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Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?

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Abstract—This article considers the recent flurry of successful challenges to arbitrators in International Centre for the Settlement of Investment Disputes (ICSID) arbitrations and the statistical context and significance of those decisions in light of the notoriously high historical standard for disqualifying ICSID arbitrators. Specifically, it analyses: (i) the reasoning applied in those recent challenges; (ii) whether the disqualification standards adopted in these decisions represent a notable departure from previous ICSID challenge decisions; and (iii) whether the reasoning applied in each case supports the decisions reached. The article then examines whether the decisions have addressed commentators’ primary criticisms of previous ICSID challenge decisions, in particular, the high hurdle for challenges at ICSID to be successful compared with other major arbitral decisions. In reaching the conclusion that the underlying rationale for the decisions was far from groundbreaking and, in fact, could even be described as regressive in the wider history of disqualifying arbitrators at ICSID, the article argues that a radical new interpretive approach is required for future challenges. Until such an approach is adopted—which enables a more reasoned consideration of the true intentions of the ICSID Convention drafters—criticisms of the system for disqualifying arbitrators at ICSID are likely to persist.

I. INTRODUCTION

On 12 November 2013, Dr Jim Yong Kim, acting in his capacity as Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID) upheld a challenge made by Venezuela against José Maria Alonso.³ Mr Alonso, a partner in Baker & McKenzie’s Madrid office, had been appointed by the Claimant, Blue Bank International & Trust (BBIT), to hear its investment treaty claim against Venezuela. The ruling was made on the basis that Baker & McKenzie’s New York and Caracas offices were, at that time,
acting as claimant’s counsel in another ICSID case against Venezuela. Dr Kim ruled that this indicated a ‘manifest’ lack of impartiality and independence on Mr Alonso’s part—qualities which are required of an arbitrator under Article 14 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

Even before Dr Kim’s underlying decision was published, the result was immediately heralded as ‘groundbreaking’. To understand such laudation, it is necessary to recognize the statistical context and significance of the decision. Prior to the Decision in Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela, there had been over 40 challenges to arbitrators appointed in ICSID arbitrations. In several instances, the arbitrator resigned voluntarily, but, in the remaining cases (where the challenge was adjudicated), only one challenge had been upheld and 35 rejected. The difficulty of successfully disqualifying an ICSID arbitrator is thus notorious; until the final months of 2013, only one arbitrator in ICSID’s nearly 50 year history had ever been disqualified from serving on an arbitral tribunal. This statistic is all the more remarkable when compared with the other major international arbitral systems such as United Nations Commission on International Trade Law (UNCITRAL) rules arbitration (UNCITRAL Rules) or arbitration at the Stockholm Chamber of Commerce (SCC) where a significantly larger proportion of challenges (approximately 30–40 percent) have been successful.

It is also notable that, following the Blue Bank Decision, there have been two further successful challenges to ICSID arbitrators to date. This means that,

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6 Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration (Kluwer 2012). The upheld challenge was the disqualification of Algerian arbitrator Mohammed Bedjaoui from the Vı́ctor Pey Casado v Chile case in 2006 (Vı́ctor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No ARB/98/2). This was based on a third party recommendation prepared at ICSID’s request by the Secretary-General of the Permanent Court of Arbitration (PCA). While the grounds were never made public, the circumstances were unique and exceptional; purportedly based on an allegation that Mr Bedjaoui’s continuing service as an arbitrator could conflict with Algerian law—a claim apparently denied by Mr Bedjaoui—as well as cause potential diplomatic complications for Chile’s foreign relations with Algeria (Mr Bedjaoui had been appointed as Foreign Minister of Algeria).
7 Daele (n 6) Annex 1.

The UNCITRAL statistics look very different. Of the 21 challenge decisions that the author has analysed, six disqualified the arbitrator. In another three decisions, the arbitrators were disqualified unless they were willing to cease their other activities that were deemed to be in conflict with continued service on the tribunal. In the remaining 11 cases, the challenge was rejected. In other words, nine out of the 21 challenges or 43 percent were successful. A study of challenges under the rules of the Arbitration Institute of the [SCC], which apply the same disqualification standard as the UNCITRAL Rules, yield similar statistics. In those, 30 to 40 per cent of the challenges made in the last twenty years have been upheld.

Daele’s analysis does not consider instances where the arbitral tribunal composition changed voluntarily, presumably because such statistics would be difficult to obtain particularly in the case of private SCC or UNCITRAL arbitrations. In any event, the focus of this article is on the result of formal challenge decisions, ie cases where the arbitrator has not voluntarily resigned and the challenging party has sought a formal decision to remove the arbitrator.

9 See the cases of Burlington Resources, Inc v Republic of Ecuador, ICSID Case No ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (13 December 2013) and Caratube International Oil Company LLP and Devinci 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), both of which are discussed below.
whereas previously there had been a solitary successful challenge in 50 years, there have now been three successful challenges in less than six months. Faced with such evidence, there is an obvious temptation to conclude (without further enquiry) that these decisions represent a new dawn in the challenge of ICSID arbitrators. Indeed, the development was even nominated in the category of ‘Best Development of the Past Year’ at the 3rd Annual Global Arbitration Review awards in 2013. Some commentators have gone even further, speculating that the Blue Bank Decision ‘arguably lowers the disqualification threshold’ and may indicate that ICSID is ‘moving in the direction of the “reasonable doubts test” found in most commercial arbitration rules’.

The purpose of this article is not to dampen such optimism and, to be clear, the authors wholeheartedly support a general lowering of the standard required for ICSID arbitrator challenges to succeed. Indeed, a move towards the accepted standard of ‘reasonable doubts’ [employed almost uniformly in the other major arbitral institutions] and prescribed by the International Bar Association (IBA) Guidelines on conflicts of interest would be hugely beneficial to ICSID arbitration generally for various well-documented reasons. However, in order to determine whether the underlying rationale for the recent decisions is as ground-breaking as the actual fact that the challenges were successful, we must examine the decisions themselves more closely. With this aim in mind, the purpose of this article is three-fold:

(i) to provide a brief summary of the reasoning applied in the Blue Bank decision and the subsequent successful challenges in Burlington Resources Inc v Republic of Ecuador and Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan which followed in December 2013 and March 2014, respectively;

(ii) to consider whether the disqualification standards adopted in these decisions represent a notable departure from previous ICSID challenge decisions and

11 Perry (n 5). The comment cited is attributed to Karel Daele. See also Karel Daele, ‘The Standard for Disqualifying Arbitrators Finally Settled and Lowered’ (2014) 29 ICSID Rev—FILJ 296, 302: ‘By doing so, the ICSID Chairman appears to return to the reasonable doubts test as it was applied in the earlier 2000’s.’
12 See eg UNCITRAL Arbitration Rules (2010) art 12: ‘Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.’ Justifiable’ reflects UNCITRAL’s clear intention of establishing an objective standard for impartiality and independence. The IBA Guidelines are also frequently referred to in UNCITRAL challenge decisions. See IBA Guidelines on Conflicts of Interest in International Arbitration (May 2004) (IBA Guidelines).
13 IBA Guidelines, ibid, General Standard (2)(c):

Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

14 It is worth noting at this point that, in addition to the successful challenges in Burlington (n 9) and Caratube (n 9), there have been a number of unsuccessful challenges following the Blue Bank decision (n 3): Repsol SA and Repsol Butano, SA v Argentine Republic, ICSID Case No ARB/12/38, Decision Sobre la Propuesta de Recusacion a la Mayoria del Tribunal (Decision on the Proposal for Disqualification of the Majority of the Tribunal) (13 December 2013); 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); Koch Minerals Särt and Koch Nitrogen International Särt v Bolivarian Republic of Venezuela, ICSID Case No ARB/11/19 (24 February 2014); ConocoPhillips Petrozuata BV, 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) (ConocoPhillips II); and Transhan Investments Corp v Bolivarian Republic of Venezuela, ICSID Case No ARB/12/24 (13 May 2014). This article will not analyse these decisions in detail, but the published decisions (in Repsol, Abaclat and ConocoPhillips II) raise a number of important points which are considered below.
whether the reasoning applied in each case supports the groundbreaking decisions reached; and
(iii) to ascertain whether the decisions have addressed commentators’ primary criticisms of previous ICSID challenge decisions, namely: (a) an overly high hurdle for challenges to be successful (particularly when compared with other major arbitral decisions) and (b) a distinct lack of clarity regarding the standard and procedure unchallenged co-arbitrators and the Administrative Council will adopt in adjudicating challenges. 15

II. THE LEGAL STANDARD FOR DISQUALIFYING AN ARBITRATOR AT ICSID

By way of essential background, Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

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 14.16

Article 14(1) of the ICSID Convention in turn provides:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field 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. 17

While ICSID tribunals have had considerable difficulty developing a single standard of disqualification, it has traditionally been held that the standards of ‘impartiality’ and ‘independent judgment’ embodied in Article 14 of the ICSID Convention,18 coupled with the provisions of Article 57 of the ICSID Convention requiring a ‘manifest lack’ of those qualities, create a higher bar for disqualification than either the standards prescribed by other international arbitral bodies or ordinary conflict rules which adopt a general objective test of ‘reasonable doubts’.

This theoretically higher standard for the disqualification of ICSID arbitrators has been the subject to heavy criticism by commentators and tribunals alike, noting that it arguably sends the unfortunate message that certain relationships between arbitrators and parties that would be unacceptable in most national jurisdictions or even in private commercial arbitration, might be permitted in ICSID arbitrations. 19 Furthermore, Karel Dałe’s work on the legislative history of

15 By way of example, ICSID has occasionally consulted a ‘third party’ for an opinion on the challenge at issue: see e.g., Pey v Chile (n 6). However, ICSID has rarely expounded publicly on the reasons why it views itself as poorly placed or well placed in any given challenge to assess the facts/merits resulting in a distinct lack of clarity.
16 ICSID Convention (n 4) art 57 (emphasis added).
17 ibid art 14 (emphasis added).
18 The English version of art 14 refers only to ‘independent judgment’, but the Spanish version refers to ‘impartiality’. Given that both versions are in force and valid, it is accepted that arbitrators must be both impartial and independent: see Blue Bank (n 3) para 58.
19 See e.g., George Kahale III, ‘Is Investor-State Arbitration Broken?’ (2012) 9 Transnatl Dispute Management 7 and the comments of the non-challenged members of the ad hoc Committee in Compañía de Aguas del Aconcagua SA and Vivendi Universal v Argentine Republic, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001) para 20.
the ICSID Convention has demonstrated that tribunals that have interpreted ‘manifest’ in Article 57 as pertaining to the seriousness of the lack of the required quality may have drifted away from the true intentions of the drafters of the ICSID Convention. Indeed, Daele has argued (persuasively in our opinion) that the relevant sections of the ICSID Convention were never intended to create an impossibly high standard for disqualification, particularly given that such an interpretation of ‘manifest’ is squarely at odds with the commonly perceived purpose of ICSID—to provide host States and investors with an international device to settle their disputes in an arena which offers the highest possible guarantees of legality, fairness and impartiality.

III. THE ‘BLUE BANK BOMB SHELL’

In Blue Bank, the decision to disqualify Alonso turned on the relationship between the associated member firms of Baker & McKenzie International, which is a Swiss Verein. As mentioned above, Baker & McKenzie’s New York and Caracas offices were at the relevant time acting as claimant’s counsel in another ICSID case against Venezuela brought by Dutch investor Longreef. Longreef was being handled by the Baker & McKenzie US limited liability partnership, rather than the Spanish member firm of which Mr Alonso was a partner. Nonetheless, the Chairman found that the ‘sharing of a corporate name’ among the member firms, the existence of an international arbitration steering committee at a global level, and the fact that Mr Alonso’s remuneration as a partner was not limited to the results of the activities of the Spanish member firm ‘imply a degree of connection or overall coordination’ between the different firms within the Verein. Dr Kim went on to note that ‘given the similarity of issues likely to be discussed in Longreef v. Venezuela... it is highly probable that Mr Alonso would be in a position to decide issues that are relevant in Longreef v. Venezuela if he remained an arbitrator in this case’. Dr Kim thus concluded that ‘it has been 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’ and accordingly upheld the challenge.

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20 Daele (n 6) para 5-027.
21 See eg the comments of the deciding co-arbitrators in Amco Asia Corporation and others v Republic of Indonesia, ICSID Case No ARB/81/1, Challenge Decision (24 June 1982). The description of the challenge and quotations used in this footnote are taken from Daele (n 6) paras 5-005–5-007: ‘It goes without saying that in this respect, an absolute impartiality of the sole arbitrator or, as the case may be, of all the members of an arbitral tribunal, is required....’
22 A Swiss Verein is a legal structure broadly equivalent to a voluntary association under English law.
23 Longreef Investments AVV v Bolivarian Republic of Venezuela, ICSID Case No ARB/11/5.
24 Blue Bank (n 3) para 67.
25 ibid para 68.
26 ibid para 69. See also ibid: ‘Accordingly, the Chairman finds that Mr Alonso manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention in this particular case.’
A. The Standard for Disqualification Applied in Blue Bank

While the simple fact that Dr Kim decided to uphold the challenge is significant in itself, it is important to understand the Chairman's interpretation of the ICSID legal standard for disqualification with a view to ascertaining the decision's true significance for future challenges. In this regard, the Chairman was impressively clear (an approach not uniformly adopted in previous challenges) in explaining his reading of Articles 57 and 14 of the ICSID Convention:

59. 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.

60. The 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.

61. Finally, regarding the meaning of the word ‘manifest’ in Article 57 of the Convention, a number of decisions have concluded that it means ‘evident’ or ‘obvious’.

Dr Kim was thus effectively applying four parameters or ‘guidelines’ which are summarized below (with reference to the relevant paragraph of Blue Bank). Somewhat surprisingly, in light of the pioneering end result reached by the Chairman, a closer analysis of these parameters reveals that the underlying rationale for his decision was far from groundbreaking and, in fact, could even be described as regressive in the wider history of adjudicator-interpretations of the legal standard prescribed under Articles 14 and 57 of the ICSID Convention. In short, there does not appear to be a ‘eureka’ moment in Dr Kim’s interpretative reasoning or a notable departure from prior interpretations, which led to his decision:

(i) Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; it is sufficient to establish the appearance of dependence or bias (para 59).

There was nothing novel about this first criterion applied by the Chairman. The Tribunal in Suez Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v Argentina (Suez I) in 2007 noted that ‘[i]ndependence and impartiality are states of mind’ and, as such, can only be ‘inferred from conduct either by the arbitrator in question or persons connected to him or her’ (ie not necessarily proven). Similarly, in Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic, the non-challenged arbitrators held that ‘[a]n 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.

27 ibid paras 59–62 (emphasis added).
28 Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales del Agua SA v Argentine Republic, ICSID Case No ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 October 2007) para 30 (Suez I).
29 Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic, ICSID Case No ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan (12 August 2010) para 43.
(ii) The applicable legal standard is objective rather than subjective (para 60).

Nor was there anything radical about the second parameter applied by the Chairman. In the Urbaser Decision, the non-challenged arbitrators considered their analysis ‘from a reasonable and informed third person’s point of view’, and in Suez I, the non-challenged members of the Tribunal clarified that the applicable legal standard is ‘an objective standard based on a reasonable evaluation of the evidence by a third party’. The phrase ‘objective standard based on a reasonable evaluation of the evidence by a third party’, in isolation, may admittedly imply a move towards the standard of ‘reasonable doubts’ utilized in other international tribunals and the International Bar Association (IBA) Guidelines. However, Dr Kim’s decision regarding the meaning of ‘manifest’ (summarized below) ensured that the theoretical objective standard adopted in Blue Bank remained (as in previous decisions) higher than the objective standard traditionally utilized in such other fora.

