 1982, Indonesia sought the disqualification of the claimants' appointed arbitrator on a number of grounds, including that he had provided tax advice to a principal shareholder in the claimants' company after the commencement of the arbitration. Prior to this, his law firm also had a profit-sharing arrangement with the claimants' counsel.[15] The unchallenged arbitrators are reported to have dismissed the proposal, noting that proof of the existence of facts that indicated a lack of independence was insufficient without strict proof of actual bias.[16] The standard of proof imposed in *Amco* was, accordingly, significantly higher than the 'justifiable doubts' standard typically adopted by other arbitral institutions[17] and rules.[18]

This decision was heavily criticised,[19] and a majority of subsequent decisions have confirmed that Articles 57 and 14(1) do not require proof of actual dependence or bias; rather, it is sufficient for a party to establish the appearance of dependence and bias.

The next challenge, some 20 years later, was to the president of the ad hoc committee in the annulment proceedings in *Vivendi I*.[20] In that case, the unchallenged committee members rejected the findings in the *Amco* decision, noting a proper interpretation of the standard of proof was analogous to that in Rule 3.2 of the International Bar Association (IBA) Code of Ethics, which refers to an 'appearance of bias'.[21]

The rationale for this lower standard was neatly summarised in the 2010 *Urbaser* decision:

> *[t]he requirements of independence and impartiality serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case. In order to be effective this protection 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.*[22]

14 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Proposal to Disqualify an Arbitrator (24 June 1982) (unpublished) (*Amco*).

15 *Compañía de Aguas del Aconquija SA & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001) (*Vivendi I*), Paragraph 21.

16 M N Cleis, 'Disqualification Decisions under the ICSID Convention and Arbitration Rules' in *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions*, Brill, 2017, pp. 31–87, www.jstor.org/stable/10.1163/j.ctt1w8h3hc (accessed 3 May 2023).

17 See, e.g., Permanent Court of Arbitration (PCA) Arbitration Rules, Article 12(1); United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976, Article 10(1); UNCITRAL Arbitration Rules 2010 and 2013, Article 12(1).

18 See, e.g., International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration Adopted by resolution of the IBA Council on Thursday 23 October 2014 (the IBA Guidelines).

19 See the opinion of the unchallenged members of the ad hoc committee in *Vivendi I*, Paragraphs 21–22.

20 The qualities required of tribunal members pursuant to Article 14(1) of the ICSID Convention apply *mutadis mutandis* to ICSID ad hoc committee members.

21 *Vivendi I*, Paragraph 20.

22 *Urbaser*, Paragraph 43.

This was also espoused by the chair of the ICSID Administrative Council in the *Blue Bank*, *Burlington* and *Interocean* decisions,[23] and in the *Raiffeisen* decision, in which the chair relatedly noted that '[a]ll relevant facts shall be taken into account in establishing the appearance of dependence or bias'.[24]

iii Requirements of impartiality or independence, or both, must be manifestly lacking

The nature of these requirements has twice been summarised by the chair of the ICSID Administrative Council in the following terms: 'Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterised by the absence of external control.'[25]

The requirement that these must be manifestly lacking is found in Article 57. As Professor Schreuer observed in his commentary: 'The requirement that the lack of qualities must be 'manifest' imposes a relatively heavy burden of proof on the party making the proposal.'[26] The meaning of 'manifest' has been the subject of interpretation through ICSID jurisprudence.

Karel Daele's monograph, *Challenge and Disqualification of Arbitrators in International Arbitration*, suggests the existence of three generations of decisions on this matter:[27]

a The first comes from *Amco*, in which the unchallenged arbitrators interpreted 'manifest' to mean that a lack of the qualities required pursuant to Article 14(1) must be 'quasi-certain or highly probable'.[28]

b Daele's second generation of decisions, starting with *Vivendi I*, refocused the discussion in this context on a requirement that the circumstances giving rise to the challenge must be established.[29] In this regard, the unchallenged arbitrators noted that the term 'manifest' in Article 57 'must exclude reliance on speculative assumptions or arguments'. Instead, 'the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality'.[30] Without further discussion of the specific meaning of 'manifest', the unchallenged arbitrators concluded that any deficiency of the qualities in Article 14(1) so proven would be manifest.

c The third and most recent generation of decisions, starting with *Blue Bank* in 2013, preferred a more focused and specific interpretation of 'manifest' as meaning 'evident' or 'obvious'.[31]

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23 *Blue Bank*, Paragraph 59; *Burlington*, Paragraph 66; *Interocean*, Paragraph 68.

24 *Raiffeisen*, Paragraph 83.

25 See *Blue Bank*, Paragraph 59; *Burlington*, Paragraph 66; *Green Energy Opportunities I, Sárl and Canepa Green Energy Opportunities II, Sárl v. The Kingdom of Spain*, ICSID Case No. ARB/19/4, Decision on the Proposal to Disqualify Mr Peter Rees QC (19 November 2019) (*Canepa*), Paragraph 51.

26 C Schreuer, et al., *The ICSID Convention: A Commentary* (2009) (Schreuer), p. 1202, Paragraph 19.

27 K Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (2012) (*Daele*).

28 ibid., p. 237, Paragraph 5-034.

29 ibid., p. 239, Paragraph 5-035.

30 *Vivendi I*, Paragraph 25.

