

**IN THE MATTER OF AN ARBITRATION
UNDER THE ICSID CONVENTION**

**PCA Case No. IR-2019/1
ICSID Case No. ARB/12/12**

BETWEEN:

**1. VATTENFALL AB; 2. VATTENFALL GMBH;
3. VATTENFALL EUROPE NUCLEAR ENERGY GMBH;
4. KERNKRAFTWERK KRÜMMEL GMBH & CO. OHG;
5. KERNKRAFTWERK BRUNSBÜTTEL GMBH & CO. OHG**

Claimants

-and-

FEDERAL REPUBLIC OF GERMANY

Respondent

**RECOMMENDATION PURSUANT TO
THE REQUEST BY ICSID DATED 24 JANUARY 2019
ON THE RESPONDENT'S PROPOSAL TO DISQUALIFY
ALL MEMBERS OF THE ARBITRAL TRIBUNAL
DATED 12 NOVEMBER 2018**

Hugo Hans Siblesz

**Secretary-General
Permanent Court of Arbitration**

4 March 2019

TABLE OF CONTENTS

I. Introduction 1

II. Procedural History 1

 A. The Arbitration Proceedings..... 1

 B. The Respondent’s Requests to Introduction Additional Documents..... 2

 C. The Tribunal’s Partial Decision on Jurisdiction 4

 D. The Tribunal’s Request for Further Submissions..... 4

 E. The Disqualification Proposal 6

III. Observations on the Applicable Law and Timeliness..... 7

 A. The Legal Basis for a Disqualification Proposal under the ICSID Convention 7

 B. Burden and Standard of Proof under Article 57 of the ICSID Convention..... 8

 C. Timeliness of a Proposal 8

IV. Observations on the Grounds on which the Proposal Is Based 9

 A. Ground One: Alleged Assistance to the Claimants in the Formulation of their Claims..... 9

 B. Ground Two: Alleged Unequal Treatment of the Parties..... 12

 C. Other Matters Raised by the Respondent 14

 1. *The Presiding Arbitrator’s Disclosure*..... 14

 2. *Judge Brower’s Conduct during the Hearing*..... 16

V. Conclusion 17

VI. Recommendation 18

I. Introduction

1. The present recommendation (the “**Recommendation**”) concerns the arbitration proceedings commenced in 2012 by 1. Vattenfall AB; 2. Vattenfall GmbH; 3. Vattenfall Europe Nuclear Energy GmbH; 4. Kernkraftwerk Krümmel GmbH & Co. oHG; 5. Kernkraftwerk Brunsbüttel GmbH & Co. oHG (the “**Claimants**”), against the Federal Republic of Germany (the “**Respondent**”, and together with the Claimants, the “**Parties**”) under the Energy Charter Treaty of December 17, 1994 (the “**Treaty**”). Vattenfall AB is a Swedish company; the remaining claimants are subsidiaries of Vattenfall AB incorporated in Germany.
2. These arbitration proceedings are administered by the International Centre for the Settlement of Investment Disputes (“**ICSID**”) pursuant to the Convention on the Settlement of Disputes between States and Nationals of Other States (the “**ICSID Convention**”) and the Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”).
3. By letter dated January 24, 2019 from Ms. Lindsay Gastrell, Legal Counsel at ICSID, I have been asked to provide an recommendation to ICSID on the Respondent’s Application for the Disqualification of the Tribunal (the “**Proposal**”), submitted on 12 November 2018.
4. The Respondent’s Proposal is based on allegations that:
 - (a) The Tribunal has “assisted Claimants with the formulation of their claims and has given them an opportunity to remedy shortcomings at a time when Claimants themselves would not have been able to do so” (“**Ground One**”);
 - (b) The Tribunal treated the Parties unequally (“**Ground Two**”).
5. The Respondent also outlines certain additional facts that are invoked to “confirm the Tribunal’s lacking ability for independent judgment.” I understand, however, that these additional facts are not themselves proposed as independent grounds for the disqualification of the Tribunal.
6. Because of the seriousness of the matters to which the Proposal relates, the reasons on which the present Recommendation is based are set out herein.