(iii) ‘Manifest’ in Article 57 of the ICSID Convention means ‘evident’ or ‘obvious’ (para 61).

The meaning and the intended effect of ‘manifest’ in Article 57 have historically been the most contested and controversial aspects of applying the test for disqualifying arbitrators. They are also generally recognized to be the primary source for ICSID tribunals’/the Administrative Council’s traditional reluctance to disqualify an arbitrator, and hence the cause of the notoriously high evidential burden for the challenging party to demonstrate bias or lack of impartiality. For that reason, before analysing the Chairman’s interpretation of ‘manifest’ in Blue Bank, it is worth briefly summarizing how ICSID adjudicating authorities have developed a working understanding of this term over time.

In the very first case in which a challenge to an arbitrator was decided at ICSID, Amco Asia Corporation and others v Republic of Indonesia, the deciding co-arbitrators noted that:

[I]n the Random House Dictionary, there are four several synonymous words of ‘manifest’, three of them being ‘evident’, ‘obvious’, ‘plain’. That means that 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.

This literal interpretation obviously supports a high evidential burden. In the later Vivendi Universal v Argentine Republic challenge Decision, however, the ad hoc Committee ruled that while ‘manifest’ could be interpreted in this strict sense, such an interpretation would be inconsistent with the need for high standards of impartiality in adjudicating investor–State disputes. Decisions following Amco and Vivendi continued to wrestle with the inherent tension between a dictionary definition of ‘manifest’ and the undesirable consequential effects of rendering.

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30 ibid para 43.
31 Suez I (n 26) para 39.
32 Amco (n 21) para 29. The precise quotation cited is from Daele (n 6) paras 5-005–5-007.
33 Vivendi (n 19) para 20:

In such a case, the arbitrator might be heard to say that, while he might be biased, he was not manifestly biased and that he would therefore continue to sit. As will appear, in light of the object and purpose of Article 57, we do not think this would be a correct interpretation.
challenges at ICSID almost impossible to uphold. Frustratingly, more recent decisions prior to *Blue Bank* seemed to move back towards a more literal definition of ‘manifest’ and hence a higher standard for adjudicating challenges. In *Suez I* the non-challenged members of the Tribunal cited a comment by Christoph Schreuer to the effect that the term ‘manifest’ denotes a ‘relatively heavy burden of proof’. Similar conclusions were reached by the Tribunals in the second *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic (Suez II)* challenge, *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic* and *Nations Energy, Inc and others v Panama*. From these more recent decisions, Professor James Crawford discerns two trends: (a) a move towards the interpretation of ‘manifest’ as meaning ‘certain’ and (b) a (consequent) move away from the ‘reasonable doubts’ standard seen in the UNCITRAL Rules and IBA Guidelines.

Seen in this wider context, Dr Kim’s interpretation of ‘manifest’ as ‘evident’ or ‘obvious’ in *Blue Bank* is far from radical and, in many ways, marks a mere continuation of the trend described by Professor Crawford in relation to the *Suez II, EDF* and *Nations Energy* Decisions. The Chairman is certainly not advocating a reversion to the standard of ‘reasonable doubts’ as suggested by the Tribunal in *Vivendi* nor is his decision a (long awaited) acknowledgment that the term ‘manifest’ may have been ascribed a significance never intended by the ICSID Convention drafters. Instead, the Chairman in *Blue Bank*, as in many previous challenges, focused on a literal interpretation of ‘manifest’ with the result of maintaining a theoretically high burden for the challenging party (notwithstanding that he went on to uphold the challenge).

(iv) Although external rules and guidelines can serve as useful tools (for example, the IBA Guidelines), it is mandatory for the Chairman of ICSID’s Administrative Council to decide challenges pursuant to the provisions of the ICSID Convention (para 62).

Dr Kim’s guidance in this regard went no further than simply affirming statements from prior decisions regarding the tangential relevance to ICSID challenges of guidance issued by the IBA and other arbitral institutions such as UNCITRAL. While prior tribunals have acknowledged the submissions of parties

35 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/03/17 and ICSID Case No ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008) para 29 (Suez II):

[T]he Respondent to succeed must prove such facts that would lead an informed reasonable person to conclude that [the arbitrator] clearly or obviously lacks the quality of being unable to exercise independent judgment and impartiality.

36 *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic, ICSID Case No ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler (25 June 2008) para 68, citing Christoph Schreuer (n 34): ‘Something is “manifest” if it can be “discerned with little effort and without deeper analysis”’.

37 *Nations Energy, Inc and others v Republic of Panama, ICSID Case No ARB/06/19, Challenge to Dr Stanimir A Alexandrov (on the Annulment Committee) (7 September 2011) para 65: ‘We have already established that the burden of proof concerning the facts that make evident and probable to the highest degree, and not only possible...’ [translated from the Spanish by Prof James Crawford ‘Challenges to Arbitrators in ICSID Arbitrations’ (PCA Peace Palace Centenary Seminar, The Hague, 11 October 2013)] <www.pca-cpa.org/showfile.asp?fil_id=2398> accessed 11 July 2014.

38 Crawford ibid.

39 As originally suggested by Karel Daele (n 6) para 5-027.
citing the IBA Guidelines, they were keen to stress that such guidance related primarily to the ‘reasonable doubts’ standard which was not the relevant standard for ICSID tribunals. For example, in the first ConocoPhillips Company and others v Venezuela (ConocoPhillips I) challenge in 2012, the Tribunal made a clear statement that the ‘reasonable doubts’ standard is more appropriate to a judgment based on the IBA Guidelines than one based on the ICSID Convention and ‘the conflict of interest text incorporated in General Standard 2(b) [of the IBA Guidelines] is significantly different from that in Article 57 of the Convention and is easier to satisfy’.40 Dr Kim’s decision did little more than maintain this position.

The above analysis should not detract from the significance of the Blue Bank Decision. It should also be noted that the standard applied by Dr Kim in his written decision may not reflect the practical or even subconscious theoretical test he applied when hearing the Blue Bank challenge [but which was not (for whatever reason) ultimately reflected in his written decision]. Indeed, in practice, the Chairman may have considered the test ‘from a reasonable and informed third person’s point of view’ without being unduly fettered by a literal meaning of ‘manifest’. That notwithstanding, the above analysis of the written Decision reveals that the theoretical legal standard applied in Blue Bank falls victim to the same criticisms made of prior decisions. The Decision also expressly endorses the same literalist interpretation of ‘manifest’ seen in prior decisions, which was the primary contributing factor in the creation of an impossibly high threshold for disqualifying arbitrators. The end result is that, while Blue Bank broke the run of losing arbitrator challenges at ICSID, it appeared to keep the underlying much-maligned theoretical foundations of challenges at ICSID intact.

IV. SUCCESSFUL CHALLENGES FOLLOWING BLUE BANK

Like Blue Bank, the recent successful challenges in Burlington and Caratube are unquestionably of huge significance because of the ultimate decisions reached. However, as with the Blue Bank decision, the theoretical deciding rationale applied by the adjudicating authority in each case is also important to consider.