31 See, for example: *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, 28 December 2016, Paragraph 54; *Burlington*, Paragraph 68, n.83; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (4 February 2014) (*Abaclat*) Paragraph 71, n.25; *Blue Bank*, Paragraph 61, n.43; *Repsol, SA and Repsol Butano, SA v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser (13 December 2013) (*Repsol*),

This interpretation was recently affirmed in the 2019 *Canepa* decision,[32] in which the unchallenged arbitrators rejected the respondent's submissions that Articles 57 and 14(1) of the ICSID Convention must be interpreted as an obligation to disqualify an arbitrator if there is 'any indication' of a lack of independence or impartiality or 'any doubt' of bias. At the other end of the spectrum, in the 2021 *Meijer* decision, the chair of the ICSID Administrative Council rejected the respondent's attempt to import a higher standard requiring 'established facts which place in clear doubt the appearance of impartiality'.[33]

In its 2019 recommendation to ICSID on Germany's proposal to disqualify the entire tribunal in *Vattenfall*, the Permanent Court of Arbitration (PCA) summarised the applicable legal principles as follows:[34]

> *Pursuant to Article 57 of the ICSID Convention, the challenging party carries the burden to establish, first, the existence of facts on the basis of which a 'manifest' lack of the qualities of an arbitrator can be inferred. Second, the challenging party must establish that such inference is reasonable, considering the circumstances of the case. Article 57 of the ICSID Convention contains an objective standard. Subjective perceptions or beliefs of the challenging party are insufficient to disqualify an arbitrator.*[35]

Paragraph 73, n.58; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal (5 May 2014) (*Conoco I*), Paragraph 47 and Decision on the Proposal to Disqualify a Majority of the Tribunal (1 July 2015), (*Conoco II*), Paragraph 82; *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13 Decision on the Proposal for Disqualification of Mr Bruno Boesch (20 March 2014) (*Caratube II*), Paragraph 64; *Raiffeisen*, Paragraph 79; *Elitech*, Paragraph 40. As described by Daele: 'These terms connote to something that is easily understood, that is readily apparent, that is discerned with little effort. This standard is slightly more strenuous than a pure reasonable doubts test. It will not be sufficient that a challenging party establishes facts that give rise to reasonable doubts as to the arbitrator's competence, impartiality or independence. These doubts will have to be established by "objective evidence", meaning that the link between the established facts and the inference that the arbitrators lacks the required qualities will have to easily understood, clear, straightforward, without requiring a deeper and complex analysis.' (Daele, p. 240, Paragraph 5-037).

32 *Canepa*, Paragraph 50.

33 *Meijer*, Paragraphs 35, 36 and 69.

34 Following a complaint by Germany that the ICSID Secretary General had prejudged the merits of its pending proposal to disqualify the entire tribunal (based on comments reported to have been made by the Secretary General in an interview), ICSID agreed to solicit a non-binding recommendation on the proposal from the PCA. The Secretary General of the PCA recommended that Germany's proposal be dismissed. See Tom Jones, 'PCA to weigh in on challenge to Vattenfall panel', Global Arbitration Review, 25 January 2019, https://globalarbitrationreview.com/pca-weigh-in-challenge-vattenfall-panel (accessed 3 May 2023).

35 *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Recommendation of the Permanent Court of Arbitration pursuant to the Request by ICSID dated 24 January 2019 on the Respondent's Proposal to Disqualify all Members of the Arbitral Tribunal dated 12 November 2018 (4 March 2019), Paragraph 50.

IV CIRCUMSTANCES GIVING RISE TO CHALLENGE UNDER THE ICSID CONVENTION: A SELECTION OF DECISIONS

In establishing the circumstances giving rise to an alleged lack of independence or impartiality, parties have often relied on the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines). They are a non-binding source of guidance that represent an international consensus on minimum standards in relation to conflicts of interest in international arbitration. As such, it is often argued that they can be equated with the view that a reasonable and informed third party would take of a set of circumstances, and that they would form a part of the analysis of a reasonable third party when assessing a conflict situation. Notwithstanding their non-binding nature, previous ICSID decisions have referred to them as 'useful references',[36] 'instructive'[37] and 'a most valuable source of inspiration'.[38]

i Multiple appointments by (or against) the same party

Challenges based on multiple appointments by the same party, or its affiliates, have a long history in ICSID arbitration.

The 2010 *Tidewater* decision remains highly relevant to challenges of this nature. In finding that 'the question whether multiple appointments to arbitral tribunals may impugn the independence or impartiality of an arbitrator is a matter of substance, not of mere mathematical calculation',[39] the unchallenged arbitrators noted that '[t]he starting-point is that multiple appointments as arbitrator by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function'.[40] Either or both of the following factors may give rise to an appearance of a manifest lack of independence or impartiality: (1) the prospect of continued and regular appointment, with attendant financial benefits that might create a relationship of dependence or otherwise influence the arbitrator's judgement; or (2) a material risk that the arbitrator may be influenced by factors outside the record as a result of his or her knowledge derived from the other cases.[41]

This has found support in a majority[42] of later decisions,[43] including the successful challenge in *Caratube II* and the decisions in *Elitech* and *Raiffeisen*.

In *Caratube II*, the only successful challenge in this category, the claimants challenged Kazakhstan's appointed arbitrator, Mr Bruno Boesch, on two main grounds: (1) his three prior appointments by Kazakhstan's counsel, Curtis Mallet-Prevost Colt & Mosle; and (2) his

36 *Blue Bank*, Paragraph 62; *Burlington,* Paragraph 69.

37 *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr Yoram Turbowicz (19 March 2010), Paragraph 56.

38 *Urbaser*, Paragraph 37.

39 *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, CA, et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator (23 December 2010) (*Tidewater*), Paragraph 59.

40 *Tidewater*, Paragraph 60.

41 ibid., Paragraph 62.

