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STANDARDS OF DISQUALIFICATION OF AN ARBITRATOR UNDER THE ICSID CONVENTION

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Abstract

The ICSID Convention provides a standard for disqualification of arbitrators for lack of qualities of independence and impartiality. However, jurisprudence on the standard of "manifest lack" of qualities in an arbitrator that the Convention envisages is not yet settled as it does not shed much light on what constitutes the terms "manifest lack". In the recent past, arbitrators have faced frequent challenges regarding their independence and impartiality in relation to the matter at hand. Owing to the absence of clarity in the Convention, this article lays emphasis on the various decisions that have contributed to the change in jurisprudence regarding the disqualification of arbitrators and have introduced a new dimension, akin to certain other arbitration rules. It discusses the three major standards laid down in these decisions for determining "manifest lack" of qualities in an arbitrator under ICSID, namely, the strict standard, the reasonable doubt standard and the very recent, the appearance of bias standard. Further, the article highlights a paradigm shift in the ICSID challenge jurisprudence from an initial stringent requirement of manifest lack towards a linear approach that has contributed to the divergence seen in recent challenge decisions. This article also advocates the need for certain uniform and unambiguous set of rules for effective adjudication of arbitrator challenges in ICSID.

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I. Introduction

The Convention on Settlement of Investment Dispute between States and Nationals of Other State ("ICSID Convention") was enforced in 1966 with the objective to promote economic development by providing a forum for settlement of investment disputes. To fulfil this objective the Convention established the International Centre for Settlement of Investment Disputes ("ICSID") as a forum for settlement of Investment disputes between contracting States and Nationals of other contracting States through the mechanism of dispute resolution.[1] It is pertinent to mention that while adjudicating these disputes, the party appointed arbitrators plays a vital role. Resultantly, they are duty bound to keep themselves free from any clout throughout the proceedings.[2]

The parties to the dispute are entitled *firstly*, to a fair-hearing[3], i.e., the dispute is heard by independent, impartial and competent arbitrators[4] and *secondly*, to have an arbitrator disqualified if he lacks these qualities.[5] Consequently, the ICSID Convention[6] under Article 14 protects the right of the parties by enunciating certain specific qualities that an individual must possess to get

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1 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY ON THE CONVENTION OF THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 4-5 (2 ed. Cambridge University Press 2009).

2 William W. Park, *Arbitrator Bias*, TDM 15-18 (2015).

3 Federica Cristani, *Challenge and Disqualification of Arbitrators in International Investment Arbitration: An Overview*, 13 LAW & PRAC. INT'L CTS. & TRIBUNALS 153, 154 (2014).

4 E.E. GAILLARD AND J. SAVAGE (EDS.), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1021 (Kluwer Law International 1999); S. GREENBERG, C. KEE AND J. R. WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 6.87 (Cambridge University Press 2011).

5 24 KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 218 (Kluwer Law International 2012).

6 Convention on Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), Mar. 18, 1965, 575 UNTS 159.

appointed as an arbitrator, failing which, pursuant to Article 57 of the ICSID Convention, the concerned party is entitled to propose disqualification of the arbitrator.

In the above backdrop, Part II of the article discusses the qualities required in an arbitrator under the ICSID Convention, the alleged lack of which factors in the challenge proposals. Part III discusses the threshold required to successfully disqualify an arbitrator. Part IV lays emphasis on the shift in jurisprudence on the standard of disqualification of an arbitrator. Part V concludes the article by suggesting incorporation of certain sets of rules that will pave the path for successful arbitrator challenges in ICSID.

II. Qualities in an arbitrator

Under the ICSID, the members of the arbitral Tribunal "shall be persons of *high moral character and recognized importance in the fields of law, commerce, industry or finance who may be relied upon to exercise independent judgment*".[7] The English and French versions of the ICSID Convention mention the quality of 'independence', whereas the quality of 'impartiality' is recognized in the Spanish version.[8] However, these qualities of 'independence' and 'impartiality' have usually been considered as two sides of the same coin[9] and have been used interchangeably.[10] A situation may arise where a person who is completely competent in exercising an independent judgment may be ineligible if he has some kind of conflict of interest in a particular case or *vice versa*.[11] Therefore,

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7 *Id.* art. 14.

8 Gabriel Bottini, *Should the Arbitrator Live on Mars – Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 341-342 (2009).

9 H. Warsame, *Law and Practice on Impartiality and Independence in International Investment Arbitration*, 8 (2016), (September 26, 2018, 12;01 PM), http://www.scriptiesonline.uba.uva.nl/en/scriptie/617809.

10 J. D. M. LEW, L. A. MISTELIS AND S. M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 255-273 (Kluwer Law International 2003).