II. Procedural History

A. The Arbitration Proceedings

7. On 31 May 2012, the Secretary-General of ICSID registered the Claimants’ request for the institution of arbitration proceedings.
8. The Tribunal in this arbitration comprises of The Honorable Charles Brower, Professor Vaughan Lowe QC, and Professor Albert Jan van den Berg, presiding arbitrator.
9. On 27 September 2013, the Claimants submitted their *Memorial on the Merits*.
10. On 22 August 2014, the Respondent submitted its *Counter-Memorial on the Merits*, a *Memorial on Jurisdiction*, and a request to address objections to jurisdiction as a preliminary question.
11. On 7 September 2014, the Tribunal issued Procedural Order No 8 in respect of the Respondent’s request, joining the objections to jurisdiction to the merits of the dispute.

12. On 1 September 2015, the Claimants submitted a *Reply on the Merits* and a *Counter-Memorial on Jurisdiction*.
13. On 27 April 2016, the Respondent submitted a *Rejoinder on the Merits* and a *Reply on Jurisdiction*.
14. On 18 July 2016, the Claimants submitted a *Rejoinder on Jurisdiction*.
15. From 10 to 21 October 2016, the Tribunal held a hearing in respect of the Parties' arguments on jurisdiction, liability, and damages.
16. On 2 May 2017, the Parties submitted their *First Post-Hearing Submissions* simultaneously.
17. On 14 September 2017, the Parties submitted their *Second Post-Hearing Submissions* simultaneously.
18. On 11 December 2017, the ICSID Secretariat, writing on behalf of the Tribunal, advised the Parties that "the Tribunal is making progress in the drafting and expects to be able to notify its decision in the first quarter of 2018."

B. The Respondent's Requests to Introduction Additional Documents

19. On 19 December 2017, the Respondent wrote to the Tribunal, seeking leave to introduce three additional documents to rebut the Claimants' previous assertions regarding the date on which certain of their nuclear power plants were expected to cease power operations. On 22 December 2017, the Claimants opposed the Respondent's application.
20. On 29 December 2017, the Tribunal denied the Respondent's application, reasoning as follows:
 5. The Tribunal has considered the Parties' submissions and deliberated. In particular, the Tribunal has analysed the Application under Section 13.3 of Procedural Order No. 1, which provides:

Neither Party shall be permitted to submit additional or responsive documents after the dates for the Reply and Rejoinder, save under exceptional circumstances as determined by the Tribunal.

13.3.1 Should a Party request leave to file additional or responsive documents, the Party may not annex to its request the documents that it seeks to file.

13.3.2 If the Tribunal grants an application for submission of an additional or responsive document after the afore-mentioned dates, the Tribunal shall ensure that the other Party be afforded sufficient opportunity to make its observations concerning such a document.
 6. The Tribunal agrees with Claimants that at this very late stage in the proceeding—more than 14 months after the hearing and three months after the Parties' final written submissions—the standard of "exceptional circumstances" set forth in Section 13.3 is a particularly high threshold.
 7. In the Tribunal's view, Respondent has not met this threshold. The New Documents relate to a specific point of damages that has been contested by the Parties from the outset of the proceeding. Respondent's damages calculation already reflects its own position on this point (that the Brokdorf nuclear power plant will continue to operate after 2018), and the Claimants' ex-ante damages calculation would not be affected by the introduction of the New Documents. Thus, the New Documents would alter neither Party's proposed damages assessment.

8. In such circumstances, at this late stage in the proceeding, the Tribunal does not see any exceptional circumstances that requires introduction of the New Documents into the record.
21. On 15 February 2018, the Respondent wrote to the Tribunal, seeking leave to introduce an additional document relating to safety and maintenance at one of the Claimants' nuclear power plants. On 21 February 2018, the Claimants opposed the Respondent's application.
 22. On 23 February 2018, the Tribunal denied the Respondent's application, reasoning as follows:
 7. The Tribunal has considered the Parties' submissions and deliberated. In particular, the Tribunal has analysed the Application under Section 13.3 of Procedural Order No. 1, which provides:

