

## CASE COMMENT

# Saint Gobain v Venezuela<sup>1</sup> and Blue Bank v Venezuela<sup>2</sup>

## *The Standard for Disqualifying Arbitrators Finally Settled and Lowered*

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### I. INTRODUCTION

The challenge and subsequent disqualification of an arbitrator is a serious event. It might not only have a substantial impact on the duration and the costs of the arbitration, it might also damage the reputation of the disqualified arbitrator and of the arbitral institution, if it was involved in the appointment of the arbitrator. It is also a difficult and delicate exercise. A balance must be found between the interests of the challenging and non-challenging party. The former is entitled to have its case determined by an impartial, independent and competent arbitrator and to have an arbitrator disqualified that does not meet those thresholds. The latter is entitled to an arbitration process that is conducted expeditiously and without major interruptions and, if its nominee is being challenged, to have its case determined by the arbitrator of its choice.

There is no doubt that grave injustice would be done if an arbitrator was allowed to continue serving on a tribunal despite the existence of good reasons to disqualify the person. On the other hand, injustice would be achieved if an arbitrator were to be disqualified if such a course were not justified. The one million dollar question is what disqualification standard must be applied to find that balance. A lower standard will make it easier to disqualify and remove arbitrators. A more stringent standard will make it more difficult to disqualify arbitrators.

International Centre for Settlement of Investment Disputes (ICSID) jurisprudence has struggled with this issue. Two schools of thought have developed over the years, applying a different standard. The recent *Blue Bank International & Trust (Barbados) Ltd v The Bolivarian Republic of Venezuela* decision may mark the beginning of a new era, setting one clear and lower standard.

<sup>1</sup> *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).

<sup>2</sup> *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Decision of the Parties' Proposals to Disqualify a Majority of the Tribunal (12 November 2013).

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## II. THE ICSID CONVENTION

Article 57 of the Convention on the Settlement of Investment Disputes between States and National of Other States of 18 March 1965 ('ICSID Convention') provides that a party may propose the disqualification of an arbitrator 'on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14'. Article 14 requires an arbitrator to be 'of high moral character', 'of recognized competence in the field of law, commerce, industry or finance' and, most importantly, a person 'who may be relied upon to exercise independent judgement'.<sup>4</sup> Article 58 of the ICSID Convention stipulates in relevant part that 'if it is decided that the proposal is well-founded, the arbitrator to whom the proposal relates shall be replaced'. Reading these three provisions in conjunction, the challenging party will have to prove facts indicating a manifest lack of impartiality and or independence in order to be successful.

## III. AFTER A FALSE START, THE APPLICATION OF A REASONABLE DOUBTS TEST

The very first challenge decision was issued in 1982, in *Amco Asia Corporation and others v Republic of Indonesia*.<sup>5</sup> It was also the first time that the appropriate disqualification standard was discussed in any detail. Indonesia suggested the application of a reasonable doubts test. It contended it was sufficient to prove objective facts that resulted, from the perspective of a reasonable person, in an appearance of non-reliability. The deciding non-challenged arbitrators disagreed and set a much higher standard. For a challenge to be successful, they required the establishment of facts indicating 'not a possible lack of the quality, but a quasi-certain, or to go as far as possible, a highly probable one'.<sup>6</sup>

*Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* was the second case in which the ICSID disqualification standard was tested.<sup>7</sup> The non-challenged *ad hoc* Committee members firmly rejected *Amco's* interpretation of the 'manifest lack' requirement. They considered that the term 'manifest' 'might imply that there could be circumstances which, though they might appear to a reasonable observer to create an appearance of lack of independence or bias, do not do so manifestly. 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'. In the Committee members' view, this was not the correct interpretation. 'If the facts would lead to the raising of some

<sup>4</sup> The Spanish version of the ICSID Convention refers to a person 'inspiring full confidence in his impartiality of judgement'. Because of the fact that the ICSID Convention by its terms makes all language versions equally authentic, it has long been established that the requirement of reliability for independent judgement requires arbitrators to be both independent and impartial. See eg *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, together with *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 October 2007) para 28.