11 SCHREUER, *supra* note 1, at 49.

the requirement of independence and impartiality is a subjective inquiry (ensuring arbitrator bias) based on external, objective facts and circumstances.[12]

The ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Rules") serve to ensure that members of the Tribunal meet the test enshrined under Article 14 of the ICSID.[13] Pursuant to Rule 6(2), the arbitrators so appointed in a dispute shall sign a declaration as soon as the first session of the Tribunal is held. Such declaration ensures that the arbitrator is duty bound to *inter alia* act fairly, independently and impartially during the course of the arbitration process.[14] Under the declaration, the arbitrator shall disclose relevant information, i.e., his independence, impartiality, fairness and confidentiality in regard to the arbitral proceeding.[15] Consequently, under Rule 8(2), if the declaration is not filed after the first session of the Tribunal, the arbitrator shall be deemed to have resigned.[16]

It is necessary to acknowledge the fact that "independence and impartiality are states of mind".[17] Resultantly, it becomes difficult to examine the "inner workings of an arbitrator's mind with perfect accuracy" since only the conduct of the challenged

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12 James Ng, *When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics through IBA Guidelines on Conflict of Interest and Published Challenges*, 2 MCGILL J. DISP. RESOL. 23, 25 (2015-2016).

13 James Crawford, *Challenges to Arbitrators in ICSID Arbitration*, in PRACTISING VIRTUE INSIDE INTERNATIONAL ARBITRATION 596, 603 (Oxford University Press 2015).

14 Greg C. Nwakoby & Charles Emenogha Aduka, *Challenge of Arbitrator under ICSID*, 36 J.L. POL'Y & GLOBALISATION 171 (2015).

15 KRÖLL, *supra* note 10, at 264.

16 Nwakoby *supra* note 14, at 171.

17 Suez, Soceidad General de Augus de Barcelona S.A. and Vivindi Universal S.A v. Agentine Republic, ICSID Case No. ARB/03/17, Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19 AWG Group v. The Argentine Republic (UNCITRAL), Decision on the proposal for disqualification of a member of the arbitral tribunal, ¶28-30 (Oct. 22, 2007) ("Suez I"); William Park, *supra* note 2, at 20.

arbitrator can demonstrate such state of mind.[18] Irrespective of the safeguards provided by the Convention and Rules, aimed towards ensuring integrity in the arbitration process[19], it has been observed that the parties have time and again proposed disqualification of appointed arbitrators for lack of required qualities enshrined under Article 14 of the ICSID.[20] It is pertinent to mention that, the quality to render a decision independently and impartially, has been in the limelight in the proposals for disqualification.[21] Pursuant to Article 58 of the ICSID Convention, when only one member of the tribunal is challenged, the unchallenged arbitrators of the tribunal ("Co-arbitrators") are authorized to decide upon the disqualification proposal. However, in case of the majority of the tribunal is challenged the Chairman of the Administrative Council of ICSID ("Chairman") decides the challenge.

While, ICSID Convention entitles the parties to propose disqualification of an arbitrator by showing any facts indicating manifest lack of qualities[22] envisaged under Article 14[23], the ICSID Convention is silent on the circumstances that actually constitute "manifest lack" of qualities arbitrator. These standards have been discussed in the past decisions by the adjudicators of the disqualification proposals, i.e., *Co-arbitrators and Chairman*, and have subsequently contributed to the growth of challenge

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18 JEFFREY WAINCYMER, PROCDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 292-293 (Kluwer Law International 2012).

19 GB BORN, INTERNATIONAL COMMERCIAL ARBITRATION 463 (Kluwer Law International the Hague 2009).

20 Christine Meerah Kim, *Issue Conflict in Investor-State Dispute Settlement: Focusing on the Challenges against Professor Francisco Orrego Vicuna in CC/Devas et al. v. India and Repsol v. Argentina*, 27 GEO. J. LEGAL ETHICS 621, 624 (2014).

21 SCHREUER, *supra* note 1, at 1202; Audley Sheppard, *Arbitrator Independence in ICSID Arbitration* in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 132 (C. Binder al ed. 2009).

22 WAINCYMER, *supra* note 18, at Pg. 292-293.

23 ICSID, *supra* note 6, art. 57.

jurisprudence under ICSID, i.e., the standard of "manifest lack" required to disqualify an arbitrator.[24]

III. Manifest Lack

The Convention and the Rules provide that to disqualify an arbitrator, the concerned party is required to file a disqualification proposal as soon as the concerned party becomes aware of grounds of possible disqualification.[25] The ground of possible disqualification pursuant to Article 57 is the "manifest lack" of qualities in the arbitrator as mandated under Article 14.

Article 57 plays an "evidentiary" role, i.e., it creates a "burden of proof on the challenging party" to prove the "manifest lack" of qualities.[26] Therefore, the standard of "manifest lack" is crucial because it brings effectiveness and legitimacy to the award rendered by the Tribunal[27], particularly when the challenges against arbitrators are on a rise.[28]

However, the standard for disqualifying an arbitrator under ICSID is a moot point[29], i.e., a lower standard of proof to show manifest lack makes it easier to disqualify an arbitrator, whereas a strict standard will make it relatively difficult to disqualify the arbitrator.[30] Moreover, the other question is whether "manifest" describes the seriousness of the lack of qualities enshrined under

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[24] Peter Horn, *A matter of Appearance: Arbitrator Independence and Impartiality in ICSID Arbitration*, 11 NYU J L.& BUS 356 (2014).