42 This view was disavowed less than six months later by the unchallenged arbitrators in *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (5 May 2011), Paragraph 47, who concluded that multiple appointments is a factor that, without more, is worthy of consideration and may lead to the conclusion that it is manifest that the arbitrator cannot be relied on to exercise independent judgement as required by the Convention.

43 See, e.g., *Caratube II*, Paragraph 75.

appointment by Kazakhstan (also represented by Curtis Mallet-Prevost Colt & Mosle) in the *Ruby Roz* United Nations Commission on International Trade Law (UNCITRAL) arbitration, said to have been premised on the same legal grounds and factual allegations as the claims in *Caratube II*.

In relation to point (1), the unchallenged arbitrators noted that the claimants had not made any allegations of Mr Boesch's financial dependency on either Curtis Mallet-Prevost Colt & Mosle or Kazakhstan and, following the proposition in *Tidewater*, the mere fact of his appointments (without more) could not suffice to indicate a manifest lack of independence or impartiality.[44]

Regarding point (2), the unchallenged arbitrators concluded that there was a significant overlap in the underlying facts between the two arbitrations,[45] which satisfied the objective test for disqualification. In particular, Mr Boesch would be privy to information and facts from the *Ruby Roz* proceedings (outside the record of the instant proceedings), leading a reasonable third party to find it highly likely that Mr Boesch would prejudge legal issues in the present arbitration based on the facts underlying the *Ruby Roz* case.[46] The claimants in each case were relying on the same fact witnesses.[47] Relatedly, the same was held to give rise to an appearance of imbalance within the tribunal.[48] The unchallenged arbitrators left it open as to whether this constituted an aggravating factor or a stand-alone ground for disqualification.[49]

In February 2018, the claimants in *Elitech* submitted an application to disqualify Croatia's appointed arbitrator, Professor Brigitte Stern, on the basis that her repeat appointments by Croatia and Croatia's counsel, Latham & Watkins,[50] raised doubts regarding her ability to exercise the qualities enshrined in Article 14(1) of the ICSID Convention.[51] In particular, the claimants noted that, between 2014 and 2016, Professor Stern had been appointed by Croatia in three other investor-state arbitrations, all of which were still current, and, including the case in question, Professor Stern had served as Croatia's appointed arbitrator in four of the seven known investor-state proceedings brought against it.[52]

The claimants relied on the IBA Guidelines, which include, in Clause 3.1.3 of the Orange List,[53] whether the arbitrator has been appointed as arbitrator on two or more occasions by one of the parties within the past three years.[54] To extend the temporal scope of this guideline, the claimants referred to the decision in *Highbury v. Venezuela*,[55] relating to

44 ibid., Paragraph 107.

45 ibid., Paragraphs 78–90.

46 ibid., Paragraphs 90–91.

47 ibid., Paragraph 86.

48 ibid., Paragraphs 92–94.

49 ibid., Paragraph 96.

50 Professor Stern had been appointed as arbitrator twice in the preceding six years by Croatia's counsel, Latham & Watkins (*Elitech*, Paragraph 20). This ground of complaint was not addressed in the decisions.

51 *Elitech*, Paragraphs 12 and 41.

52 ibid., Paragraph 15.

53 The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts regarding the arbitrator's impartiality or independence (IBA Guidelines, Recital II, 3).

54 IBA Guidelines, Part II, Section 3, Clause 3.1.3.

55 *Highbury International AVV, Compañia Minera de Bajo Caroní AVV and Ramstein Trading Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Decision on the Proposal to Disqualify Professor Brigitte Stern (9 June 2015) (*Highbury*).

an (unsuccessful) challenge to Professor Stern three years earlier,[56] which stated that it was sometimes appropriate in investment arbitrations to consider the period beyond the three years specified in the IBA Guidelines.[57]

The claimants also argued that the other current cases in which Professor Stern was appointed by Croatia concerned factual and legal issues that were substantially similar to those to be decided in the proceedings in question.[58] Relying on Clause 3.1.5 of the IBA Guidelines,[59] the claimants asserted that this fact created 'reasonable or clear doubt or real risk in regard to the exercise of independent judgement' and therefore served as a ground for disqualification.[60]

The unchallenged arbitrators (Professors Kaufmann-Kohler and Goatanda) were divided on the issue, and the challenge was accordingly decided by the chair of the ICSID Administrative Council in accordance with ICSID Article 58.[61] In a decision dated 23 April 2018, the chair rejected the claimants' disqualification proposal, reaffirming the *Tidewater* decision and noting that the claimants had failed to set out any circumstance that would call into question Professor Stern's impartiality and independence. The multiplicity of her appointments by Croatia by itself was insufficient,[62] and the claimants had failed to discharge the burden of showing that the presence of common issues was 'sufficient to give rise, objectively, to the appearance of dependence or bias'.[63] Of relevance to this finding, the chair noted that Professor Stern's other appointments were in cases that did not arise in the same industry as in *Elitech*. That those disputes arose under the same treaty was insufficient to give rise to any presumption of bias.[64]

In February 2018, in another ICSID arbitration involving Croatia, Croatia proposed the disqualification of the claimants' appointed arbitrator, Dr Stanimir Alexandrov, in *Raiffeisen*. The application was premised on four points that Croatia asserted gave rise to objective and justifiable doubts regarding Dr Alexandrov's independence and impartiality, including his multiple appointments in treaty cases against Croatia.

In this regard, pointing to Dr Alexandrov's appointment in three other extant treaty arbitrations against Croatia[65] (and a further nomination that was voluntarily declined),[66] Croatia stated that the effect of Dr Alexandrov's serving on 45 per cent of current ICSID claims against the state was that he 'possesse[d] significant and unique influence over the Respondent's financial situation and international reputation which no single arbitrator

56 *Elitech*, Paragraph 14.