[. . .]
 8. As stated in Procedural Order No. 34, the Tribunal agrees with Claimants that the standard of "exceptional circumstances" set forth in Section 13.3 is a particularly high threshold at this very late stage in the proceeding.
 9. The Tribunal finds that Respondent has not met this threshold. While the Tribunal appreciates that the New Document could not have been submitted with Respondent's Rejoinder, the Tribunal is not willing to admit all new documents at this stage. It appears that any relationship between the New Document and the three issues noted by Respondent is only indirect, and the New Document would neither alter nor establish either Party's position on those issues. In particular, the New Document, which concerns a recent event, does not speak to the conduct of the Parties during the time frame at issue in this case. Therefore, in the Tribunal's view, Respondent has not shown any exceptional circumstance that justifies introduction of the New Document into the record.
 23. On 11 May 2018, the Respondent wrote to the Tribunal, seeking leave to introduce three additional documents that the Respondent considered to rebut the Claimants' assertions regarding the market for electricity production volumes. On 17 May 2018, the Claimants opposed the Respondent's application.
 24. On 21 May 2018, the Tribunal denied the Respondent's application, reasoning as follows:
 7. The Tribunal has considered the Parties' submissions and deliberated. The Tribunal has analysed the Application under Section 13.3 of Procedural Order No. 1, which provides:

[. . .]
 8. As stated in Procedural Order No. 34, the Tribunal considers that at this very late stage in the proceeding, the standard of "exceptional circumstances" set forth in Section 13.3 is a particularly high threshold.
 9. The Tribunal finds that the Respondent has not met this high threshold. In this regard, the Tribunal agrees with Claimants' assessment that the reasoning set forth in Procedural Order No. 34 applies directly to the current Application.
 10. As stated in Procedural Order No. 34:

Respondent's damages calculation already reflects its own position on this point (that the Brokdorf nuclear power plant will continue to operate after 2018), and the Claimants' ex-ante damages calculation would not be affected by the introduction of the New Documents. Thus, the New Documents would alter neither Party's proposed damages assessment.
 11. Indeed, Respondent accepts in the Application that it "has always challenged" Claimants' assertion that certain nuclear power plants will cease power operations in 2019.

12. Respondent challenges the Tribunal's reasoning in Procedural Order No. 34, arguing that the "very fact that an issue is in dispute between the Parties is what makes it necessary for the Tribunal to consider evidence in the first place". The Tribunal agrees with this statement in principle, but finds that it does not support Respondent's position in the current circumstances. In the present case, the fundamental issue in dispute between the Parties is the appropriate method of assessing damages, if any: *ex-ante* versus *ex-post*. The New Documents would not speak to this issue.
13. Nor can the Tribunal accept Respondent's argument that the New Documents are relevant to demonstrate Claimant's bad faith and to confirm that Claimants "have made false submissions of fact to the Tribunal". None of Claimants' statements cited in the Application amount to false statements made in bad faith. Rather, they reflect Claimants' assessment of the evidence and their support for an *ex-ante* damages calculation. The fact that Respondent disagrees and draws a different conclusion from the evidence is to be expected in a contentious arbitration.
14. In addition, the Tribunal finds that the admission of evidence, even evidence that may have some potential relevance to an issue in dispute, is not without limits. That is the understanding behind Section 13.3 of Procedural Order No. 1, and it is the reason that the standard of "exceptional circumstances" set forth therein must be interpreted in light of the phase of the proceeding.
15. For these reasons, the Tribunal finds that exceptional circumstances do not exist to justify introduction of the New Documents into the record at this late stage in the proceeding.

C. The Tribunal's Partial Decision on Jurisdiction

25. On 7 March 2018, the Tribunal wrote to the Parties, posing certain questions.
26. On 4 and 23 April 2018, the Parties wrote to the Tribunal regarding its questions of 7 March 2018.
27. On 8 May 2018, the Tribunal received a non-disputing party submission from another party, and on 30 May 2018, the Parties provided their written comments on this non-disputing party submission.
28. On 26 June 2018, the ICSID Secretariat, writing on behalf of the Tribunal, advised the Parties that "the Tribunal now expects to be able to issue its ruling in the Fall of this year."
29. On 31 August 2018, the Tribunal issued a decision on one of the Respondent's objections to jurisdiction.

D. The Tribunal's Request for Further Submissions

30. On 26 October 2018, the ICSID Secretariat, writing on behalf of the Tribunal, requested additional submissions from the Parties. The Secretariat's letter provided as follows:

I write on behalf of the Tribunal regarding the Tribunal's assessment of its jurisdiction and alleged damages in these proceedings.

The Tribunal has carefully considered each Party's submissions and evidence as presented in this matter. However, in the Tribunal's view, the Parties have not sufficiently addressed certain issues which may be relevant to the Tribunal's jurisdiction over the Third, Fourth and Fifth Claimants, as well as with respect to damages.