[25] ICSID, *supra* note 6, art. 57, Rules of Procedure for Arbitration Proceedings (Arbitration Rules) r.9(1).

[26] Peter Horn, *supra* note 24, at 356-357.

[27] MARIA NICOLE CLEIS, THE INDEPENDENCE AND IMPARTIALITY OF THE ICSID ARBITRATOR 31 (Brill 2017).

[28] Lars Markert, *Challenging Arbitrators in Investment Arbitration: The Challenging Search for Relevant Standards and Ethical Guidelines*, 3 CONTEMP. ASIA ARB. J. 237, 239 (2010).

[29] Baiju S Vasani & Shaun A Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A new Dawn?*, 30(1) ICSID REV. 194, 200 (2015).

[30] DAELE, *supra* note 5, at 218.

Article 14 or describes the standard of proof required to establish such lack.[31]

Consequently, three major standards have been laid down with regard to the interpretation of Article 57 of the ICSID. *Firstly*, the strict proof indicating manifest lack or *Amco Asia* standard, *secondly*, reasonable doubt or *Vivendi* standard and *lastly*, disqualification on the appearance of bias or the *Blue Bank* standard.[32]

A. STRICT PROOF INDICATING MANIFEST LACK OR *AMCO* STANDARD

The strict standard of proof for establishing manifest lack of qualities in an arbitrator was laid down in the *Amco Asia*[33] case, the first case in arbitrator challenge[34] wherein the Co-arbitrators decided on the proposal to disqualify the Claimant appointed arbitrator.[35] In this case, the Respondent proposed disqualification on the grounds that *firstly*, the challenged arbitrator had advised the Claimant on tax matters a number of years prior to the current arbitration proceedings and *secondly*, the law firm of the challenged arbitrator had a profit sharing understanding with the Claimant's counsel and the premises of their office and administrative services were shared six months after the initiation of the proceedings. It was contended that on these grounds the challenged arbitrator lacks independence towards the Claimant[36] as it was sufficient to prove the

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31 Georgios Dimitropoulos, *Constructing the Independence of International investment Arbitrators: Past, Present and Future*, 36 NW. J. INT'L L. & BUS. 371, 398 (2016).

32 Horn, *supra* note 24, at 357.

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

34 Meg Kinnear, *Challenge of Arbitrators at ICSID – An Overview*, 108 Am. Soc'y Int'l L. Proc. 412, 412-413 (2014).

35 Vasani, *supra* note 29, at 200.

36 CLEIS, *supra* note 27, at 32.

appearance of non-reliability from the perspective of a reasonable person.[37]

The Co-arbitrators while rejecting the challenge observed that pursuant to the dictionary meaning, the term 'manifest' may mean 'evident', 'obvious', 'plain'. Therefore, the facts indicating lack of qualities "have to indicate not a possible lack of qualities, but a quasi-certain, or to go as far as possible, a highly probable one".[38] Furthermore, it was observed that, existence of some relationship cannot stand as a ground to disqualify an arbitrator as the "party appointing system presumes some connection" between the appointed arbitrator and the party.[39]

Similarly, in *Suez II*[40], the Respondent challenged the independence and impartiality of the Claimant appointed arbitrator, on the basis of past appointments and relationship with the Claimants.[41] The Tribunal while dismissing the proposal relied on the strict standard and observed "that Article 57 places a heavy burden of proof on the challenging party to prove not only facts indicating lack of qualities, but also the lack is manifest or highly-probable and not just possible or quasi-certain".[42]

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37 Karel Daele, *Saint Gobain v. Venezuela and Blue Bank v. Venezuela – The Standard for Disqualifying Arbitrators Finally Settled and Lowered*, 29 No. 2 ICSID REV. 296, 297 (2014).

38 Amco Asia, *supra* note 33, at ¶29.

39 Horn, *supra* note 24, at 358.

40 Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Suez, Sociedad General de Aguas de Barcelona S.A., and Inter Aguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/2017, AWG Group Limited v. The Argentine Republic (UNCITRAL), Decision on a second proposal for disqualification of a member of the arbitral tribunal (May 12, 2008). ("Suez II").