57 *Highbury*, Paragraph 84.

58 *Elitech*, Paragraph 18.

59 IBA Guidelines, Part II, Section 3, Clause 3.1.5: 'The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.'

60 *Elitech*, Paragraph 19 (citing *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal (25 February 2008), Paragraph 40).

61 ibid., Paragraph 10.

62 ibid., Paragraph 50.

63 ibid., Paragraph 52.

64 ibid., Paragraph 54.

65 *Raiffeisen*, Paragraphs 17–19.

66 Dr Alexandrov declined an appointment as the claimants' arbitrator in *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37.

should possess'[67] and that he was highly likely to be negatively predisposed against Croatia (albeit if subconsciously) to secure further appointments by future claimants against the state.[68] Furthermore, and as a result of Dr Alexandrov having become an independent arbitrator in September 2017, Croatia argued that his own income was heavily dependent on arbitral appointments by claimants in investment treaty arbitrations.[69] Dr Alexandrov's multiple appointments in cases against Croatia was stated to be equivalent to multiple appointments of an arbitrator by the same claimant or counsel falling under Clause 3.1.3 of the IBA Guidelines Orange List.[70]

Croatia stated that the overall circumstances surrounding Dr Alexandrov's repeat appointments and, in particular, 'the prospect of continued and regular appointment, with the attendant financial benefits' gave rise to justifiable doubts regarding his ability to exercise independent judgement.[71]

Croatia also argued that Dr Alexandrov would be required to consider the same legal issues as in the case of *Gavrilović*, for which he was also sitting as the claimants' arbitrator.[72] In this regard, and owing to the more advanced stage of the *Gavrilović* proceedings, it was contended that Dr Alexandrov would already have formed a view on the compatibility of the Austria–Croatia bilateral investment treaty (BIT) and EU law, before any opportunity to hear the parties' submissions in the case in question arose.[73]

More broadly, Croatia also noted that Dr Alexandrov had served as the claimant-investor's appointee in 35 of the 38 known investment treatment arbitrations in which he has sat as arbitrator.[74]

For reasons that were not disclosed, Croatia's appointed arbitrator, Mr Lazar Tomov, recused himself from deciding the application,[75] which was accordingly considered instead by the chair of the ICSID Administrative Council.

In determining Croatia's complaint regarding Dr Alexandrov's multiple appointments in treaty cases against Croatia, and by claimant-investors more generally, the chair relied on the earlier stated proposition from *Tidewater* and further noted the principle in *Vivendi I*, stating that circumstances giving rise to a finding that a lack of impartiality of independence is manifest 'must negate or place in clear doubt the appearance of impartiality'.[76] In this regard, the chair determined that Croatia had failed to evince an appearance of bias or financial dependence that satisfied this requirement.[77]

Specific to any overlap of factual or legal issues, the chair noted that 'the mere exposure of an arbitrator to the same legal issue in multiple arbitrations is insufficient to disqualify

67 *Raiffeisen*, Paragraph 19.
68 id.
69 ibid., Paragraph 20.
70 ibid., Paragraph 23.
71 ibid., Paragraph 22.
72 See *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39.
73 *Raiffeisen*, Paragraph 26.
74 ibid., Paragraph 16.
75 ibid., Paragraph 10.
76 ibid., Paragraph 88 (citing *Vivendi I*, Paragraph 25).
77 ibid., Paragraph 89.

that arbitrator', and, relying on the unchallenged arbitrators' reasoning in *Caratube II*, that '[t]here must be an additional – significant – overlap of facts that are specific to the merits and the parties involved'.[78]

Both challenges made reference to the frequency with which the challenged arbitrators had been appointed by either investors or states: in the case of Dr Alexandrov, appointments by claimant-investors and, in the case of Professor Stern, appointments by respondent-states. So far as the authors are aware, no challenge based on this (relatively commonplace) occurrence in the ICSID context has ever been successful.

The subject of multiple appointments also arose in three separate challenges brought by Venezuela against Mr Alvaro Castellanos Howell.[79] These challenges, all of which were decided in 2018, concerned Mr Castellanos Howell's appointment as the president of three ad hoc committees in ICSID annulment proceedings involving Venezuela. All three challenges were reported to have been brought on the same grounds and all were rejected.[80] The decision in the *Blue Bank* annulment proceedings (the only one of the decisions that is publicly available) is considered below.

Venezuela relied on Article 3.1.3 of the Orange List of the IBA Guidelines to argue that the appointment of Mr Castellanos Howell to five ad hoc committees overseeing annulment proceedings involving Venezuela was indicative of Mr Castellanos Howell's reliance and financial dependence on such repeat appointments and his resultant lack of independence.[81] In determining the application, the unchallenged committee members noted that the potential risk of conflict identified by Article 3.1.3, which applies to multiple appointments by a party or its affiliate, was not applicable to a recurring professional relationship with ICSID, the appointing authority to ad hoc committees.[82]

At the same time, relying on Article 3.1.5 of the Orange List of the IBA Guidelines, Venezuela also pointed to an alleged commonality of issues across the proceedings to be determined by the committees on which Mr Castellanos Howell sat as president. This was dismissed on the basis that Venezuela had failed to identify any overlap beyond all proceedings being in respect of the annulment of awards in proceedings involving Venezuela.[83]

This issue also arose in Spain's challenge to the claimant's appointed arbitrator, Mr Peter Rees KC, in *Canepa*. The unchallenged arbitrators dismissed this ground of challenge, finding that the fact of Mr Rees KC's two previous appointments by Allen and Overy 'is not, standing alone, a basis for finding either an actual or an appearance of a manifest lack of independence or impartiality when appointed in a third case'.[84]

78 ibid., Paragraph 91 (citing *Caratube II*, Paragraphs 78, 84, 86 and 90).