Further to the Tribunal's power to judge its own competence (Article 41(1), ICSID Convention), and to consider on its own initiative whether any dispute or claim is within the jurisdiction of the Centre and its own competence (Rule 41(2), ICSID Arbitration Rules), the Tribunal seeks the Parties' views on the following questions:

1. What is the rationale of Article 25(2)(b) ICSID Convention read together with Article 26(7) ECT?
2. What is the meaning of “foreign” in “foreign control” in Article 25(2)(b) ICSID Convention read together with “controlled by Investors of another Contracting State” in Article 26(7) ECT?
3. Is a domestic subsidiary (the Third Claimant) of a locally incorporated company referred to in Article 25(2)(b) ICSID Convention read together with Article 26(7) ECT (the Second Claimant) also to be treated as such a locally incorporated company (the Second Claimant)?
4. Does the same analysis apply to the domestic subsidiaries, being the Fourth and Fifth Claimants, held by the Third Claimant?
5. Or, is or are such domestic subsidiaries (the Third, Fourth and Fifth Claimants) to be treated as part of the Investment made through the locally incorporated company (the Second Claimant)?
6. Is the situation of a domestic subsidiary (the Third, Fourth and Fifth Claimants) of a locally incorporated company (the Second Claimant) referred to in Article 25(2)(b) ICSID Convention read together with Article 26(7) ECT to be distinguished from the situation considered in *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, ¶¶ 28-38?
7. Having regard to the answers to the above questions, what would be the consequences for each Party’s case on jurisdiction and liability?

With respect to the alleged damages, the Tribunal has the following question (see Respondent’s First Post-Hearing Submission, ¶ 464):

8. Having also regard to the answers to the above questions, including question 7, and if the Tribunal were to decide that the valuation date for quantification of the alleged damages is 29 June 2011 (corresponding to the date prior to the date of adoption of the 13th Amendment to the German Atomic Energy Act), what would be each Party’s case regarding the alleged damages due?

The Tribunal invites the Parties to provide any comments on the above within 28 days, i.e., by Friday, 23 November 2018. The Parties may reply to the other side’s comments within 28 days thereafter, i.e., by Friday, 21 December 2018.

With their comments, the Parties may submit new legal authorities, but no new factual or expert evidence (including domestic law cases) will be admitted, except in relation to question 8, in response to which the Parties may submit new factual or expert evidence as relevant.

31. On 2 November 2018, the Claimants wrote to the Tribunal to clarify the Tribunal’s request, in the follow terms:

Claimants refer to the Arbitral Tribunal’s letter dated 26 October 2018, in which it seeks the Parties’ views on a number of questions.

Claimants write to ask the Arbitral Tribunal for a confirmation on the scope of the new evidence to be allowed to be submitted in relation to question 8.

In question 8, the Arbitral Tribunal, referring also to its previous questions, asks, “if the Tribunal were to decide that the valuation date for quantification of the alleged damages is 29 June 2011 [...] what would be each Party’s case regarding the alleged damages due?” Further on, the Arbitral Tribunal states that, in relation to question 8, “the Parties may submit new factual or expert evidence as relevant” (emphasis added).

Claimants ask the Arbitral Tribunal to confirm that any new evidence must be limited to such evidence which is necessary for a Party to adjust its case on quantum in direct response to the Arbitral Tribunal’s question in isolation; and that is must not include, for

instance, a complete update of the Party's assessment and evidence on quantum, regardless of whether the Party advocates an ex-ante or ex-post assessment.

In the current situation and in view of the procedural rules, it is submitted that this is the only reasonable approach, given that new evidence is only permitted in "exceptional circumstances", a threshold which the Arbitral Tribunal has noted is "particularly high" at this extraordinarily late stage of the proceedings. Claimants are already deeply concerned about the very substantial delays of these proceedings. More than two years have passed since the hearing. Apart from the two agreed upon post-hearing submissions, several additional rounds of submissions have been filed; none at the request of Claimants. Claimants have no intention of submitting extensive new evidence in response to the Arbitral Tribunal's questions, and cannot accept that an award risks being delayed even further by Germany doing so.