A. Burlington Resources Inc v Ecuador

On 13 December 2013, in the first challenge to be adjudicated following the Blue Bank decision, Dr Kim upheld a challenge by Ecuador and disqualified claimant-appointed arbitrator Professor Francisco Orrego Vicuña.41

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40 ConocoPhillips Petrozuata BV, 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 L Yves Fortier QC, Arbitrator (27 February 2012) para 59 (ConocoPhillips I): ‘The IBA General Standards are not law for ICSID tribunals. Moreover, in their own terms, they are “Guidelines”; they are not legal rules and do not override any arbitral rules chosen by the parties.’ See also Urbaser (n 29) para 37.
41 Burlington (n 9) paras 80–81.
Ecuador’s proposal for disqualification was based on three grounds:

(i) Professor Vicuña had been appointed by Freshfields Bruckhaus Deringer (Freshfields) in an ‘unacceptably high number of cases’ (namely, eight between 2007 and 2013⁴²);
(ii) Professor Vicuña had breached his continuing obligation to disclose any circumstance that might cause his reliability for independent judgment to be questioned; and
(iii) Professor Vicuña had displayed ‘a blatant lack of impartiality to the detriment of Ecuador’ during the course of the arbitration.⁴³

In his decision, Dr Kim found that Ecuador’s challenges in respect of grounds (i) and (ii) had not been raised promptly, pursuant to Article 9 of the ICSID Convention, and the proposal for disqualification was dismissed to the extent that it relied on these grounds of challenge.⁴⁴

Significantly, however, in Professor Vicuña’s responses to Ecuador’s challenge, he included certain allegations about the conduct of Ecuador’s counsel, Dechert LLP. He said:

Lastly there are some ethical assertions that cannot be left unanswered. Dechert admonishes this arbitrator to resign on ethical grounds as if Dechert’s views were proven correct. This is certainly not the case. Moreover, the real ethical question seems to lie with Dechert’s submissions and the handling of confidential information. To the best of this arbitrator’s knowledge the correspondence concerning disclosure and other matters in Pan American v. Bolivia is part of the confidential record of that case. Dechert is in the knowledge of such correspondence as counsel for Bolivia, but it does not seem appropriate or ethically justified that this information be now used to the advantage of a different client of Dechert, a use that in any event should be consented to by the other party to that case.⁴⁵

Regarding this statement from Professor Vicuña, the Chairman held that:

Such comments do not serve any purpose in addressing the proposal for disqualification or explaining circumstances relevant to the allegations that the arbitrator manifestly lacks independence or impartiality.⁴⁶

The Chairman went on to conclude that ‘a third party undertaking a reasonable evaluation of [Professor Vicuña’s] explanations would conclude that [Professor Vicuña’s statement regarding Dechert] manifestly evidences an appearance of lack of impartiality with respect of the Republic of Ecuador and its counsel’ and, accordingly, upheld Ecuador’s proposal to disqualify Professor Vicuña.⁴⁷ The inference to be drawn from Dr Kim’s comments is that the criticisms aimed at Dechert could not be taken lightly and would not have been made by an impartial arbitrator (regardless of whether such criticisms were correct and/or justified).

⁴² ibid para 21. See also ibid: ‘[Ecuador] considers this an “excessively high number of appointments by the same law firm during such a limited period of time”.’
⁴³ ibid para 20.
⁴⁴ ibid para 75.
⁴⁵ ibid para 61.
⁴⁶ ibid paras 79–80.
⁴⁷ ibid paras 79–80.
In defining the applicable legal standard, Dr Kim copied and pasted his guidance from *Blue Bank*, noting the same four parameters summarized above.\(^{48}\) Therefore, as with the *Blue Bank* Decision, there was nothing overtly ‘ground-breaking’ in the applicable legal standard advocated by the Chairman. Indeed, his concluding remarks emphasized that the relevant comments from Professor Vicuña ‘manifestly’ exhibited an appearance of impartiality, thus underlining the (theoretically) high evidential burden to be met.\(^{49}\) While it should be noted for completeness that the Chairman’s application of this stated standard does hint at a tacit relaxation of the strict standard (in the sense that Professor Vicuña’s comments were assessed from the perspective of a ‘third party undertaking a reasonable evaluation’), as with the grounds cited in *Blue Bank* there is certainly no suggestion that the applicable test is (or should be) ‘reasonable doubts’.\(^{50}\)

**B. Caratube International and Mr Hourani v Kazakhstan**

In *Caratube*, an arbitration arising out of an investment in Kazakhstan’s oil industry, the Claimants filed a request to disqualify Kazakhstan’s appointee, Swiss lawyer Bruno Boesch which was heard on 20 March 2014. Significantly, unlike the Decisions in *Blue Bank* and *Burlington*, the challenge was heard by Mr Boesch’s co-arbitrators, Laurent Levy and Laurent Aynes, who upheld the challenge. To put this in context, this was the first time in ICSID’s 50 year history that a pair of arbitrators agreed to disqualify a colleague. As such, the *Caratube* Decision marks yet further groundbreaking territory, given that it is often speculated that one of the biggest barriers to more successful challenges at ICSID is that the large majority of challenge decisions are taken by the co-arbitrators.\(^ {51}\)

*Caratube*’s challenge centred on two main issues: (i) Mr Boesch’s involvement as an arbitrator in an earlier UNCITRAL Rules arbitration, *Ruby Roz Agricol and Kaseem Omar v Kazakhstan*, where the arbitrators had dismissed claims by Ruby Roz against Kazakhstan on grounds of jurisdiction;\(^ {52}\) and (ii) Mr Boesch’s

\(^{48}\) ibid paras 63–9, noting again that: (i) ICSID Convention (n 4) arts 57 and 14(1) do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias; (ii) the applicable legal standard is objective rather than subjective; (iii) ‘manifest’ in art 57 of the Convention means ‘evident’ or ‘obvious’; and (iv) the IBA Guidelines (n 12), which are not binding in an ICSID challenge, have been recognized as useful guidance in prior cases.

\(^{49}\) *Burlington* (n 9) para 80.

\(^{50}\) ibid paras 79–80. The decision also makes clear that ‘manifest’ should be given a literal meaning:

> Regarding the meaning of the word ‘manifest’ in Article 57 of the Convention, a number of decisions have concluded that it means ‘evident’ or ‘obvious’ and that it relates to the case with which the alleged lack of the required qualities can be perceived.

\(^{51}\) As Karel Daele posits:

> That does not provide for a good system. These are people with whom the challenged individual may have been sitting for a while. There may be broader personal relationships, maybe even unconscious ones. Many of those who are asked to adjudicate a challenge, may have faced one themselves. Thus, they may have sympathy for what it is like to have one’s fitness questioned.

numerous appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP (Curtis) and Kazakhstan.\footnote{\textit{Caratube} (n 9) para 30.}

In relation to the first issue, the Claimants argued that the \textit{Ruby Roz} case arose out of the same factual context (alleged mistreatment of investors due to their purported ties to former Kazakh President, Nursultan Nazarbayev).\footnote{ibid para 25: The \textit{Ruby Roz} case was brought on the basis of the 1994 Kazakh Foreign Investment Law, which is one of the legal instruments relied upon in the present case (and indeed one of the primary bases of jurisdiction in the present arbitration.\ldots.} The Claimants asserted that because, in \textit{Ruby Roz}, Mr Boesch had been privy to the facts, witness testimony and legal arguments that share common issues with those likely to be argued in the ICSID arbitration, it gave rise to an appearance of prejudgment as well as to a potential for an imbalance in knowledge among the arbitrators.\footnote{ibid paras 26–7.}