<sup>5</sup> *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Challenge Decision (24 June 1982).

<sup>6</sup> It is difficult to reconcile this standard with another determination of the deciding co-arbitrators according to which investor-State disputes had to offer *inter alia* 'the highest possible guarantees of legality, fairness and impartiality'. This required 'an absolute impartiality' of the arbitrators.

<sup>7</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001). A number of challenges were brought between 1982 and 2001 but they are not relevant for the present topic.

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.’<sup>8</sup> The Committee members thus adopted a ‘reasonable doubts’ test.<sup>9</sup> As evidenced by the following decisions, this test became the standard for the next eight to nine years of ICSID challenging practice.

In *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, the non-challenged arbitrators determined that the challenging party had to establish facts ‘of a kind or nature as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment’. They dismissed the challenge because they were not persuaded that the facts were ‘of such a nature as reasonably to give rise to the inference that [the challenging party] claims to derive from them’.<sup>10</sup>

In *Siemens AG v Argentine Republic*, the deciding non-challenged arbitrators had different views on the outcome of the challenge. They were, however, not divided on what disqualification standard to apply. *Siemens’* party-appointed arbitrator noted in his reasoned opinion ‘some potential inconsistency’ between the challenge Decisions in *Amco v Indonesia* and *Vivendi v Argentina*. The arbitrator saw this inconsistency ‘as tracing an evolution’.<sup>11</sup> To appreciate the requirement of a manifest lack, the arbitrator found guidance in the ‘justifiable doubts’ test under the IBA Guidelines on Conflicts of Interest. On the facts of the case, the arbitrator held that the challenged arbitrator ‘had neither a conflict of interest, nor, for that matter, the appearance of a conflict of interest, manifest or otherwise’.<sup>12</sup> According to Argentina’s party-appointed arbitrator, ‘the standard of the ICSID Convention [was] not far from the one which prescribe[d] the international customary law’.<sup>13</sup>

In *Azurix Corp v Argentine Republic*, the challenge was dismissed because the facts did not sustain a conclusion that ‘some reasonable doubt as to the impartiality of [the arbitrator] had been raised’.<sup>14</sup>

In *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, the deciding co-arbitrators were of the view that the challenged arbitrator had to cease serving ‘if reasonable doubts exist’ about her independence.<sup>15</sup> Referring to Schreuer’s treatise on the ICSID Convention, they further determined that a lack of reliability to exercise independent judgment became ‘manifest’ ‘when it can be easily understood or recognized by the mind’

<sup>8</sup> *ibid* para 20.

<sup>9</sup> The ‘reasonable doubts’ test is also used in most commercial arbitration rules. See eg Arbitration Rules of the United Nations Commission on International Trade Law (2010) (‘UNCITRAL Arbitration Rules’) art 12(1); Rules of Arbitration of the International Chamber of Commerce (2012) art 14(1); Rules of Arbitration of the London Court for International Arbitration (1998) (‘LCIA Arbitration Rules’) art 10(3); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2010) art 15(1); International Bar Association Guidelines on Conflicts of Interest (2004) (‘IBA Guidelines’) General Standard 2(b).

<sup>10</sup> *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Claimant’s Proposal to Disqualify Arbitrator (19 December 2002).

<sup>11</sup> *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/18, Decision on Proposal to Disqualify an Arbitrator (Judge Brower) (11 February 2005) para 33.

<sup>12</sup> *ibid* para 52.

<sup>13</sup> *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/18, Decision on Proposal to Disqualify an Arbitrator (Prof Bello Janeiro) (11 February 2005) paras 57–58.

<sup>14</sup> *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Respondent’s Proposal to Disqualify President (25 February 2005).