32. The Tribunal wrote to the Parties the same day, inviting the Respondent to provide its comments on the Claimants' communication by 6 November 2018.
33. On 5 November 2018, the Respondent wrote to the Tribunal, stating as follows:

Respondent's counsel will be traveling in the next two weeks. Respondent's main representative will also be out of the office and unavailable. Therefore, we will not be in a position to discuss the reaction to Claimants' email with Respondent and provide comments before 16 November 2018. Respondent therefore requests an extension until 16 November 2018.
34. On 6 November 2018, the Tribunal wrote to the Parties, granting the Respondent until 12 November 2018 to provide its comments.

E. The Disqualification Proposal

35. On 12 November 2018, the Respondent wrote to the ICSID Secretary-General, requesting the disqualification of the Tribunal.
36. On 20 November 2018, in accordance with the schedule established by ICSID, the Claimants wrote to the ICSID Secretary-General, opposing the Respondent's Proposal.
37. On 26 November 2018, the ICSID Secretariat wrote to the Parties, conveying the comments of each member of the Tribunal on the Respondent's Proposal.
38. On 11 December 2018, the Parties wrote simultaneously to the ICSID Secretary-General. In these communications the Respondent maintained its Proposal, and the Claimants endorsed the comments provided by the members of the Tribunal.
39. On 24 January 2019, the ICISD Secretariat, on behalf of the ICSID Secretary-General, wrote to me, enquiring whether I would be willing to make a recommendation on the Respondent's Proposal to the Chairman of the ICSID Administrative Council. According to ICSID, this request to me was made on the basis of a request from the Respondent.
40. On 28 January 2019, I responded that I would be willing to provide a recommendation on the Respondent's Proposal.
41. On 28 and 30 January and 1 February 2019, the International Bureau of the PCA and the ICSID Secretariat exchanged correspondence regarding the timing and modalities for the provision of this Recommendation.

III. Observations on the Applicable Law and Timeliness

A. The Legal Basis for a Disqualification Proposal under the ICSID Convention

42. The legal basis for the Proposal that the Tribunal be disqualified is Article 57 of the ICSID Convention, which provides:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

43. In the Proposal, the Respondent proposes disqualification based on the first sentence of Article 57, *i.e.*, the existence of facts “indicating a manifest lack of the qualities required by paragraph (1) of Article 14.” According to Article 14(1) of the ICSID Convention,

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

44. The Respondent questions neither the high moral character of the members of the Tribunal nor their competence in the field of international law. The Proposal addresses only whether the members of the Tribunal may be “relied upon to exercise independent judgment”. I note that the term “independent judgment” also encompasses the concept of impartiality.

45. Rule 9 of the ICSID Arbitration Rules provides:

Disqualification of Arbitrators

- (1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.
 - (2) The Secretary-General shall forthwith:
 - (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
 - (b) notify the other party of the proposal.
 - (3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.
 - (4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.
 - (5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.
 - (6) The proceeding shall be suspended until a decision has been taken on the proposal.
46. I note that decisions on challenges previously brought in other cases under the ICSID Convention or other procedural frameworks are not binding upon me. However, this does not preclude me from considering such decisions and the arguments of the Parties based upon

them, to the extent that I find that they shed any useful light on the issues arising in relation to this proposal for disqualification.

B. Burden and Standard of Proof under Article 57 of the ICSID Convention

47. Under Article 57, the burden is on the challenging party to establish the existence of the required fact or facts and to prove that such fact or facts indicate a “manifest lack” of the quality required of an arbitrator, that is, that such an arbitrator lacks the quality of being a person who can be relied upon to exercise independent judgment and impartiality of judgment. 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.
48. I note that the standard imposed by Articles 14 and 57 has been considered in a number of prior decisions. It has been held that “manifest” in Article 57 of the ICSID Convention means “evident” or “obvious” and relates to “the ease with which the alleged lack of the required qualities can be perceived”.¹
49. The Parties appear to be largely in agreement with respect to the applicable legal standard.² I note that both accept the interpretation of Article 57 and 14(1) set out in *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, namely 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.

The legal standard applied to a proposal to disqualify an arbitrator 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.³
50. In sum, the applicable legal principles are as follows. Pursuant to Article 57 of the ICSID Convention, the challenging party carries the burden to establish, first, the existence of facts on the basis of which a “manifest” lack of the qualities of an arbitrator can be inferred. Second, the challenging party must establish that such inference is reasonable, considering the circumstances of the case. Article 57 of the ICSID Convention contains an objective standard. Subjective perceptions or beliefs of the challenging party are insufficient to disqualify an arbitrator.