Despite Mr Boesch’s stated intention to ignore facts from this earlier case, the co-arbitrators ruled that a reasonable third party would doubt an arbitrator’s ability to bifurcate their mind in such a manner:

\[\text{[I]t remains that Mr. Boesch is privy to information that would possibly permit a judgment based on elements not in the record in the present arbitration and hence there is an evident or obvious appearance of lack of impartiality as this concept is understood without any moral appraisal: a reasonable and informed third party observer would hold that Mr. Boesch, even unwittingly, may make a determination in favor of one or as a matter of fact the other party that could be based on such external knowledge.}\footnote{ibid para 89. See also ibid: The Unchallenged Arbitrators have carefully considered Mr Boesch’s Explanations of 13 February 2014, in particular his assurances that he ‘consider[s] that it would be improper for [him] to discuss or disclose anything that transpired in the \textit{Ruby Roz} Agrocol LLP case, and [he] will not do so’.
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On this basis, the co-arbitrators deemed that Mr Boesch manifestly lacked the independence or impartiality required of an ICSID arbitrator in this particular case.\footnote{ibid paras 90–1.} Furthermore, the co-arbitrators held that Mr Boesch’s past activity meant that he:

\[\ldots\text{has benefitted from knowledge of facts on the record in that case which may not be available to the two other arbitrators in the present arbitration (or even be incompatible or contradictory with some facts on the record of the present arbitration), thereby giving rise to a manifest imbalance within the Tribunal to the disadvantage of the Claimants.}\footnote{ibid para 93.}

On the more controversial issue of whether Mr Boesch’s repeat appointments by Curtis and Kazakhstan meant that he could not exercise independent and impartial judgment in the \textit{Caratube} arbitration, the co-arbitrators’ findings were far more conservative, declining to offer any broad definitive view on the controversial issue of repeat appointments, and instead offering several specific observations. The co-arbitrators recalled the \textit{Tidewater v Venezuela} case which suggested that there were two primary ways in which multiple appointments might give rise to a disqualification:

\footnote{ibid paras 90–1.}
[I]f either (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence on the arbitrator’s judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his knowledge derived from other cases. 59

The co-arbitrators noted that, in one respect, the earlier Curtis appointments (specifically in Ruby Roz) posed a problem for Mr Boesch (given that it presented ‘a material risk that the arbitrator may be influenced by factors outside the record’60). For the sake of completeness, they offered views as to whether the multiple appointments of Mr Boesch by Curtis generally posed a risk of dependency or influence based on the Tidewater criteria. As an initial point, it was noted that the Claimants did not allege a financial dependency, thus it was necessary only to look at the scope of some other influence. Based on the record before them, the co-arbitrators could not see grounds for disqualification on the basis of some other alleged (non-financial) influence arising from the multiple appointments. The co-arbitrators also rejected in this context the Claimants’ attempts to draw upon arguments that Mr Boesch should be disqualified because he might be thought to have been appointed due to a perception that he would be inclined to side with the party that appointed him:

What is decisive is not a party’s or its counsel’s expectation that the arbitrator appointed by them will decide in their favor, but the appointed arbitrator’s ability to exercise independent judgment. The fact that Mr. Boesch does not have prior ICSID experience does not constitute an objective circumstance demonstrating that his prior appointments manifestly influence his ability to exercise independent judgment in the present arbitration.61

C. The Standard for Disqualification adopted by the Co-Arbitrators in Caratube

Interestingly, the co-arbitrators in Caratube took their lead from the raft of recent challenge decisions in which Dr Kim adopted the same formulaic standard described above in relation to the Blue Bank and Burlington Decisions:62

Having considered the Parties’ respective positions and in the light of recent ICSID jurisprudence, the Unchallenged Arbitrators find that the applicable burden of proof is expressed in the Decision on the Parties’ Proposal to Disqualify a Majority of the Tribunal in Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, as subsequently confirmed in Burlington Resources, Inc. v. Republic of Ecuador, Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina and Abaclat and Others v. Argentine Republic. In these cases, Dr. Kim, the Chairman of the ICSID Administrative Council 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’.63

59 ibid para 104; Tidewater Investment SRL and Tidewater Caribe, CA v Bolivarian Republic of Venezuela, ICSID Case No ARB/10/5, Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator (23 December 2010) para 62.
60 Caratube (n 9) para 104.
61 ibid para 107.
62 As summarized below (n 69), the unsuccessful challenges in Repsol (n 14), Abaclat (n 14) and ConocoPhillips II (n 14) (the only published unsuccessful decisions since Blue Bank to date) were also adjudicated by Dr Kim who adopted the same formulaic legal standard he had employed in Blue Bank (n 3) and Burlington (n 9) in each decision.
63 Caratube (n 9) para 57.
On the key question of the burden of proof prescribed by the term ‘manifest’, the parties in *Caratube* presented conflicting interpretations. The Claimants argued that ‘Mr. Boesch must be disqualified if they can show that there are “reasonable doubts” as to his independence or impartiality’. The Respondent, on the other hand, submitted that ‘the existence of reasonable doubts is not enough. Instead, the Claimants must submit clear evidence of Mr Boesch’s lack of impartiality and independence’. The unchallenged arbitrators sided squarely with the Respondent, again reaffirming the high evidential burden to be met in order to disqualify an arbitrator at ICSID:

> [T]he 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.66

On the subject of the relevance of the IBA Guidelines in the context of ICSID challenges, the co-arbitrators added that ‘the Unchallenged Arbitrators are only bound by the standards set forth in the ICSID Convention and Arbitration Rules. They are not bound by the IBA Guidelines and consider them as merely indicative.’67

Overall, therefore, notwithstanding the final decision of the unchallenged arbitrators in *Caratube*, their interpretation of the guidelines prescribed by Dr Kim in his recent decisions, like Dr Kim’s own decisions, reverted to a more traditional interpretation of the legal standard. Specifically, the unchallenged arbitrators clearly affirmed that ‘manifest’ meant ‘evident’ or ‘obvious’. Accordingly, while the unchallenged arbitrators, in assessing Mr Boesch’s partiality, drew upon the standard of a ‘reasonable third-party’, this affirmation of the fundamentally higher standard implied by ‘manifest’ remained.

**V. UNSUCCESSFUL CHALLENGES FOLLOWING BLUE BANK**

The unsuccessful challenges in *Repsol, Abaclat, Koch Minerals Sàrl and Koch Nitrogen International Sàrl v Bolivarian Republic of Venezuela, ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela (ConocoPhillips II) and Transban Investments Corp v Bolivarian Republic of Venezuela* have, for obvious reasons, not received the same

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64 ibid para 56; thus advocating the traditional ‘reasonable doubts’ standard utilized in the IBA Guidelines and UNCITRAL Rules.

65 ibid para 56.

66 ibid para 57 (emphasis added).

67 ibid para 59. The paragraph continues:

This does not mean that bodies deciding on challenges may not seek guidance from the Guidelines as a helpful instrument reflecting a transnational consensus on their subject matter. Other arbitrators have recognized the usefulness of the IBA Guidelines, albeit always with the understanding of their non-binding nature. For instance, in *Blue Bank and Burlington*, the Chairman of the ICSID Administrative Council found them to be ‘useful references’.

68 ibid para 89:

[A] reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case, Mr Boesch’s objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted.
level of attention as the successful challenges in *Blue Bank*, *Burlington* and *Caratube*. However, there are a number of points to highlight from the published decisions (in *Repsol*, *Abaclat* and *ConocoPhillips II*) which help to provide a further degree of clarity to the legacy of *Blue Bank* and the future of arbitral challenges at ICSID:

(i) Each of the published unsuccessful decisions adopted the same formulation of the legal standard prescribed by Dr Kim in the *Blue Bank* decision.

As in the *Burlington* decision, Dr Kim, who presided over each of the published unsuccessful decisions in his capacity as Chairman, adopted an identical formulation of the disqualification standard he had utilized in *Blue Bank*.\(^{69}\) Given that the same standard was adopted by the unchallenged arbitrators in *Caratube*, this strongly suggests that, for the first time, the ICSID Administrative Council is moving towards a standard formulation of a test for disqualification of arbitrators, suggesting a consistency not seen to date in the history of challenges at ICSID.\(^{70}\) Unfortunately, this uniform standard is disappointingly conservative and arguably confirms many fears and criticisms regarding the higher standard for disqualification of ICSID arbitrators. This also arguably affirms the unfortunate message that certain relationships and predispositions that would be unacceptable in other tribunals and national courts are allowable in the ICSID context.