79 *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v. Venezuela*, ICSID Case No. ARB/10/19 (19 February 2018, unpublished); *OI European Group BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Annulment Proceedings (6 December 2018); *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20 (Annulment Proceedings), Decision on Venezuela's Proposal for the Disqualification of Alvaro Castellanos Howell (2 March 2018) (*Blue Bank* Annulment) (unofficial translation).

80 Alison Ross, 'Castellanos Howell Survives three challenges by Venezuela', Global Arbitration Review, 12 March 2018, www. globalarbitrationreview.com/article/1166554/castellanos-howell-survives-three-challenges-by-venezuela (accessed 3 May 2023).

81 *Blue Bank* Annulment, Paragraph 75.

82 ibid., Paragraphs 98–99.

83 ibid., Paragraphs 104–05.

84 *Canepa*, Paragraph 63.

In 2020, the chair of the ICSID Administrative Council rejected Spain's proposal to disqualify Professor Guido Santiago Tawil on the basis of his multiple appointments by investors against Spain alleged to concern similar issues. In doing so, the chairman affirmed the test set out in *Tidewater* emphasising that the cases involved different (1) investors, (2) law firms representing the claimants, (3) dates of the alleged investment and (4) measures; therefore, the mere existence of these multiple appointments did not rise to the level that would merit questioning the independence and impartiality of an arbitrator.[85]

These decisions suggest that the test set out in *Tidewater* is likely to remain persuasive in determining these types of challenges, and that the threshold for establishing an appearance of dependence or partiality remains high.

ii A pre-existing relationship with one of the parties or their affiliates

Pre-existing professional relationships have formed the basis for a number of challenges under the ICSID Convention. It does not define the kinds of relationships that should be disclosed by arbitrators or considered as a bar to appointment. As noted by Professor Christoph Schreuer:

> *a relationship with a party affecting the eligibility as arbitrator may be of a personal, family or business nature. It would include a permanent attorney/client relationship, any other permanent or recurrent business relationship, employment by a party, including civil service in a State that is a party, substantial participation or shareholding in a company that is a party and any form of relationship in which the arbitrator stands to profit directly or indirectly from the financial gain of a party.*[86]

A pre-existing professional relationship, in this case in the context of a lawyer and client, formed the grounds for challenge in *Amco*. Although the challenge was dismissed, in noting the subsequent criticism of this decision, the unchallenged arbitrators in *Vivendi I* stated that any such relationship can only be justified under the *de minimis* exception.[87] In their estimation, anything more would be sufficient to establish the appearance of dependence.

In *Blue Bank*, the respondent challenged the claimant's appointee, Mr José María Alonso, on the basis that the firm at which he was a partner (Baker McKenzie) also represented the claimant in parallel arbitration proceedings. The chair of the ICSID Administrative Council upheld the respondent's request, inter alia, because, in the words of Professor Schreuer, Mr Alonso 'stood to profit directly or indirectly from the financial gain of a party'.[88]

As the chair observed:

> *The sharing of a corporate name, the existence of an international arbitration steering committee at a global level, and Mr. Alonso's statement that his remuneration depends 'primarily' but not exclusively on the results achieved by the Madrid firm imply a degree of connection or overall coordination between the different firms comprising Baker & McKenzie International.*[89]

85 *VM Solar Jerez GmbH*, Paragraphs 92–93.

86 Schreuer, p. 513, Paragraph 22.

87 *Vivendi I*, Paragraph 22.

88 Schreuer, p. 513, Paragraph 22.

89 *Blue Bank*, Paragraph 67.

In *Generation Ukraine*,[90] the claimant challenged the respondent state's nominee, Dr Jürgen Voss, on the basis that he had been involved in studies and investment policy reviews of Ukraine during his time as Deputy General Counsel of the Multilateral Investment Guarantee Agency. The claimant cited concerns that Dr Voss had developed personal connections with Ukrainian political officials and that these personal connections would deprive him of the capacity for independent judgement.[91] On referral by the unchallenged arbitrators, the request was recommended to be dismissed by the Secretary General of the PCA without reasoning; nevertheless, it must presumably have been considered that previous professional relationships arising out of an arbitrator's participation in a multi-state programme of cooperation, without any resultant financial dependency, was not a basis for disqualification.

The circumstances of the challenge in *Generation Ukraine* are similar in a number of respects to those raised by the claimant in its challenge to Kazakhstan's appointed arbitrator, Professor Rolf Knieper, in *Big Sky*.[92] The challenge, which was successful, centred on Professor Knieper's previous work as a German-employed consultant on various legal reforms across central Asia. In particular, it was alleged that Professor Knieper's work had brought him into close contact with members of the Kazakh judiciary, whose actions the claimant criticised.[93]

The successful challenge in *Big Sky* was distinguished by the co-arbitrators in their 2020 decision on Hope Services's challenge to Cameroon's appointed arbitrator, Professor Pierre Mayer.[94] Hope Services's complaint centred on Professor Mayer's role as counsel to Cameroon some 30 years earlier in the ICSID case of *Klockner v. Cameroon*.[95] In rejecting the challenge, the co-arbitrators noted that the fact that an arbitrator previously served as counsel to a party does not create an automatic presumption of partiality. Instead, this required an assessment case by case by reference to three key factors: (1) the time frame of the relationship (when it started and ended), (2) the materiality of the relationship (including consideration of the frequency of contract) and (3) the existence of any dependency. Weighing these factors, the co-arbitrators concluded that Professor Mayer's role in *Klockner v. Cameroon* did not warrant his disqualification (in particular, this involvement had occurred more than 30 years earlier, and Professor Mayer's role in any event was 'limited and circumscribed').[96]