C. Timeliness of a Proposal

51. Rule 9(1) of the ICSID Arbitration Rules states that a party seeking the disqualification of an arbitrator must do so “promptly” after the party has obtained knowledge of the relevant facts on which the challenge is based.
52. Neither the ICSID Convention, nor the ICSID Arbitration Rules specify a precise number of days within which a proposal for disqualification must be filed, and it is well established that

¹ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, para. 61.

² Claimants’ Response, 20 November 2018, p. 3; Respondent’s Comments, 11 December 2018, p. 2.

³ *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify All Members of the Tribunal, 3 October 2017, paras. 68-69.

the timeliness of a proposal must be evaluated on a case-by-case basis.⁴ I will address the timeliness of the Respondent's Proposal below, in considering the specific grounds for disqualification set out therein.

IV. Observations on the Grounds on which the Proposal Is Based

53. In the following sections, I shall set out my considerations regarding each of the two grounds for the Proposal put forward by the Respondent. I will also address certain additional matters raised by the Respondent that are alleged to relate to the two grounds for the Proposal.

A. Ground One: Alleged Assistance to the Claimants in the Formulation of their Claims

54. The Respondent submits that the Tribunal's questions to the Parties of 26 October 2018 constituted an "illicit attempt by the Tribunal to assist the Claimants" by directing the Claimants to remedy certain defects in their case, identifying how such defects should be remedied, and permitting the Claimants to submit additional evidence and expert testimony at a very late stage in the proceedings, well after the point at which the Parties could themselves make new submissions.⁵

55. According to the Respondent, "all of the questions posed by the Tribunal relate to shortcomings in Claimants' case that Respondent ha[d] raised early on in the proceedings and that were discussed by both Parties in great detail."⁶ These were also, the Respondent emphasizes, issues that the Tribunal had already directed the Parties to address in the questions it provided the Parties in advance of their closing arguments at the end of the October 2016 hearing.⁷

56. The Respondent focuses in particular on the Tribunal's question no. 8, concerning the valuation date, arguing that the Tribunal had improperly invited new factual and expert evidence regarding "a valuation date for which Claimants have not even presented a claim."⁸ According to the Respondent, the Tribunal may not consider valuation dates other than those submitted by the Claimants. In the Respondent's view: "because of Claimants' continued refusal to make a claim of damages as of a proper valuation date, the Tribunal has to dismiss Claimants' claims if it comes to the conclusion that the 14 March 2011 valuation date for which Claimants present claims is wrong."⁹

57. According to the Respondent, the Tribunal's bias is further shown by the short deadline of 28 days for the Parties to respond to its questions of 26 October 2018. In the Respondent's view "it is impossible to present a truly proper new expert report with a different valuation date in this arbitration within this short time period."¹⁰ Accordingly, the Respondent concludes, "the Tribunal just wanted to elicit a new number from Claimants for their damages case – irrespective of whether it reflects a serious calculation – to overcome the procedural hurdle that

⁴ See, e.g., *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify All Members of the Tribunal, 3 October 2017, para. 70; *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, para. 68.

⁵ Respondent's Proposal, p. 3.

⁶ Respondent's Proposal, p. 2.

⁷ Respondent's Proposal, p. 2.

⁸ Respondent's Proposal, p. 3.

⁹ Respondent's Proposal, p. 3.

¹⁰ Respondent's Comments of 11 December 2018, p. 4.

it cannot decide in Claimants' favor without Claimants having put the claim forward."¹¹ The Respondent also considers that the absence of any provision for an oral hearing on the matters raised in the Tribunal's questions of 26 October 2018 "curtailed the Respondent's right to a fair trial" and "deprives Respondent of its right to confront evidence."¹²

58. Ultimately, the Respondent concludes:

The Tribunal has left the role of a neutral assessor of the case presented by the Parties. Instead, it is giving Claimants yet another chance to remedy their defective case and, indeed, it is telling Claimants how to remedy it. Because of this conduct, the members of the Tribunal cannot be relied upon anymore to exercise independent judgment.¹³