Furthermore, the generality of the standard adopted by Dr Kim and his failure to fully explain his application of that standard (in any of his decisions in *Blue Bank*, *Burlington*, *Repsol*, *Abaclat* and *ConocoPhillips II*) is equally disappointing. In each written decision, while Dr Kim provides a consistent formulation of parameters he seeks to apply, he devotes little more than approximately a page in each case (or sometimes less) to applying this test to the facts and grounds for disqualification at issue.\(^{71}\) The result is that a large degree of uncertainty remains as to how the general standards advocated by Dr Kim are to be applied to future challenges. Future adjudicating authorities will therefore likely retain a large degree of discretion in applying the parameters advocated by Dr Kim, resulting in yet further inconsistency in decisions and uncertainty for parties.

(ii) The decision in *Repsol* arguably affirms that a clear difference remains between the standard to be adopted for challenging an arbitrator in ICSID and that utilized in UNCITRAL and other commercial tribunals.

In *Repsol*, Argentina proposed the disqualification of Professor Vícuña on the basis of (amongst other things) alleged bias arising out of his role in co-authoring three earlier awards (in arbitrations between Argentina and each of CMS, Enron and Sempra\(^{72}\)) that were later partially or fully annulled, but whose reasoning the Chilean arbitrator continues to defend in public statements. Dr Kim rejected this

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\(^{69}\) See *Abaclat* (n 14) paras 70–8; *ConocoPhillips II* (n 14) paras 46–53; and *Repsol* (n 14) paras 65–74.

\(^{70}\) *Caratube* (n 9) para 56.

\(^{71}\) See eg *Blue Bank* (n 3) paras 66–9 (a mere three paragraphs of application); *Burlington* (n 9) paras 70–80; *Repsol* (n 14) paras 75–86; *Abaclat* (n 14) paras 70–82; and *ConocoPhillips II* (n 14) paras 54–6 (little more than a paragraph of application).

\(^{72}\) CMS Gas Transmission Company v Argentine Republic, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007); Sempra Energy International v Argentine Republic, ICSID Case No ARB/02/16, Decision on Annulment (29 June 2010); Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic, ICSID Case No ARB/01/3, Decision on Annulment (30 July 2010). Argentina also sought the disqualification of Dr Claus von Wobeser on separate grounds which was also rejected and is discussed below [*Repsol* (n 14) paras 53–6 and 86].
ground and observed that the earlier arbitrations between Argentina and CMS, Enron and Sempra were based on ‘a different set of facts, related to different laws, and arose at different times to that of the present case’. Significantly, this outcome differed from the recent UNCITRAL case, *CC/Devas v India*,74 where Professor Vicuña’s views in the same prior arbitral rulings (*CMS Gas Transmission Company v Argentine Republic, Sempra Energy International v Argentine Republic* and *Enron Creditors Recovery Corporation and Ponderosa Assets, LP v Argentine Republic*) and same academic publications formed the basis for his successful disqualification. Adopting the traditional ‘reasonable doubts’ standard, it was determined in the UNCITRAL case that a reasonable observer might conclude that Professor Vicuña had fixed views with respect to questions that were likely to be aired in the India arbitration.75 Accordingly, in the ICSID and UNCITRAL cases, where essentially the same grounds for disqualification were at issue, it appears that the higher evidential burden for challenges to arbitrators at ICSID prevented the arbitrator’s disqualification, notwithstanding evidence of ‘reasonable doubts’ as to his impartiality.

To provide further support to the contention that challenges are more likely to be successful by adopting a standard of ‘reasonable doubts’ (as opposed to the ‘manifest’ standard contained in Article 57 of the ICSID Convention), we can consider how a particular type of challenge in investment disputes has been treated under both the ICSID and UNCITRAL standards and compare the results. One of the most frequent challenges to arbitrators being appointed is that they have previously worked for a law firm or government department with a history with the appointer.76 This ground has been raised as the basis for a challenge at ICSID on a number of occasions without success. In *Amco*, the challenge by Indonesia was premised on the basis that the arbitrator in question had previously advised an individual who controlled the Claimant companies and the Claimant’s counsel had previously shared both profits and office space with the challenged arbitrator (albeit this relationship had been terminated before the commencement of the *Amco* arbitration).77 It is not difficult to see why such a relationship could give rise to ‘reasonable doubts’ as to the arbitrator’s independence. However, the challenge in *Amco* was rejected because the facts did not present a sufficient degree of partiality to be considered a ‘manifest’ lack of independence.78 Similar challenges were rejected under ICSID rules in *ConocoPhillips I* and *Saint-Gobain v*

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73 *Repos* (n 14) para 77 (translated from Spanish).
74 *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telecom Devas Mauritius Limited v India*, UNCITRAL, 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) paras 64–5.
75 An alternative view is that the reason for this different outcome may be found in the different treaty wording at issue in the ICSID and UNCITRAL decisions. A notable difference between *CC/Devas* (ibid) and *Repos* (n 14) is that the relevant BIT in the former case contained an ‘essential security’ clause [*CC/Devas* (ibid) para 3]—similar to that found in the USA–Argentina treaty that Professor Vicuña had written about in the earlier CMS (n 72), *Sempra* (n 72) and *Enron* (n 72) cases, as well as in academic statements. By contrast, and as noted by Dr Kim, in his *Repos* decision, the Spain–Argentina BIT does not contain an ‘essential security’ clause similar to the one seen in the USA–Argentina BIT and also the India–Mauritius BIT [*Repos* (n 14) paras 77–9]. However, whether this more limited degree of factual similarity (in the ICSID case) would, in any event, have resulted in his disqualification under the ‘reasonable doubts’ standard remains in question.
77 *Amco* (n 21) [description taken from Fry and Stampalija (n 76) 209–10].
78 ibid [description taken from Fry and Stampalija Fry and Stampalija (n 76) 209–10].
However, significantly, an equivalent challenge adjudicated under UNCITRAL Rules was upheld. In *ICS v Argentina*, Argentina challenged the Claimant-appointed arbitrator, Stanimir Alexandrov, based on: (i) the fact that his law firm had represented an entity potentially linked to the Claimant; and (ii) both Mr Alexandrov and his law firm were counsel in other claims against Argentina. Jernej Sekolec of the UNCITRAL Secretariat applied the standard of the UNCITRAL Rules (reasonable doubts), took into consideration the IBA Guidelines and, significantly, upheld the challenge. Mr Sekolec found that both arbitrations, although unrelated, referred to similar issues and were raised against the same country, which was why such a situation could generate an appearance of bias; Mr Alexandrov was accordingly disqualified. It therefore seems clear that a frequently relied upon (and arguably justifiable) ground for disqualification of an arbitrator which would lead to 'reasonable doubts' regarding the independence of the arbitrator in question and potential disqualification in an UNCITRAL Rules arbitration would be highly unlikely to give rise to a successful disqualification under ICSID rules.

Overall, the decision in *Repsol* along with a comparative analysis of how similar grounds for disqualification have been adjudicated under ICSID and 'reasonable doubts' standards provide clear evidence that a move towards the 'reasonable doubts' standard at ICSID would result in a greater number of challenges being upheld. Perhaps more importantly, it would also mean that ICSID would no longer be perceived as providing a lower standard of protection against bias than equivalent international arbitral bodies.

(iii) Even following *Blue Bank* the Administrative Council has shown reluctance to tackle and uphold challenges based on the more controversial grounds for disqualifying an arbitrator at ICSID.