<sup>15</sup> *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Decision on Respondent’s Proposal to Disqualify an Arbitrator (25 June 2008) para 64.

and that ‘the proposed test for what is “manifest” relates not to the seriousness of the allegation, but to the ease with which it may be perceived’.<sup>16</sup>

In *Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, the challenging investor contended that the requirement of impartiality was a question of appearance and trust. The deciding co-arbitrators concurred with this view. ‘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.’<sup>17</sup>

#### IV. A MORE STRINGENT TEST

Despite the string of decisions mentioned above applying a ‘reasonable doubts’ test, the ‘highly possible’ standard reappeared in *Suez v Argentina*, almost 15 years after *Amco*. The deciding co-arbitrators observed that ‘the language of Article 57 places a heavy burden of proof on the [challenging party] to establish facts that make it obvious and highly probable, *not just possible*, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment’.<sup>18</sup> As illustrated by the following decisions, this would become the new standard for the next five years.

In *Participaciones Inversiones Portuarias (PIP) SARL v Gabonese Republic*, the deciding co-arbitrators were deadlocked. The challenge was therefore decided by Mr Zoellick, the Chairman of the Administrative Council of ICSID.<sup>19</sup> In his view, the ‘manifest lack’ concept implied a lack that was ‘obvious’ or ‘evident’ and therefore imposed ‘a relatively high burden of proof on the challenging party’.<sup>20</sup>

In *Alpha Projectholding GmbH v Ukraine*, the deciding co-arbitrators qualified the ‘manifest lack’ requirement in Article 57 of the ICSID Convention as ‘stringent’. Referring to the rules of interpretation of the Vienna Convention, they felt compelled ‘to assign significance to the use of the adjective “manifest” in the language of Article 57’ and highlighted ‘the need for especially persuasive evidence in order to satisfy the dictates of Articles 14(1) and 57 of the ICSID Convention’. They ultimately rejected the challenge ‘because, in order to establish a real or apparent conflict within the express terms of the ICSID Convention, [the challenge] required the creation of the very inferences that the common definition of the term “manifest” does not in its ordinary meaning permit’.<sup>21</sup>

In *OPIC Karimum Corporation v Bolivarian Republic Venezuela*, the non-challenged arbitrators repeated that there ‘exists a relatively high burden for those seeking to challenge ICSID arbitrators. The Convention’s requirement that the lack of independence be “manifest” necessitates that this lack be clearly and

<sup>16</sup> *ibid* paras 65–8.

<sup>17</sup> *Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Decision on Claimants’ Proposal to Disqualify an Arbitrator (12 August 2010) para 43.

<sup>18</sup> *Suez v Argentina* (n 4), together with *Vivendi* (n 4) para 29.

<sup>19</sup> In line with ICSID’s standard practice, he did so after seeking a recommendation on the challenge from the Secretary-General of ICSID.

<sup>20</sup> *Participaciones Inversiones Portuarias SARL v Gabonese Republic*, ICSID Case No ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator (12 November 2009) para 22.

<sup>21</sup> *Alpha Projectholding GmbH v Ukraine*, ICSID Case No ARB/07/16, Decision on Proposal for Disqualification of an Arbitrator (19 March 2010), para 44. In relation to the arbitrator’s duty to disclose information under article 6 of the ICSID Convention, the co-arbitrators adopted a ‘justifiable doubts’ test instead of ‘the much higher “manifest” threshold that must be met in order to sustain a challenge under the ICSID Convention’ (*Alpha Projectholding* para 55).

objectively established. Accordingly, it is not sufficient to show an appearance of a lack of impartiality or independence.<sup>22</sup>

In *Universal Compression v Bolivarian Republic of Venezuela*, each of the parties challenged the other party's nominee. As a majority of the arbitrators was thus challenged, the decision on the challenges fell upon Mr Zoellick as Chairman of the Administrative Council of ICSID. After *PIP v Gabon*, this was the second time that the ICSID Chairman could shine his light on the issue. He reiterated that the term 'manifest' meant 'obvious' or 'evident' and that it imposed a 'relatively heavy burden of proof on the party making the proposal'.<sup>23</sup>