*

59. The Claimants reject the suggestion that the Tribunal has exhibited bias through its questions of 26 October 2018. In the Claimants' view, "the Arbitral Tribunal has identified certain questions within the existing framework of the case on which it seeks both Parties' comments."¹⁴ The Claimants consider this to be routine, and note that this has occurred on multiple occasions in the course of the proceedings without objection from the Respondent.¹⁵

60. The Claimants consider the Tribunal's questions nos. 1-7 (concerning the Tribunal's jurisdiction under the Energy Charter Treaty and ICSID Convention over locally incorporated subsidiaries and the effect on the calculation of damages) separately from the Tribunal's question no. 8 (concerning the valuation date). With respect to questions nos. 1-7, the Claimants submit that the Tribunal's questions go to an issue on which the Parties have taken clearly opposing positions. According to the Claimants, "[t]here is no suggestion, let alone any request, for any of the Parties to amend its case." Accordingly, the Claimants submit that:

there is no "defect" in Claimants' case which the Arbitral Tribunal has "told Claimants [...] how to remedy". There are only questions on certain legal aspects of Germany's jurisdictional objection which the Arbitral Tribunal has identified and on which it seeks both Parties' views.¹⁶

61. With respect to question no. 8, Claimants note that they had advocated for an *ex-ante* valuation as of 14 March 2011 whereas the Respondent had argued for an *ex-post* valuation. In this question, the Tribunal raises the possibility of an *ex-ante* valuation with a valuation date proposed by neither Party. In the Claimants' view, "[g]iving both Parties the opportunity to submit a damages figure based on that valuation date does not show any bias against or in favour of either Party."¹⁷ In other words, the Claimants argue:

The Arbitral Tribunal is asking the Parties – both Parties – what the effect on the alleged damages would be if the Arbitral Tribunal were to disagree with Claimants' preferred position – and indeed also with Germany's preferred position – on a particular point of the

¹¹ Respondent's Comments of 11 December 2018, p. 4.

¹² Respondent's Comments of 11 December 2018, p. 4.

¹³ Respondent's Proposal, p. 6.

¹⁴ Claimants' Response, p. 4.

¹⁵ Claimants' Response, p. 4.

¹⁶ Claimants' Response, p. 4.

¹⁷ Claimants' Response, p. 5.

damages calculation and instead use a valuation date mentioned by Germany in its Post-Hearing Submission.¹⁸

62. In the Claimants' view, there is nothing improper with this approach:

There is also no doubt that an arbitral tribunal can adopt its own reasoning within the framework of the case established by the parties, and that it can – and sometimes must, in order to avoid surprises – invite the parties' comments before adopting an approach on which the parties have not provided submissions.¹⁹

63. Indeed, the Claimants submit that the Respondent's proposal "rests on a misconception" in suggesting that the Tribunal would exceed its mandate in selecting a valuation date other than that proposed by a Party.²⁰ It is, in the Claimants' view:

standard practice for an arbitral tribunal to award damages in a different amount than that calculated by the claimant if the arbitral tribunal does not agree with the claimant on a particular point, whether it is a point of jurisdiction, a point of liability, or another assumption on which the damages calculation is based.²¹

* *

64. As an initial matter, I note that the first ground for disqualification in the Respondent's proposal was raised in a timely fashion. The Claimants do not suggest otherwise, and I recall that the Respondent's proposal was submitted on 12 November 2018, 17 days after the Tribunal's questions to the Parties of 26 October 2018. I consider that the Proposal, with respect to this ground, was filed promptly for the purpose of Rule 9(1) of the ICSID Arbitration Rules.

65. Turning to the content of the Tribunal's questions of 26 October 2018, I agree with the Claimants that the circumstances of questions nos. 1-7 differ from those of question no. 8. While the Respondent concentrates its Proposal on the Tribunal's question no. 8, it also objects to questions nos. 1-7 as allegedly giving the Claimants a further opportunity to submit arguments on points that had already been extensively briefed by the Parties. As I understand the Proposal, the Tribunal's questions are alleged to show a lack of independence and impartiality insofar as they offered the Claimants a further opportunity to develop their submissions, absent which the Tribunal would have found itself compelled to deny jurisdiction over the claims of Vattenfall's locally incorporated subsidiaries.