Specifically, the Administrative Council has shown reluctance to uphold challenges based on grounds that either directly or indirectly criticize or cast dispersions on the character of the challenged arbitrators. This is also true of the co-arbitrators in *Caratube* where, as noted above, they were reluctant to offer any broad definitive view on the controversial issue of repeat appointments by law firms/respondent States and rejected a challenge based on repeat appointments. In *Repsol*, Argentina raised an issue with Mr von Wobeser's prior involvement with Repsol's counsel, Freshfields, in three disputes. However, Dr Kim dismissed these grounds and summed up his analysis of the three cases cited by Argentina by noting that a reasonable third party observer evaluating these facts would not conclude that they evidence a 'manifest' lack of the qualities required of Mr von

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79 *ConocoPhillips I* (n 40) paras 1–2 and 56 (Venezuela filed a proposal to disqualify L Yves Fortier who had disclosed to the parties in the case that his law firm was merging with Macleod Dixon LLP, whose Caracas office advised ConocoPhillips and other parties in several arbitrations against Venezuela. The unchallenged Tribunal members rejected the challenge, noting that 'the term “manifest” in Article 57 means “obvious” or “evident” and highly probable, not just possible, and that it imposes a relatively heavy burden on the party proposing disqualification’; *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/13, Decision on Claimant's Proposal to Disqualify an Arbitrator (27 February 2013) paras 15 and 76–9. (The Claimant challenged the Respondent-appointed international arbitrator Gabriel Bottini, arguing that he was an employee of the Argentine Government’s Attorney General at the time of his appointment. The unchallenged Tribunal members rejected, the challenge, again citing the high evidential burden under Article 57 of the ICSID Convention.)

80 *ICS Inspection and Control Services Limited (United Kingdom) v The Republic of Argentina*, UNCITRAL, PCA Case No 2010-9, Decision on Challenge to Arbitrator (17 December 2009) 2.

81 ibid 4–5.
Wobeser under Article 14(1). This traditional reticence to uphold challenges casting direct dispersions on the arbitrators in question is long-standing at ICSID and seems likely to continue.

(iv) By invoking the assessment of a ‘third party’ in his recent decisions, Dr Kim raises—but does not address—the controversial issue of when and in what circumstances ICSID will outsource its decisions to draw upon the recommendation of third parties.

In Argentina’s proposal to disqualify the majority of the Tribunal in Abaclat, the Chairman noted that:

The Chairman has requested recommendations on a proposal to disqualify an arbitrator on rare occasions in the past, in light of the specific circumstances of the case at issue. In each such case, the parties were informed that the final decision would be taken by the Chairman, as prescribed by the Convention. The circumstances in this proposal do not justify such a request.

On several occasions, ICSID has acquiesced to the request of a challenging party to consult a ‘third party’ for an opinion on the challenge at issue. This figured in the Pey v Chile case where the PCA was asked for an opinion. The fact that ICSID consults actual third-parties from time to time implies that ICSID sometimes views itself as ‘too close’ to a particular challenge, and thus not able to offer an impartial view. However, ICSID has rarely elaborated on the reasons why it chooses to do so and under what circumstances an approach would be justified. Unfortunately, as is clear from Dr Kim’s reasoning set out above in Abaclat, the most recent cases following Blue Bank take us no further. Should ICSID face increased demands for it to consult actual third parties with respect to arbitrator challenges, it would be of great benefit for ICSID to offer clearer public guidance as to the circumstances under which it will grant such a request.

VI. THE EFFECT OF THE RECENT DECISIONS ON THE FUTURE OF CHALLENGES AT ICSID

Prior to the Blue Bank Decision, commentators were almost unanimously in agreement that the standards and system for adjudicating arbitral challenges at ICSID were inadequate. In essence, the criticism levelled at ICSID challenges was that the standard for disqualification was impossibly high, which in fact comprised two separate criticisms:

(i) It was implausible that, in the entire 50 year history of ICSID, only one challenge had been upheld, indicating a fundamental problem (or problems) with the manner in which challenges were being heard/adjudicated; and

(ii) Certain commentators attacked the legal standard itself (as the source of the problem) suggesting either that: (a) ‘manifest’ in Article 57 of the ICSID Convention entailed an impossibly high legal standard with the (unintended)
consequence that few challenges to ICSID arbitrators could ever be upheld; or (b) the emphasis on ‘manifest’ had been blown out of all proportion with the result that adjudicating tribunals and the Administrative Council were often railroaded into maintaining a standard which was unjustified given that there was no proper basis for the disqualification test for ICSID arbitrators to be any more burdensome than the test for challenging arbitrators in an UNCITRAL Rule (or indeed any other international commercial) arbitration.

In relation to the first criticism, time will tell whether the flurry of successful challenges starting with Blue Bank will be maintained. However, we can at the very least conclude that the ‘taboo’ surrounding upholding challenges to arbitrators at ICSID has been soundly broken. Future tribunals may no longer feel pressured to simply reject challenges out of hand based on overwhelming precedent with the result that they are less fettered in their discretion to uphold meritorious challenges.

However, the second criticism, relating to the underpinning theoretical standard to be applied by future tribunals not only remains uncorrected but was not truly addressed in the Blue Bank and subsequent decisions.\footnote{In this regard, while we agree with Karel Daele that a lowering of the threshold for successfully challenging arbitrators would be a good thing, we disagree that the recent decision in Blue Bank (n 3) ‘definitely lowers the threshold’: see Daele (n 11) 305.} How this second criticism can and should be addressed thus looks set to remain the subject of debate.

In their recent article on the ‘ICSID Problem’, James D Fry and Juan Ignacio Stampalija considered the stringent standards of the ICSID Convention in relation to challenging arbitrators and proposed three main solutions: \footnote{Fry and Stampalija (n 76) 256–8.}

(i) To exclude fellow arbitrators from deciding challenges against their colleagues and leave such decisions to the Administrative Council of ICSID (in a similar manner to the UNCITRAL Rules which provide that the challenge will be heard by an appointing authority); \footnote{As set out above, the fact that the majority of ICSID challenges are adjudicated by the remaining unchallenged arbitrators has been the subject of criticism and presents a number of potential problems (see n 49 above).}

(ii) To amend either the ICSID Convention or the terms of individual investment agreements between contracting States. In this regard, Fry and Stampalija highlight that ‘states are in a privileged position to change what they believe must be changed’ and ‘the ICSID Convention would be an ideal starting point for states to set clearer and more modern standards regarding international arbitrators’ conflicts of interest, and if not there, then states could look at their international investment agreements as the next best place to improve standards’; \footnote{Fry and Stampalija (n 76) 258.} and

(iii) As a useful intermediary step (until modification of the ICSID Convention is effective) parties in a dispute could consider the IBA Guidelines as being directly applicable as the guidelines would provide a more robust normative basis to adjudicate challenges given the emphasis on ‘reasonable doubts’ contained therein.\footnote{Ibid 258–9.}
Taking each of these proposed solutions in turn: With regard to the first proposal, it is relatively uncontroversial that, by prescribing that all challenges be adjudicated by a neutral authority at ICSID, transparency will be increased and certain criticisms of the ICSID system eliminated. However, this does not guarantee a quick fix; in the Repsol Decision (decided by the Chairman of the Administrative Council who was independent and had no professional relationship with the challenged arbitrator) a challenge was rejected notwithstanding that a challenge based on similar facts was upheld in a parallel UNCITRAL decision. Furthermore, providing for neutral adjudication of challenges would not address the underlying theoretical underpinning of challenges at ICSID, which is at the root of the notoriously high burden for challenges.

In respect of Fry and Stampalija’s second proposal [to amend the ICSID Convention and/or the individual bilateral investment treaties (BITs)], it is acknowledged that this would present a (hopefully) definitive end to the ‘ICSID problem’. However, like many commentators, the authors of this article consider such a solution unrealistic not least given the self-evident political implications. Further, any solution proposing that an amendment to the ICSID Convention is predicated on an assumption that the ‘manifest lack’ standard for disqualification at ICSID is/should be more stringent (or rather was intended to be far more stringent) than other arbitral rules or the IBA Guidelines. For the reasons set out below, this assumption is not necessarily correct.