In *Abaclat and others v Argentine Republic*, Mr Zoellick, as Chairman of the Administrative Council of ICSID, ruled that 'the standard of proof required is that the challenging party must prove not only facts indicating the lack of independence, but also that the lack is "manifest" or highly probable, not just possible'.<sup>24</sup>

In *ConocoPhillips Company and others v Bolivarian Republic of Venezuela*, the deciding non-challenged arbitrators summarized the ICSID challenge jurisprudence as interpreting the term 'manifest' as 'obvious' and 'evident' and as 'imposing a relatively heavy burden' on the challenging party. Further, the manifest lack of the required quality, be it independence or impartiality, had to appear from objective evidence.<sup>25</sup>

The summary in *ConocoPhillips* was fully endorsed in *Getma International and others v The Republic of Guinea* in which Mr Zoellick, as Chairman of the Administrative Council of ICSID, repeated that the 'manifest lack' concept imposed a relatively high burden of proof and required objective evidence.<sup>26</sup>

## V. SAINT GOBAIN, TAKING STOCK OF THE SITUATION BUT AVOIDING TO SET A TEST

In *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, a French investor sued Venezuela for the nationalization of an industrial facility. It challenged Venezuela's nominee on the Tribunal *inter alia* on the ground that he was a long-time Argentina government lawyer and would therefore avoid making decisions adverse to positions he had taken in Argentine cases.

Before looking into the merits of the challenge, the deciding non-challenged arbitrators first addressed the applicable standard which needed to be met for a challenge to be upheld. In their view, there was 'no unequivocal answer'. On the one hand, they referred to the challenge decisions that had set a high bar for

<sup>22</sup> *OPIC Karimun Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/14, Decision on Claimants' Proposal to Disqualify an Arbitrator (5 May 2011) para 45.

<sup>23</sup> *Universal Compression v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/9, Decision on the Proposal for the Disqualification of two Members of the Arbitral Tribunal (20 May 2011) para 71.

<sup>24</sup> *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (21 December 2011) referring to the PCA Case No IR 2011/1, *Abaclat and Others v Argentine Republic* (ICSID Case No ARB/07/5), Recommendation of the Secretary General of the Permanent Court of Arbitration Regarding the Proposal of the Respondent to Disqualify Professor Pierre Tercier and Professor Albert Jan Van Den Berg (19 December 2011) para 50. This decision was made, taking into account a recommendation sought from the Secretary-General of the Permanent Court of Arbitration.

<sup>25</sup> *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 56.

<sup>26</sup> *Getma International and others v Republic of Guinea*, ICSID Case No ARB/11/29, Decision on the Proposal for Disqualification of Arbitrator Bernardo M Cremades (28 June 2012) para 60.

challenging an arbitrator, based on the ‘manifest lack’ concept. As the clearest example of this school of thought, they quoted from the challenge Decision in *Suez v Argentina*, requiring facts that ‘make it obvious and highly probable, not just possible’ that the challenged arbitrator could not be relied upon for independent and impartial judgment. On the other hand, they also acknowledged the existence of the second school of thought, applying a reasonable doubts test and construing the word ‘manifest’ not as an indicator of the seriousness of the allegation but of the ease with which it could be perceived. *EDF v Argentina* and *Vivendi v Argentina* were cited as examples of this latter school.<sup>27</sup>

Confronted with these two schools, the arbitrators observed that there was no clear-cut guidance as to which degree the facts invoked by a challenging party had to substantiate the alleged lack of independence or impartiality. The arbitrators refrained, however, from committing to one of these schools. Adopting a very pragmatic approach, they determined that they had to establish first whether the alleged ‘facts (in contrast to speculation and inferences) could lead a reasonable person to conclude that there is a possibility that the challenged arbitrator is not independent and/or impartial’. Only if the facts would establish such a possibility, they observed, the further question of ‘how probable the lack’ of independence and impartiality had to be, would have to be decided.<sup>28</sup>

On the facts of the matter, the deciding arbitrators did not get that far. They determined that the challenging party had presented no facts which cast ‘reasonable’ doubt on the challenged arbitrator’s impartiality and independence, let alone facts which made it obvious and highly probable.<sup>29</sup> On that ground, they simply dismissed the challenge, without revisiting the probability issue.