The only challenge upheld in 2022 also arose out of a pre-existing relationship between the challenged arbitrator and their appointing party. In *Optima v. USA*, the chair of the ICSID Administrative Council upheld the claimant's challenge to the respondent's arbitrator (named only as Mr M) on the basis of his concurrent employment as a member of the US

90 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (unpublished). See Sam Luttrell, *Bias Challenges in International Arbitration: The Need for a 'Real Danger' Test*, Kluwer Law International BV, 2009, p. 231.

91 id.

92 *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Decision on the Proposal for Disqualification of Professor Rolf Knieper (3 May 2018, unpublished) (*Big Sky*).

93 L Peterson, 'In a rare development, a pair of ICSID arbitrators decide that a colleague must be disqualified', IA Reporter (4 May 2018), www.iareporter.com/articles/30250 (accessed 3 May 2023).

94 *Hope Services*.

95 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2.

96 D Charlotin, 'Analysis: Co-arbitrators in Hope Services v. Cameroon find that Pierre Mayer's role in 1980s case against the state does not warrant his disqualification', *IA Reporter* (25 September 2020), www.iareporter.com/articles/analysis-co-arbitrators-in-hope-services-v-cameroon-find-that-pierre-mayers-role-in-1980s-case-against-the-state-does-not-warrant-his-disqualification (accessed 3 May 2023).

Homeland Security Advisory Council. On this basis, the chair found that: 'By serving on a tribunal in an arbitration while simultaneously acting as an advisor to one of the disputing parties, albeit in different matters, the arbitrator inevitably risks creating an appearance that he lacks impartiality and independence.' The fact that he was not compensated for this role was not relevant to the analysis.[97] The claimant's reliance on Mr M's prior employment with the US government until 2009, including as Secretary of Homeland Security, was rejected, with the chair noting that prior government service is not of itself a basis to exclude a person from service as an arbitrator.[98]

Although not strictly within the scope of disqualification, on 11 June 2020, an ICSID ad hoc committee granted Spain's application to annul the award in *Eiser v. Spain*[99] in its entirety. The committee found that the failure by Eiser's party-appointed arbitrator, Dr Alexandrov, to disclose connections with Eiser's damages expert, Mr Carlos Lapuerta of The Brattle Group, in the underlying arbitration resulted in an improper constitution of the tribunal and a serious departure from a fundamental rule of procedure. The committee found that a third party would find an evident or obvious appearance of lack of impartiality based on a reasonable evaluation of the facts.[100]

The committee observed that Dr Alexandrov, in his capacity as counsel in other cases, had appointed The Brattle Group in numerous commercial arbitrations and nine investor-state arbitrations. In four of those cases, two of which were contemporaneous with the *Eiser* proceedings,[101] he had worked closely with Mr Lapuerta. Notably, these facts had also given rise to two challenges to Dr Alexandrov in other cases.[102]

By not disclosing these facts in the *Eiser* arbitration, the committee held that Dr Alexandrov did not fulfil his continuing duty of disclosure and thereby created an obvious appearance of lack of independence or impartiality.[103] In the committee's view, the duty to disclose was warranted because of the customarily close relationships that develop between counsel and damages experts during a case, noting that they cannot possibly maintain

97 *Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC v. United States of America*, ICSID Case No. ARB/21/11, Decision on the Claimant's Proposal to Disqualify Mr. M. as Arbitrator (20 December 2022), Paragraphs 85–86.

98 ibid., Paragraphs 75–76.

99 *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment (11 June 2020) (*Eiser*).

100 ibid., Paragraph 206 (citing the test applied by the ICSID Secretary General in *Blue Bank*, Paragraphs 59–60 and adopted by numerous other ICSID annulment committees).

101 ibid., Paragraphs 55 and 218.

102 *SolEs Badajoz GmbH v. The Kingdom of Spain*, ICSID Case No. ARB/15/38, Disqualification Proposal (18 September 2017) and *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Request for Disqualification of Dr Stanimir Alexandrov (7 July 2017); *Raiffeisen*. In *Raiffeisen*, it was also alleged that Dr Alexandrov and counsel to the claimants, Wilmer Cutler Pickering Hale and Dorr (WilmerHale), had developed a 'special relationship' based on cross-appointments of Dr Alexandrov as arbitrator by WilmerHale as counsel, and of Mr Gary Born, a partner at WilmerHale, as arbitrator by Dr Alexandrov as counsel. This was said to give rise to an appearance of dependence or bias. In this regard, the unchallenged arbitrators held that these 'cross-appointments', without 'something more', were insufficient to satisfy the objective test that Dr Alexandrov appeared lacking in the ability to exercise independence or impartiality, or both (Paragraph 95).