The third proposal (utilizing the IBA Guidelines as an intermediary step) would also present practical difficulties. As set out above, Dr Kim’s recent guidance in Blue Bank, Burlington, Abaclat and Repsol makes expressly clear that such external material can be utilized as ‘guidance only’ and is not directly applicable or binding in the context of challenges at ICSID. In light of this, it is difficult to envisage in practice a scenario where the parties would agree to adopt IBA Guidelines to adjudicate challenges as suggested by Fry and Stampalija (particularly when, in any given challenge, the party whose appointed arbitrator is subject to the challenge in question is likely to be incentivized to hold firm to the traditional higher ICSID standard).

Given the practical impossibility of amending the ICSID Convention or transposing IBA Guidelines as binding, a radical new interpretive approach is required.

In his 2012 work on challenges to arbitrators in international arbitration, Karel Daele reviewed the legislative history of the word ‘manifest’ in the ICSID Convention, noting that minimal consideration was given by drafters of the ICSID Convention to the effect and meaning of this wording (suggesting that the significance now attached to the literal meaning of the word is undue). Daele also highlights that an overly strict definition of this term would be fundamentally inconsistent with the fact that ‘nowhere in the legislative history of the

91 See above (n 51).
92 See above (n 75).
93 Incidentally, Fry and Stampalija (n 76) perhaps overestimate the level of State support for such a renegotiation, with many States benefitting from the high standard for disqualification at ICSID by being able to appoint the same arbitrators on a repeated basis. See eg Tidewater (n 59) [in which Tidewater’s proposal for the disqualification of Professor Stern (on the basis of repeated appointments by Venezuela) was rejected].
94 Fry and Stampalija (n 76) 258–9 and 262.
Convention, is there any indication that anything less than the full and complete possession of the [independence and impartiality] would be sufficient’. In essence, Daele argues that ‘[t]ribunals that have interpreted the term “manifest” as an indication of seriousness or gravity or lack of the required quality such as Amco v. Indonesia, have drifted away from the intention of the drafters of the convention.’ In support of this contention Daele contrasts the use of ‘manifest’ in Article 57 with its uses elsewhere in the ICSID Convention, namely:

(i) Article 36(3) of the ICSID Convention which provides that ‘the Secretary-General shall register the request [for arbitration] unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of [ICSID]’ (emphasis added). Under Article 36(3) ‘manifest’ means ‘easily recognizable’;

(ii) ICSID Rule 41(5) which stipulates that ‘unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, not later than 30 days after the constitution of the Tribunal…file an objection that the claim is manifestly without legal merit’ (emphasis added). Rule 41(5) requires the objecting party to establish its objection clearly and obviously, with ‘relative ease and dispatch’;

(iii) Article 52(1)(b) of the ICSID Convention which provides that a party may seek annulment of an award on the ground that ‘the Tribunal has manifestly exceeded its powers’. In numerous decisions, tribunals have determined that this means the excess of power must be ‘obvious’ or ‘self-evident’.

Daele thus accepts that, in each of the above mentioned uses, ‘manifest’ has been equated to mean, in essence, ‘easily recognizable’, ‘clear’, ‘obvious’ and/or ‘self evident’. However, Daele correctly highlights an important and fundamental difference between the above provisions and Article 57. Each of Articles 36(3), 52(1)(b) and Rule 41(5) impose restrictions on fundamental rights of the arbitrating parties and, as a consequence, the threshold and evidential burden to engage those provisions must be high, justifying a literal and strict interpretation of

95 Daele (n 6) para 5-027.
96 ibid.
97 ibid para 5-028.
98 Christoph Schreuer and others, The ICSID Convention: A Commentary, vol 2 (CUP 2009) 470:

Manifest means easily recognizable…. This would be the case if neither party is a Contracting State or a duly authorised subdivision or agency of a Contracting State or if neither party is a national of a Contracting State.

100 As confirmed in Trans-Global Petroleum, Inc v Hashemite Kingdom of Jordan, ICSID Case No ARB/07/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules (12 May 2008) paras 88 and 105. The Tribunal observed that the ordinary meaning of ‘manifest’ or ‘manifestly’ required the objecting party ‘to establish its objection clearly and obviously, with relative ease and dispatch. The standard is thus set high’. (‘In conclusion, as regards the word “manifestly”, the Tribunal requires the Respondent’s Objection to meet the test of clarity, certainty and obviousness….’)
101 See eg Wena Hotels Limited v Arab Republic of Egypt, ICSID Case No ARB/98/4, Decision on Application for Annulment (5 February 2002) para 25:

The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest. This is, among others, the reason why earlier decisions reached by ad hoc committees have been so extensively debated.
'manifest'. Conversely, Article 57 is in fact designed to safeguard (rather than restrict) rights of the parties by ensuring access to impartial and independent arbitrators. Accordingly, while the Secretary-General should understandably only refuse to register requests under Article 36(3) when a dispute is clearly outside the jurisdiction of ICSID (for example), there is no such justification for imposing such a burden on challenges to arbitrators under Article 57 (where, if anything, a lower burden would be more appropriate to ensure a high level of protection against potentially biased arbitrators).

In this legislative context, the Decision in Vivendi from a decade ago (notwithstanding that the challenge in that case was unsuccessful) in many ways arguably represented a more significant moment than the Blue Bank Decision in the sense that the ad hoc Committee at least recognized fundamental flaws in a literal interpretation of the requirements of Articles 14 and 57. Indeed, the Vivendi Decision expressly highlighted that such an interpretation would be a drift away from the likely intention of the ICSID Convention drafters and effectively submitted that a corrective move towards the 'reasonable doubts' standard was required. The justifications for such a move are readily apparent—the ICSID Convention cannot be seen to offer less protection than comparable instruments. Unfortunately, decisions following Vivendi did not follow suit and explicitly rejected the 'reasonable doubts' standard as applicable in challenging ICSID arbitrators; a trend unfortunately affirmed and continued by each of the Blue Bank, Burlington, Caratube, Repsol, Abaclat and ConocoPhillips II Decisions albeit with (long-awaited) consistency.

Leaving aside the fact that the challenges in Blue Bank, Burlington and Caratube were successful, in many respects the legal standard applied in each case was regressive or, at the very least, disappointingly conservative. In particular, Dr Kim affirmed that ‘manifest’ in Article 57 means ‘evident’ or ‘obvious’ essentially reiterating that the disqualification of arbitrators under the ICSID Convention requires a higher threshold to be reached than any other international arbitral system. There was also disappointingly no attempt in the Blue Bank Decision to grapple with the inevitable implications of such a literalist interpretation: that ICSID arbitration permits apparent bias that would not be permitted elsewhere. This in turn unfortunately lends support to the notion that the substantive protection and justice offered to parties in investor–State arbitration should be narrowed or widened merely by virtue of which procedural rules are selected by the disputing parties.

The Decisions in Blue Bank, Burlington and Caratube provide hope that future adjudicating authorities will now at least sensibly consider challenges to ICSID arbitrators, but the decisions failed to address the underlying cause of previous tribunals’ reticence in this regard. For a decision to truly represent a new dawn, we need an adjudicating authority, preferably the Administrative Council, to bravely

102 Vivendi (n 19) para 20.
103 ibid paras 20 and 25:
If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld.

104 Kahale (n 19).
consider the intended meaning of the wording contained in the ICSID Convention anew and establish definitively—by examining the legislative history of the Convention—whether previous interpretations of the wording are justifiable or whether a radical new approach is required. Providing an adjudicating authority proves willing to conduct this analysis and present the necessary interpretive guidance in line with the legislative history then a wholesale amendment to Article 57 of the ICSID Convention is not necessary. Rather, the current Article 57 should, at long last, be read purposively and (we would submit) correctly.