## VI. *BLUE BANK*, ICSID ADOPTING THE APPEARANCE STANDARD

Such was the status of the ICSID jurisprudence at the end of 2013, equally divided between two schools. In *Blue Bank v Venezuela*, in which both parties challenged each other’s nominee on the Tribunal, the new Chairman of the Administrative Council of ICSID, Dr Jim Young Kim, was given another bite at the apple.<sup>30</sup>

Venezuela’s challenge was made on the ground of a relationship conflict and an issue conflict. The relationship conflict was based on the fact that *Blue Bank*’s nominee was (1) a partner in the Madrid office of an international law firm, which New York and Caracas offices represented a Claimant in another, pending, ICSID case against Venezuela; (2) the head of arbitration of the Madrid office; (3) a member of the Steering Committee of the firm’s global arbitration group; and (4) a member of the Steering Committee of the firm’s European international disputes group. The issue conflict was based on the fact that the arbitrator would have to decide issues in *Blue Bank* that were similar or identical to those which its related offices of the firm were at the same time arguing in *Longreef Investments AVV v*

<sup>27</sup> *Saint-Gobain* (n 1) paras 58–59.

<sup>28</sup> *ibid* para 60.

<sup>29</sup> *ibid* para 78.

<sup>30</sup> Venezuela challenged *Blue Bank*’s nominee on the Tribunal, followed by *Blue Bank* challenging Venezuela’s nominee.

*Bolivarian Republic of Venezuela*.<sup>31</sup> *Blue Bank* and the challenged arbitrator himself were opposed to the challenge. They emphasized the legal and financial independence of the firm's local offices and understated the arbitrator's firm-wide responsibilities.

In line with and referring to earlier decisions, the ICSID Chairman first defined the concept of impartiality and independence. Impartiality related to the absence of bias or predisposition towards a party, whereas independence was marked by the absence of external control. Both concepts protected parties 'against arbitrators being influenced by factors other than those related to the merits of the case'.<sup>32</sup>

More importantly, in terms of the disqualification standard, he determined that 'Article 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias'. It was 'sufficient' to establish 'the appearance of dependence or bias'. This appearance has to be established 'on the basis of a reasonable evaluation of the evidence by a third party'. In this respect, the subjective belief of the challenging party itself will 'not' be 'enough'. The word 'manifest', he further clarified, related to the 'ease' with which the alleged lack of independence or impartiality 'can be perceived', thereby implicitly rejecting the suggestion that it would relate to the seriousness of the lack of independence or impartiality.<sup>33</sup>

After setting the appearance standard, the Chairman of ICSID applied it to the facts of the matter. First of all, he identified 'a degree of connection' or 'overall coordination' between the different offices of the law firm. This connection was established by the sharing of a corporate name, the existence of a global arbitration steering committee and the arbitrator's statement that his remuneration did not exclusively depend on the results of the Madrid office. Second, he pointed to the similarity of the issues in *Blue Bank* and *Longreef* which made it highly probable that the arbitrator would be deciding issues in *Blue Bank* that were relevant in *Longreef*. 'On a reasonable evaluation of [these] facts', the Chairman determined, it had 'been demonstrated that a third party would find an evident or obvious appearance of lack of impartiality'. Accordingly, the arbitrator was found to 'manifestly lack one of the qualities required by Article 14(1) of the ICSID Convention'.<sup>34</sup>

This Decision is notable for several reasons. First of all, it marks a departure from the jurisprudence of the last five years, including the ICSID Chairman's own decisions, that imposed 'a relatively high burden of proof' on the challenging party and required 'a highly possible' lack of the required qualities. Second, it confirms that it is sufficient to establish 'an appearance' of bias or dependence for as long as this appearance is based on objective evidence. By doing so, the ICSID Chairman appears to return to the reasonable doubts test as it was applied in the early 2000's. Third, the decision hopefully marks the end of the discussion over the meaning of the word 'manifest'. It has now been construed as a rule of evidence, not as a qualitative marker. Fourthly, the decision actually disqualifies an arbitrator for only the second time in over 30 years of ICSID challenge history.<sup>35</sup>

<sup>31</sup> *Longreef Investments AVV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/5.