41 Bottini, *supra* note 8, at 355-356.

42 Suez II, *supra* note 40, at ¶29.

Likewise, in *PIP*[43], the Claimant appointed arbitrator was challenged on the grounds of multiple appointments in ICSID against the Respondent in previous cases having similar set of facts.[44] The Chairman while rejecting the proposal placed reliance on the strict standard in *Suez II* and observed that "manifest lack" under Article 57 implies "clear or certain lack of qualities".[45]

Similarly, in *Universal Compression*[46], the Chairman while rejecting the challenge against majority of the Tribunal observed that Article 57 imposes a "high bar for disqualification" and a "heavy burden of proof on the challenging party to establish objective facts indicating that the independence and impartiality of the arbitrators are manifestly impacted".[47]

In *OPIC Karimum*[48], the challenging party contended that multiple appointments of the challenged arbitrator by a party or its counsel prejudice the independence or impartiality in the challenged arbitrator.[49] The Co-arbitrators while rejecting the challenge observed that, under Article 57, "it is not sufficient to establish an appearance of lack of qualities" but the challenging party is required to 'clearly' and 'objectively' establish manifest lack of independence.[50]

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43 Participaciones Inversiones Portuarias SARL v. Gabonese Re-public, ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator, ¶22 (November 12, 2009). ("PIP").

44 Horn, *supra* note 24, at 361.

45 PIP, *supra* note 43 at ¶22.

46 Universal Compression International Holdings S.L.U v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify majority of the Arbitral Tribunal (May 20, 2011). ("Universal Compression").

47 *Id*. at ¶71-72.

48 OPIC Karium Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14, Decision on proposal to disqualify member of Arbitral Tribunal (May 5, 2011). ("OPIC Karium").

49 CLEIS, *supra* note 27, at 37.

50 OPIC Karium, *supra* note 48, at ¶44-45.

Furthermore, in *Getma*[51], where the Claimant appointed arbitrator was challenged on the ground that the challenged arbitrator's brother was appointed as an arbitrator by the Claimant in another case having similar facts. The Chairman while rejecting the proposal observed that mere speculations, presumptions or beliefs are insufficient grounds to disqualify an arbitrator.[52]

Interestingly, in *Abaclat I*[53], where the Chairman considered the recommendation of the Secretary General of the Permanent Court of Arbitration, the strict standard was applied in a different context.[54] The Respondents challenged majority of the Tribunal on the ground of lack of independence.[55] It was observed that the *Amco* standard[56] shall be applicable if the party based its challenge on the wrongfulness of the award.[57]

Similarly in *Alpha*[58], the Respondent challenged the claimant appointed arbitrator on the basis of the challenged arbitrator's relation with the Claimant's counsel which began when they attended higher studies in same university at the same time.[59] The Co-arbitrators while rejecting the proposal relied on the dictionary meaning of the term "manifest"[60] and observed that

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51 Getma International and Ors. v. Republic of Guinea, ICSID Case No. ARB/11/29, Decision on Proposal to Disqualify arbitrator (June 28, 2012). ("Getma").

52 *Id.* at ¶58-60.

53 Abaclat & Ors. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Proposal to Disqualify majority of the Arbitral Tribunal (December 19, 2011). ("Abaclat I").

54 CLEIS, *supra* note 27, at 45, 46.

55 Abaclat I, *supra* note 53, at ¶46, 71, 86, 104.

56 Amco Asia, *supra* note 33.

57 CLEIS, *supra* note 27, at 46.

58 Alpha Projectholding Gmbh v. Ukraine, ICSID Case No. ARB/07/16, Decision on proposal to disqualify arbitrator (May 19, 2010). ("Alpha").

59 James D. Fry & Juan Ignacio Stampalija, *Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes*, 30 No. 2, Arb Int'l LCIA 189, 225 (2014).

60 Alpha, *supra* note 58, at ¶37.

Article 57 incorporates a "stringent requirement of manifest lack of qualities" provided under Article 14.[61]

In *Conoco I*[62], the Respondent challenged the Claimant appointed arbitrator in light of the relationship between the Claimant's counsel and the challenged arbitrator.[63] The co-arbitrators while dismissing the proposal observed that that the ICSID decisions recognizes "manifest" under Article 57 as "'obvious', 'evident', 'highly probable' not 'just possible' and imposes a relatively higher burden on the challenging party".[64] Additionally, they held that "manifest lack" of the qualities under Article 14(1) "must appear from objective evidence".[65] The Tribunal also distinguished the standards under external rules or guidelines (IBA Guidelines) with that under the ICSID Convention. It was held that *firstly*, the IBA guidelines "are not legal rules" and cannot "override any arbitral rules chosen by the parties", *secondly*, "conflict of interest" under standard 2(b) of the IBA guidelines, i.e., for disqualification of an arbitrator, there must be relevant facts and circumstances arising since the appointment of the arbitrator that give rise to "justifiable doubts from a reasonable third person's point of view" regarding the arbitrator's independence and impartiality[66], "is significantly different from that under Article 57 of the ICSID and can be easily satisfied".[67]

Therefore, as observed, under the strict standard the manifest nature of lack "relates to the ease, with which the alleged lack of qualities can be perceived", i.e., lack of qualities in an arbitrator