103 *Eiser*, Paragraphs 228–29.

between them the level of professional distance that is required between a party, its counsel and experts on the one hand, and a member of the tribunal on the other. The extent of the past and present interactions accordingly triggered Dr Alexandrov's duty of disclosure.[104]

Eiser marks the first time an ICSID award has been annulled for improper constitution of the tribunal. The unique circumstances of that case were emphasised by the unchallenged arbitrators in *Orazul v. Argentina* in their 2022 decision dismissing the claimant's proposal to disqualify the president, Dr Inka Hanefeld, on the basis that she had failed to disclose the fact that she had sat as co-arbitrator with the respondent's expert in a previous arbitration. The unchallenged arbitrators found that this was not comparable to a situation where an arbitrator and an expert had worked together in several cases as counsel and expert (as in *Eiser*).[105]

These recent decisions confirm that proposals of this nature will be considered in each case. The existence of a personal or professional relationship, without more, will be insufficient, but a risk of financial gain or profit arising out of that relationship is not a prerequisite to disqualification.[106] The most obvious lesson from *Eiser* is that the participants in investor-state dispute settlement (ISDS) proceedings – whether out of an abundance of caution or because of evolving standards – should exercise a heightened standard of vigilance when assessing and disclosing potential conflicts that might give rise to the appearance of arbitrator bias.

iii Prejudgment of issues based on previously expressed views

It is often claimed that previously expressed views give rise to an 'issue conflict'. In what has been referred to as 'the leading decision' on this question, an issue conflict was said to be 'based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view.'[107] Previously expressed opinions have formed the basis for a number of disqualification applications, all of which have been dismissed.

In *Urbaser*, the claimants sought to disqualify Professor Campbell McLachlan, the respondent-appointed arbitrator, on the basis that Professor McLachlan had expressed views in previous academic writings on a key point of law that was at issue in the case. The claimants' argument was that Professor McLachlan would not be able to find against

104 ibid., Paragraphs 227–28.

105 *Orazul International España Holdings SL v. Argentine Republic*, ICSID Case No. ARB/19/25, Decision on the Claimant's Proposal to Disqualify Dr. Inka Hanefeld (11 September 2022).

106 See also, the 2019 decision in *Canepa*, whereby Spain alleged that Mr Rees KC's prior service as the legal director of Shell from 2010 to 2014, during which Shell instructed the claimant's counsel, Allen and Overy, on six occasions for advice regarding mergers and acquisitions or antitrust litigation, demonstrated an 'old and strong mutual trust relationship' between Mr Rees KC and the firm (Paragraph 25). In this regard, the unchallenged arbitrators held that Spain had failed to prove that Mr Rees' position as legal director at Shell 'created an intertwined relationship' between him and Allen and Overy that would manifestly call into question Mr Rees KC's ability to act independently or impartially (Paragraph 70).

107 See the Recommendation Pursuant to the Request by ICSID dated 8 May 2020 on the Respondent's Proposal to Disqualify all Members of the Arbitral Tribunal dated 16 April 2020 in *Vattenfall AB and Others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (6 July 2020), Paragraph 112 (*Vattenfall AB*), citing *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (30 September 2013), Paragraph 58.

the respondent without contradicting his previous statements.[108] The issue in question was whether a most-favoured nation (MFN) clause could apply in relation to dispute settlement provisions. According to the claimant, the application of the MFN clause in the Spain–Argentina BIT was an 'essential element of the conflict that is the object of this arbitration'.[109] Professor McLachlan had previously stated that the protections afforded by the MFN clause 'will not apply to the dispute settlement provisions, unless the parties expressly so provide'.[110]

In dismissing the claimants' disqualification proposal, the unchallenged arbitrators in *Urbaser* observed as follows:

> *What matters is whether the opinions expressed by Prof. McLachlan on the two issues qualified as crucial by Claimants are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceeding.*[111]

In *Saipem*, Pakistan's proposal to disqualify the claimant-appointed arbitrator was based, in part, on the assertion that the arbitrator had expressed opinions in his writing that, in the respondent's view, showed preconceived positions with regard to some of the central issues of the arbitration. In their decision, the unchallenged arbitrators dismissed the proposal, noting that an arbitrator's doctrinal opinions 'expressed in the abstract without reference to any particular case do not affect the arbitrator's impartiality and independence'.[112]

This issue also formed the basis for a pair of challenges to Mr Gary Born in 2018, in *KS Invest* and *Mathias Kruck*. In each case, Spain's challenge was premised on the ground that Mr Born had prejudged issues relevant to the case, said to be demonstrated by Mr Born's (1) dissenting opinion in *JWS Solar*,[113] (2) questioning of counsel in *Masdar*[114] and (3) questioning of a fact witness presented by Spain during the hearing in *KS Invest*.[115]

The unchallenged arbitrators in *Mathias Kruck* issued their decision in March 2018, rejecting Spain's challenge. Dealing first with Mr Born's dissenting opinion in the *JWS Solar* case, the unchallenged arbitrators noted that the analysis and opinions contained therein were fact-specific to that particular case and accordingly did not consider that it gave rise to any doubts regarding Mr Born's impartiality in *Mathias Kruck*.[116] The unchallenged arbitrators also found that there was nothing improper in Mr Born's questioning of counsel and witnesses in the *Masdar* and *KS Invest* cases.[117] The reasoning set out in the *Mathias Kruck*

108 *Urbaser*, Paragraph 41.
109 ibid., Paragraph 23.
110 ibid., Paragraph 21.
111 ibid., Paragraph 44.
112 *Saipem SpA v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Proposal for Disqualification (11 October 2005, unpublished). See Schreuer, pp. 1205–06.
113 *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co KG v. Czech Republic*, PCA Case No. 2014-03, Dissenting Opinion of Arbitrator Gary Born (11 October 2017) (*JSW Solar*).
114 *Masdar Solar & Wind Cooperatief UA v. The Kingdom of Spain*, ICSID Case No. ARB/14/1 (*Masdar*).
115 *Mathias Kruck*, Paragraphs 28–29; *KS Invest*, Paragraph 22.
116 *Mathias Kruck*, Paragraph 54.
117 ibid., Paragraph 55.

decision was thereafter adopted by the unchallenged arbitrators in rejecting Spain's parallel challenge in *KS Invest*.[118] Notwithstanding the twin decisions of the two sets of unchallenged arbitrators, Mr Born later resigned from both the *Mathias Kruck* and *KS Invest* tribunals.