<sup>32</sup> *Blue Bank* (Challenge Decision) (n 2) para 59.

<sup>33</sup> *ibid* paras 59–61

<sup>34</sup> *ibid* para 69.

<sup>35</sup> The first successful challenge was made in *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on the Proposal for Disqualification of the Three Members of the Tribunal (21 February 2006).

Finally, as it is standard practise that in deciding challenges the ICSID Chairman seeks the recommendation of the ICSID Secretary General, the *Blue Bank* decision also reflects the policy of ICSID as an arbitration institution. It is therefore an important signpost for arbitrators who have to decide ICSID challenges in the future.

## VII. THE APPEARANCE STANDARD APPLIED

Three weeks after the *Blue Bank* decision, Dr Jim Young Kim decided three other challenges, again applying the appearance standard.

In *Burlington Resources v Ecuador*, the State challenged Burlington's nominee *inter alia* on account of his failure to properly disclose his prior appointments by Burlington's counsel. The challenged arbitrator opposed the challenge, justifying his non-disclosure on the ground that all his appointments were readily accessible on the ICSID website and therefore did not need to be disclosed. This prompted Ecuador's counsel to submit documents from another case in which it had argued before the challenged arbitrator and in which the latter had disclosed *sua sponte* his earlier ICSID appointments. These documents established, in Ecuador's view, the arbitrator's inconsistent approach to disclosure. In his response, the challenged arbitrator disagreed with Ecuador's analysis. More importantly, however, he also questioned the ethics of Ecuador's counsel by using confidential information from the other case in the present case, to the advantage of another client of the firm.<sup>36</sup> The ICSID Chairman upheld the challenge.<sup>37</sup> He observed that the arbitrator's comments on the ethics of Ecuador's counsel did not serve any purpose in explaining the facts underlying the challenge. In his view, 'a third party undertaking a reasonable evaluation of [the arbitrator's comments] would conclude that [they] manifestly evidence[d] an appearance of lack of impartiality with respect to Ecuador and its counsel'.<sup>38</sup>

In *Repsol SA and Repsol Butano SA v Argentine Republic*, the State sought the disqualification of *Repsol's* nominee on account of his co-authoring three earlier awards against Argentina.<sup>39,40</sup> Upon the request of the State, each one of these awards had later been partially or fully annulled, but the arbitrator nevertheless continued to defend the awards in an academic article published in 2010. The State further complained about the arbitrator's role in the 80's on the side of the Chilean government in a dispute with Argentina and his 1998 legal opinion

<sup>36</sup> The arbitrator had stated the following:

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

<sup>37</sup> It fell upon the Chairman to decide the challenge because the two non-challenged arbitrators on the *Burlington* Tribunal were equally divided on its outcome.

<sup>38</sup> *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) paras 79–80.

<sup>39</sup> *Repsol SA and Repsol Butano SA v Argentine Republic*, ICSID Case No ARB/12/38, Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser (13 December 2013).

<sup>40</sup> *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16.

opposing the extradition of General Pinochet from the UK. The ICSID Chairman dismissed the challenge. In relation to the annulment of the ICSID awards, he underlined that these were based on ‘a different set of facts, related to different laws, and arose at different times to that of the present case’. He further observed that Argentina, as any ICSID party, had a right to bring annulment proceedings and, as confirmed by the challenged arbitrator in his explanations, had simply exercised this right. Exercising this right did, according to the Chairman, not establish a manifest lack of impartiality on the part of the arbitrator. In relation to the 2010 legal publication, the Chairman pointedly noted that the article related to a legal provision that was not present in the present proceedings. As to the arbitrator’s legal opinion on Pinochet and his diplomatic and legal services provided to Chile twenty or more years ago were, the ICSID Chairman determined that these were both temporally and materially unrelated to the present dispute and ‘not sufficient’ to demonstrate a manifest lack of the qualities required of arbitrators.<sup>41</sup>