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61 DAELE, *supra* note 5, at 228.
62 Conoco Phillips Company et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on proposal to disqualify arbitrator (Feb. 27, 2012). ("Conoco I").
63 *Id.* at ¶1, 2, 6.
64 *Id* at ¶56
65 *Id.*
66 Bottini, *supra* note 8, at 347.
67 Conoco I, *supra* note 62, at ¶59.

will be manifest if it can be "discerned with little effort and without deeper analysis".[68]

B. REASONABLE DOUBT OR *VIVENDI* STANDARD

The second proposal[69] for disqualification of an arbitrator was filed in *Vivendi*[70], where the unchallenged arbitrator vehemently criticized the standard followed in *Amco Asia*, and laid down a new standard in determining manifest lack of qualities in an arbitrator.[71]

In the aforementioned case, Respondent challenged the Claimant appointed arbitrator on the basis of tax advice provided by the firm of the challenged arbitrator to the Claimant.[72] The unchallenged arbitrators while dismissing the proposal[73] initially adopted the "appearance of bias" test[74] and observed that *there might be circumstances which create "an appearance of lack of independence or impartiality" from the perspective of a reasonable person but do not do so manifestly*, i.e., an arbitrator could be said to lack independence or impartiality but such lack may not be manifest under Article 57.[75]

Finally, it was observed that, *firstly*, the challenging party must establish the factual basis of the challenge, i.e., challenge must not be based out of speculations or inferences.[76] *Secondly*, once such facts are established, the next step would be to see if there exists "a real risk of lack of impartiality based upon these facts which

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68 SCHREUER, *supra* note 1, at 938.
69 CLEIS, *supra* note 27, at 33;
70 Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Proposal to Disqualify President of the Tribunal (Oct. 3, 2001). ("Vivendi").
71 *Id.* at ¶22.
72 Bottini, *supra* note 8, at 348-349.
73 Loretta Malintoppi, *Independence, Impartiality, and Duty of Disclosure of Arbitrators* in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 796-797 (Oxford University Press 2015).
74 Bottini, *supra* note 8, at 349.
75 Vivendi, *supra* note 70, at ¶22.
76 CLEIS, *supra* note 27, at 33.

could be reasonably apprehended by either party"[77], i.e., even though Article 57 mandates that lack of qualities must be "manifest", often a "reasonable apprehension of bias" will be adequate.[78]

Similarly in *SGS vs. Pakistan*[79], the Respondent appointed arbitrator was challenged because the challenged arbitrator's firm was representing Mexico in another case where the counsel for Pakistan, has been appointed as an arbitrator[80] in that case.[81] The Co-arbitrators approved the point stated in *Vivendi I*, and took a clearer stand in this regard.[82] They held that an arbitrator can be challenged relying on an inference of lack of qualities from the perspective of a reasonable man on the basis of established facts and not on speculation.[83]

In *EDF*[84], Respondent challenged the Claimant appointed arbitrator on the basis of the challenged arbitrator economic interest in the outcome of the proceedings.[85] The Co-arbitrators while dismissing the proposal held that if reasonable doubt exists on reliability of the challenged arbitrator to exercise independent judgment then she should cease to serve in the proceedings.[86]

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77 Vivendi, *supra* note 70, at ¶25.
78 Fry, *supra* note 59, at 211.
79 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Proposal to disqualify arbitrator (Dec 19, 2002). ("SGS").
80 Robert Azinian v. United Mexican States, ICSID Case No. ARB/97/2, Award (Nov 1, 1999).
81 SGS, *supra* note 79, at ¶10.
82 CLEIS, *supra* note 27, at 34.
83 SGS, *supra* note 79, at ¶20.
84 EDF International S.A., SAUR International S.A., Leon Participaciones Argentina S.A. v. Argentine Republic, ICISD Case No. ARB/03/23, Decision on proposal to disqualify members of the Arbitral Tribunal (June 25, 2008). ("EDF").
85 *Id.* at ¶12, 35.
86 *Id.* at ¶64.

In *Abaclat I*[87], it was observed that if a challenge is based on the wrongfulness of award or on procedural grounds, *Amco* standard would be followed otherwise, the two-fold test of reasonable doubt laid down in *Vivendi* would be relied upon.[88]

Similarly, in *Repsol*[89], Respondent challenged the President of the arbitral Tribunal based on the relationship which was formed with the counsel of the Claimant. Argentina also proposed disqualification of the Claimant appointed arbitrator on the grounds of multiple appointments against Argentina and that he was predisposed on the concerned issue because he authored an article where he provided his view on a similar issue.[90] The Chairman relying on the *Videndi* standard, rejected the challenge and held that to challenge an arbitrator, no strict proof of dependence or bias is required, but establishing an appearance of such state of mind from the perspective of a reasonable person would suffice.[91] In *Urbaser*[92], a similar view was taken by the Co-arbitrators while rejecting the challenge proposal.[93]