This issue also arose in Venezuela's three separate challenges to Mr Álvaro Castellanos Howell.[119] In those cases, Venezuela took issues with an article written by Mr Castellanos Howell and published in a Guatemalan daily newspaper in 2017.[120] The article discussed proposed amendments to the Guatemalan Constitution, detractors of which argued would lead 'to a scenario like Venezuela'. Commenting on the debate, Mr Castellanos Howell rejected the suggestion that the proposed amendments to the constitution would result in 'imminent "Venezuelisation"', described as a 'scenario where there is no judicial independency from other branches of government'.[121]

In rejecting the *Blue Bank* annulment proposal, the unchallenged committee members held that it was not possible to extrapolate from the article any explicit criticism, or prior judgment, of Venezuela by Mr Castellanos Howell. Rather, the article was intended to reproduce and comment on the views expressed by opponents to constitutional reform, and about which Mr Castellanos Howell did not imply any value judgement.[122]

In 2020, two further disqualification proposals advanced on this basis were dismissed. In another challenge brought by Spain in the *KS Invest* arbitration, this time against Professor Born's replacement, Professor Kaj Hobér, Spain contended that Professor Hobér's dissenting opinion in *Stadtwerke v. Spain* constituted a ground for disqualification.[123] In particular, Spain argued that there existed 'substantial similarities' in *Stadtwerke* 'on essential issues' on which Professor Hobér had already expressed his opinion.[124]

Rejecting the challenge, the chair of the Administrative Council first affirmed that the fact that an arbitrator has expressed views on issues of law or fact common to two or more parallel arbitrations in which that arbitrator is involved is not – without more – evidence of partiality or appearance thereof.[125] The chair went on to note that the two cases involved investments in Spain by unrelated companies, made at different times, and in different sectors that were 'not distinctions without relevance'. Even in cases where issues could be similar, the arguments and the manner in which they are presented by different parties could differ depending on the particularities of each case.[126]

In its proposal to disqualify all three members of the tribunal in *Vattenfall v. Germany*, Germany advanced two independent grounds for the disqualification of Judge Charles Brower based on his dissenting opinion in *PV Investors v. Spain* concerning the right of local Spanish subsidiaries to bring claims as claimants in proceedings under the applicable treaty

118 *KS Invest*, Paragraph 48.

119 Ross.

120 Álvaro Castellanos Howell, 'Ideologization of Justice', *El Periodico*, 5 May 2017 (English translation available at https://res.cloudinary.com/lbresearch/image/upload/v1514989969/castellanos_howell_article_30118_1434.pdf (accessed 3 May 2023)).

121 id.

122 *Blue Bank*, Paragraphs 88–89.

123 *KS Invest GmbH*, Paragraph 87.

124 Broadly, these issues concerned changes to the regulatory framework for renewal energy in Spain.

125 *KS Invest GmbH*, Paragraph 89.

126 ibid., Paragraph 90.

and UNCITRAL Rules.[127] In his recommendation on the proposal, the Secretary General of the PCA, Mr Hugo Siblesz, disagreed that Judge Brower's dissenting opinion amounted to an issue conflict on his part. In particular, Mr Siblesz emphasised the different jurisdictional issues at stake across the arbitrations (which were brought pursuant to different arbitral rules), and that Judge Brower had not made any express finding regarding whether controlled local subsidiaries would be entitled to stand as claimants in proceedings under the ICSID Convention; therefore, Judge Brower could not be said to lack an open mind in considering Germany's jurisdictional objections.[128]

The recent cases confirm that the threshold for this category of challenge remains extremely high. Only in matters in which an independent third party would find circumstances demonstrating the appearance of a firmly held predisposition or prejudgement (and, accordingly, a real risk that the challenged arbitrator would rely on those opinions without giving proper consideration to the facts and evidence put forward by the parties) is the challenge likely to be successful.

V CONCLUSION

The disqualification decisions between 2018 and 2022, which upheld only two of the 26 proposals, demonstrate that disqualification remains the exception rather than the norm. The threshold for disqualification continues to be extremely high, regardless of the circumstances giving rise to the proposal (as to which, multiple appointments remains the most popular).

Notwithstanding this, there is recognition that the increasing number of challenges is representative of growing stakeholder concerns regarding arbitrator independence and impartiality. The draft code of conduct for adjudicators (now in its fifth iteration as at the date of publication), jointly prepared by the ICSID and UNCITRAL secretariats, contains numerous proposals to address criticisms of ISDS in this context, including heightened disclosure obligations[129] and a proposed limit, or total prohibition, on arbitrators holding multiple roles (sometimes referred to as 'double-hatting').[130]

It remains to be seen in what form, and how, the draft code will ultimately be implemented and enforced; however, it seems likely that 2023 will see more disqualification proposals, lending further support to the growing calls for widespread reform.

127 The majority of that tribunal ruled that this was not permitted, as Article 26(7) only provided for the treatment of controlled local subsidiaries under the ICSID Convention. Judge Brower disagreed, giving rise to the Opinion at issue in this disqualification proposal.

128 *Vattenfall AB*, Paragraphs 114–17.

129 Draft Code of Conduct, Article 5: 'Conflicts of Interest: Disclosure Obligations'.

130 ibid., Article 6: 'Limit of Multiple Roles'.