In the same case, the State also sought the disqualification of the president of the *Repsol* Tribunal. The challenge was made on account of (1) his participation as an investor-appointed arbitrator in the earlier case *CIT v Argentina*;<sup>42</sup> (2) the State’s objection to his appointment as a chair in three earlier ICSID cases; and (3) his involvement with *Repsol*’s counsel in three other arbitrations. In relation to the *CIT* arbitration, the ICSID Chairman merely noted that these proceedings had been discontinued upon the request of the parties in 2009, without an award on the merits being issued. The ICSID Chairman saw in Argentina’s earlier opposition to the arbitrator’s serving as the chair of a tribunal nothing more than an indication of a preference, justified or not, in each of these cases. He added that this preference may change over time. Finally, in terms of the links to *Repsol*’s counsel, the Chairman observed that the first dispute was a commercial ICC arbitration, concluded nine years ago, in which the arbitrator had only acted as an expert on Mexican law issues. The second dispute was an ICSID arbitration in which the arbitrator had been appointed by the party that was represented by *Repsol*’s counsel.<sup>43</sup> The ICSID Chairman determined that a single appointment did not establish a manifest lack. The third dispute was a conciliation matter in which *Repsol*’s counsel was acting for one of the parties and the arbitrator had been appointed by agreement between the parties.<sup>44</sup> The ICSID Chairman concluded that a ‘reasonable third observer evaluating these facts would not conclude that they evidence a manifest lack of the qualities required by Article 14(1) of the ICSID Convention’.<sup>45</sup>

## VIII. CONCLUSION

The decision in *Blue Bank* is more than welcome. First of all, it determines an issue that the ICSID community has been struggling with for almost thirty years. In terms of what standard to apply and what kind of evidence is required in

<sup>41</sup> *Repsol SA* (n 39) para 81.

<sup>42</sup> *CIT Group Inc v Argentine Republic*, ICSID Case No ARB/04/9.

<sup>43</sup> *Teco Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No ARB/10/23.

<sup>44</sup> *Republic of Equatorial Guinea v CMS Energy Corporation*, ICSID Case No CONC(AF)/12/2.

<sup>45</sup> *Repsol SA* (n 39) para 86.

challenge proceedings, it will probably serve as a signpost for future decisions. This will in turn increase the predictability and consistency of the ICSID system. Second, in comparison with the ‘manifest lack’ standard as it has been interpreted and applied in the most recent years, it definitely lowers the threshold for successfully challenging an arbitrator. Although a majority of acting or potential arbitrators will probably disagree, this is a good thing. The appearance standard comes close to the ‘reasonable doubts’ test that is applied in commercial arbitration and in most of the national courts. This test works well in those environments and there is no reason why it shouldn’t work in an investor–State context. The previously applied standard, requiring a ‘highly possible’ lack of the required qualities, was simply too high, taking into account the quasi uncontrolled power of the parties to appoint an arbitrator of their choice, the importance of the issues at stake in investor–State arbitration and the fundamental importance of having truly independent and impartial arbitrators to the credibility and the survival of international arbitration. The appearance standard will hopefully inspire parties and arbitrators to err a little bit more on the side of caution when they are making or accepting future appointments in ICSID matters.

On the other hand, well-meaning parties and arbitrators need not to panic. The lower disqualification standard is unlikely to open the floodgates. This is illustrated by the unsuccessful challenges in *Repsol*, *Vivendi*, *EDF*, *Urbaser* and others, despite the application of a reasonable doubts test. A party bringing a challenge has indeed still a mountain to climb. And if it fails, it will find itself in the most uncomfortable position of having to continue the arbitration with one unsuccessfully challenged arbitrator on board and two non-challenged arbitrators who were forced to suspend the proceedings and rule over their fellow arbitrator.