Interestingly, the Co-arbitrators in *Saint-Gobain*[94] observed (after considering both the *Amco* and *Vivendi* standard) that, there is "no unequivocal answer" to what amounts to manifest lack of independence and impartiality in an arbitrator.[95] However, they

87 Abaclat I, *supra* note at 53.
88 CLEIS, *supra* note 27, at 46.
89 Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic, ICSID Case No. ARB/12/38, Decision on the Proposal for the Disqualification of a Majority of the Tribunal (December 13, 2013).
90 Horn, *supra* note 24, at 384-385.
91 CLEIS, *supra* note 27, at 190.
92 Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on proposal to disqualify arbitrator (Aug 12, 2010). ("Urbaser").
93 *Id.* at ¶20, 43.
94 Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/13, Decision on proposal to disqualify arbitrator (Feb 27, 2013). ("Saint-Gobain").
95 *Id.* at ¶57-59.

relied on the *Videndi* standard and rejected the proposal for disqualification.[96]

C. APPEARANCE OF BIAS OR *BLUE BANK* STANDARD

Dr. Jim Yong Kim, the current Chairman laid down this standard while accepting the proposal for disqualification of majority of the Tribunal.[97] The Respondent challenged Mr. Jose Maria Alonso[98]on the ground that the challenged arbitrator had a direct or indirect economic interest on the outcome of the present dispute.[99] On the contrary, the Claimants challenged the Respondent appointed arbitrator on the grounds of multiple appointments by the Respondent, however, he resigned after the Claimants submitted their proposal for disqualification.[100]

Dr. Kim, while deciding the challenge used four parameters to draw the conclusion.[101] *Firstly*, Article 57 and 14(1) of the ICSID Convention "do not require the proof of actual dependence or bias", rather, it is sufficient to "establish the appearance of dependence or bias"[102]. *Secondly*, the "applicable legal standard" under the ICSID Convention and "objective standard based on a reasonable evaluation of the evidence by the third party".[103] Further, Dr. Kim observed that, " the subjective belief of the party requesting the disqualification is not enough to satisfy the requirement of the Convention".[104]*Thirdly*, Dr. Kim observed, that manifest mean 'evident' or 'obvious' and " relates to the ease

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96 *Id.* at ¶60.
97 Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/20, Decision on Proposal to disqualify majority of Tribunal (Nov 12, 2013). ("Blue Bank").
98 *Id.* at ¶22-32.
99 *Id.* at ¶27-31.
100 *Id.* at ¶45-54.
101 Vasani, *supra* note 29, at ¶199-202.
102 Blue Bank, *supra* note 102, at ¶59.
103 Blue Bank, *supra* note 102, at ¶60.
104 Blue Bank, *supra* note 102, at ¶60

with which the alleged lack of quality can be perceived".[105] *Lastly*, even though external rules and guidelines (IBA Guidelines) can serve as useful tools while deciding a challenge, nevertheless, challenge must be decided pursuant to the provisions envisaged under the ICSID Convention .[106] Similarly, Dr. Kim upheld the disqualification proposal in *Burlington Resources*[107] relying on the *Blue bank* standard.[108]

Another decision of importance in the ICSID challenge jurisprudence, where the Co-arbitrators for the first time upheld a proposal for disqualification of their co-arbitrator,[109]is Caratube[110], where Bruno Boesch was challenged by the Claimant on the grounds of multiple appointments in cases of similar facts and circumstances.[111] The Co-arbitrators upheld the challenge and placed reliance on the standard laid down in *Blue Bank* and held that, "Article 57 and 14(1) of the ICSID Convention does not mandate the requirement of strict proof".[112] Explaining it further, the Co-arbitrators held that, "Mr. Bosesch's objectivity and open mildness were fouled because of resemblance of issue and facts with the *Ruby Roze*".[113] The decision also prolonged it further, that "an arbitrator cannot be asked reasonably to maintain a 'Chinese Wall' in his mind".[114] Furthermore, on the question of multiple appointments, the Co-arbitrator held that,

105 Blue Bank, *supra* note 102, at ¶61.
106 Blue Bank, *supra* note 102, at ¶62.
107 Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on proposal to disqualify arbitrator (Dec 13, 2013). ("Burlington").
108 *Id.* at ¶79-80.
109 Vasani, *supra* note 29, at 204.
110 Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Decision on the proposal for disqualification of arbitrator. ("Caratube").
111 *Id.* at ¶24-27.
112 *Id.* at ¶57.
113 *Id.* at ¶90.
114 *Id.* at ¶75.

"third party would find an evident or obvious presence of disproportion within the tribunal".[115]

However, recently in *Raffeisen*[116], Respondent proposed disqualification of the Claimant appointed arbitrator on the grounds of multiple appointments, predisposition towards the issues in the current dispute and relationship with the Claimant's counsel because of appointments between them.[117] The Chairman while dismissing the challenge observed that, *firstly*, majority of the decisions have concluded that manifest means "evident" or "obvious"[118], *secondly*, the ICSID Convention doesn't "require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias"[119] and *finally*, "the legal standard applied to a proposal to disqualify an arbitrator is an objective standard based on reasonable evaluation of evidence by a third party".[120]

Therefore, the trajectory of the decisions in *Amco, Vivendi* and *Blue Bank* depicts a radical shift in the standard for determining "manifest lack" of qualities in an arbitrator under ICSID. .

IV. Paradigm shift in challenge jurisprudence

In *Amco Asia*, the Tribunal rejected the reasonable doubt test contended by the Respondent and laid down the strict standard.[121] However, the strict standard has been heavily criticized as it imposes a higher burden of proof on the party proposing the disqualification in comparison to standards

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115 *Id.* at ¶95.
116 Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Arbitrator, (May 17, 2018). ("Raiffeisen Bank").
117 *Id.* at ¶16-36.
118 *Id.* at ¶79.
119 *Id.* at ¶83.
120 *Id.* at ¶84.
121 DAELE, *supra* note 5, at 297.

prevalent in other institutional arbitration system.[122] The ICSID Tribunal's or Administrative Council's traditional reluctance to disqualification of arbitrators is the reason for such high bar on disqualification.[123] It is pertinent to note that the ICSID Convention never intended to impose a particularly heavy burden of proof to establish lack of independence or predisposition[124] and by interpreting "manifest" under Article 57 as pertaining to seriousness of lack of qualities, the Tribunals may have drifted away from the true intentions of the ICSID Convention.[125] In the absence of any reference to an appropriate threshold to the burden of proof imposed by the ICSID Convention, it must be assumed that the requirement of standard indicating lack of qualities in an arbitrator is not increased under the ICSID Convention.[126] Nevertheless, majority of the decisions on disqualification in ICSID have relied upon the strict standard of "manifest lack".[127]

On the contrary, while laying down the reasonable doubt standard, the strict standard was heavily criticized in *Vivendi.*[128] The "reasonable doubt" test lowers the standard required for disqualifying an arbitrator in ICSID.[129] The fact that the "reasonable doubt" standard has been rejected and strict standard has been upheld[130] and *vice versa* shows that there is an

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122 Dimitropoulos, *supra* note 31, at 397-398; Federica Cristani, *supra* note 3 at 159.
123 Vasani, *supra* note 29, at 197-200.
124 CLEIS, *supra* note 27, at 17.
125 Vasani, *supra* note 29, at 198.
126 DAELE, *supra* note 5, at 233.
127 Fábrica de Vidrios Los Andes, C.A. & Owens-Illinois de Venezuela, C.A. v. Bolvarian Republic of Venezuela, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal to disqualify arbitrator, ¶33 (Mar 28, 2016); Raiffeisen Bank, *supra* note 126, at ¶79.
128 Vivendi, *supra* note 70.
129 DAELE, *supra* note 5, at 225.
130 Nations Energy, Inc. & Ors. v. Republic of Panama, ICSID Case No. ARB/06/19, Decision on proposal to disqualify arbitrator, ¶56 (Sept 7, 2011).

inconsistency in the interpretation of "manifest lack".[131] This inconsistency was however considered "as tracing an evolution" by the Co-arbitrators in *Simens vs. Argentina.*[132] Here, "manifest lack" was considered in terms of "justifiable doubt test" under the IBA guidelines by Judge Brower and Professor Bello Janeiro. They observed that the standard for disqualification of an arbitrator is not far from the standard prevailing under customary international law.[133] The paradigm shift[134] in the standard for disqualification of an arbitrator, evident from the transition to "reasonable doubt test" laid down in *Vivindi*, from the strict standard test laid down in *Amco Asia*, would be hugely beneficial to ICSID arbitration in general.[135]

Considering the strict standard usually followed for determining the standard to disqualify an arbitrator under the ICSID, the decision of Dr. Kim in *Blue Bank* was a bolt from the blue in the ICSID challenge jurisprudence.[136] It is also pertinent to note that, before *Blue Bank*, only one successful challenge in *Pey Casado vs. Chile* is recorded in the history of ICSID[137], after the decision of Dr. Kim, till date there has been three successful challenges in the decisions of *Big Sky*[138], *Caratube* and *Burlington*. The decision in *Blue Bank* further lowers the threshold required to challenge an arbitrator under the ICSID. Such shift is also indicative of the fact

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131 DAELE, *supra* note 5, at 223.

132 Siemens AG v Argentine Republic, ICSID Case No ARB/02/08, Decision on Proposal to Disqualify an Arbitrator (11 February 2005)

133 Sam Luttrell, *Testing the ICSID Framework for Arbitrator Challenges*, 31 No. 3 ICSID REV. 597, 602 (2016).

134 Kim, *supra* note 20, at 636; Dimitropoulos, *supra* note 31, at 374-375.

135 Vasani, *supra* note 29, at 196.

136 Luttrell, *supra* note 143, at 605.

137 Víctor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case No. ARB/98/2), Decision on proposal to disqualify arbitrator (Feb 21, 2006). ("Pey Casado").

138 Big Sky Energy Corporation v. Republic of Kazakhstan (ICSID Case No. ARB/17/22), Decision on proposal to disqualify arbitrator (May 3, 2018).

that ICSID is shifting towards the "reasonable doubt test" followed in most commercial arbitration rules.[139]

However, on an analysis of the observations of Dr. Kim in *Blue Bank*, it is evident that there was a clear affirmation of the observations laid down in the past decisions pertaining to arbitrator challenges. *Firstly,* prior to *Blue* bank, in Urbaser, it was also observed that Article 57 doesn't require actual proof of bias, rather "an appearance of such bias from a reasonable and informed third person's perspective is sufficient to justify the doubts" regarding an arbitrator's independence and impartiality.[140] *Secondly,* the objective standard of reasonable evaluation of the evidence by a third party was also observed in *Suez I*.[141] *Thirdly*, even though Dr. Kim went on to accept the disqualification proposal but reliance on the much criticized literal interpretation of the term "manifest" which had set a high burden of proof in disqualification proposals under ICSID has been maintained by him.[142] On the contrary, Dr. Kim's reliance on an appearance of bias as opposed to the actual proof of bias is an indication that ICSID is inclining towards the "reasonable doubt" standard.[143] Thus, the paradigm shift is evident from the eventual contrast in the standard of disqualification of an arbitrator under the ICSID Convention, i.e., from an initial strict standard (*Amco Asia)* and a much appreciated reasonable doubt standard (*Vivendi)* to an altogether new standard (*Blue bank)* which takes a middle ground by accepting the reasonable doubt standard while maintaining the high threshold for determining "manifest lack" of independence and impartiality of an arbitrator in ICSID.

139 Vasani, *supra* note 29, at196.
140 Urbaser, *supra* note 92, at 43.
141 *Suez I, supra* note 17, at 39.
142 Vasani, *supra* note 29, at 201, 202.
143 Vasani, *supra* note 29, at 200.

V. Conclusion

The lack of uniformity in norms pursuant to the conflict of interest in the matter related to investment arbitration has always been a matter of great concern in the international arbitration community. Thus, it is necessary to keep arbitrator free from smear and prevent manoeuvres that cause prejudice to the proceedings. This might look simple but indeed it is not.

The integrity of the arbitrator is not only of importance to the cross-border trade and investment but also to the community which is directly or indirectly related by the arbitral process. Thus, the adjudicators of arbitration challenges should adopt a procedure which is in consonance with the public policy. The Co-arbitrators or the Chairman while deciding on a challenge should also keep in mind that the convention is around half a century old and interpretation of the term "manifest" should be in consonance with the present scenario and circumstances.

The scope of ambiguity in the standard of "manifest lack" required to disqualify an arbitrator under the ICSID makes it difficult for the parties to get an arbitrator disqualified. Dr. Kim has observed in *Blue* Bank that majority of the challenge decisions have relied on the strict standard of "manifest lack". However, the strict standard has a major drawback since it sets a high burden of proof on the challenging party to show "manifest lack" of independence and impartiality. Owing to this drawback, the reasonable doubt standard was laid down. The reasonable doubt standard is more party friendly since it significantly lowers the burden of proof on the parties to show "manifest lack" and this standard is also in consonance with the standards used in most arbitral tribunals and institutional arbitrations. Nevertheless, despite the paradigm shift, in the standard of disqualification, i.e., recent reliance on the "reasonable standard" and "appearance of bias" tests, the absence of the doctrine of *stare decisis* makes it uncertain as to what standard of "manifest lack" will be followed.

Further, a major concern with the paradigm shift in the disqualification standard is that it makes the process susceptible to frivolous challenges against an arbitrator on blatant, false and whimsical ground just to forestall the arbitral process. To prevent such instances, ICSID should adopt new set of guidelines such as:

a. Define the term "manifest lack": Since, there exists no definition of "manifest lack" in the ICSID Convention, varied interpretations of the term have led to the present ambiguity in arbitrator challenges under ICSID. By defining the term, ICSID will be able to resolve this existing ambiguity.

b. Setting up of a set of rules which would constitute as a test for determining conflict of interest in an arbitrator: These rules *inter alia* should include limitations regarding degree of relationship between the arbitrator and the appointing party, interest of the arbitrator in the subject matter of the dispute, multiple appointments, relationship between the members of the arbitral tribunal. Pursuant to the introduction of such rules a clear line can be drawn as to when one should challenge an arbitrator.

However, ICSID can only be amended if "all contracting states have ratified, accepted or approved the amendment". For this reason, amending the ICSID Arbitration Rules to incorporate such guidelines is the most feasible way to deal with this problem.

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