66. While I understand the Respondent's surprise in receiving a request for further argument on an issue of jurisdiction that, the record indicates, had already been extensively argued, I do not consider it reasonable to make the inference suggested by the Respondent that this was intended to aid the Claimants. The Tribunal's efforts to complete gaps in the evidentiary record and to ascertain the Parties' positions on additional points do not provide a basis for speculation as to a biased motive. Rather, the record shows that the Tribunal remains concerned regarding its jurisdiction over Vattenfall's locally incorporated subsidiaries and does not consider that the submissions and argument it has previously received suffice to enable it to decide the matter. Given that this issue raises a complicated question of the interpretation of the Energy Charter Treaty and ICSID Convention that does not appear to have been examined by any previous tribunal, this is hardly surprising. I do not consider that the Tribunal's request for further submissions, even at a comparatively late date in the proceedings, can reasonably be considered

¹⁸ Claimants' Response, p. 6.

¹⁹ Claimants' Response, p. 6.

²⁰ Claimants' Response, p. 6.

²¹ Claimants' Response, p. 7.

to support an inference that the Tribunal manifestly cannot be “relied upon to exercise independent judgment.”

67. In the case of the Tribunal’s question no. 8, I understand the Respondent’s arguments to be two-fold. First, as with questions nos. 1-7, it is suggested that the opportunity to provide further submissions on valuation favors the Claimants, insofar as the Tribunal would otherwise have been forced to deny the claim. Second, it is suggested that, in raising the possibility of another valuation date, the Tribunal exceeded the scope of the Claimants’ claim and thus the scope of the Tribunal’s own mandate.
68. In my view, the former objection fails for the same reasons as that made to question nos. 1-7. The Tribunal’s question was directed to both Parties, and I see no basis for the inference that, absent further submissions, the Tribunal was more likely to favor the Respondent’s approach or for concluding that a request to consider another valuation date should be seen as more beneficial to one Party than the other.
69. With respect to the argument that the Tribunal exceeded its mandate in inviting the Parties to consider an *ex-ante* valuation date other than that proposed by the Claimant, I note that arbitrators routinely propose their own analysis of facts and law to disputing parties, and then allow the parties a fair opportunity to present their views. I thus find no evidence of bias in the invitation to consider another *ex-ante* valuation date. Moreover, the question of the scope of the Tribunal’s jurisdiction to consider such alternative dates is one that ultimately falls to the Tribunal itself to determine in the first instance as a matter of *kompetenz-kompetenz*.
70. The Respondent’s Proposal thus raises a disagreement with the position the Respondent expects the Tribunal to take regarding its jurisdiction to consider alternative valuation dates. In fact, however, the Tribunal has not yet taken any decision. In this circumstance, the appropriate step is for the Respondent to raise its concerns with the Tribunal itself. If the Respondent ultimately considers the Tribunal’s decision on this point to be in manifest excess of its powers, it will retain the option of an application against the award pursuant to Article 51(1)(b) of the ICSID Convention. Such a substantive disagreement, however, provides no basis for an inference of bias. Accordingly, I do not consider that the Tribunal’s request for the Parties to address the implications of an alternative valuation date can reasonably be considered to support an inference that the Tribunal manifestly cannot be “relied upon to exercise independent judgment.”
71. Insofar as the Respondent further objects to the time period for responses to the Tribunal’s questions or 26 October 2018 and to the absence of provision for an oral hearing on the implications of an alternative valuation date, I note merely that it remains open to the Respondent to seek a modification of the procedural calendar or to request an oral hearing.

B. Ground Two: Alleged Unequal Treatment of the Parties

72. The Respondent submits that the Tribunal’s questions to the Parties of 26 October 2018 “exhibit severe unequal treatment of the Parties.”²² According to the Respondent, the questions “serve[d] one purpose, and one purpose only, and that is to help Claimants overcome the shortcoming in their case.”²³
73. In the Respondent’s view, however, the Tribunal’s questions are also part of “a longer pattern of unequal treatment of the Parties to the detriment of Respondent.”²⁴ The Respondent points

²² Respondent’s Proposal, p. 7.

²³ Respondent’s Proposal, p. 7.

²⁴ Respondent’s Proposal, p. 7.

to three occasions in December 2017 and February and May 2018 (set out above) on which the Respondent sought to introduce additional documents and was denied permission to do so. The Respondent notes that, on each occasion, the Tribunal considered “it too long after the oral hearing and too long after the Parties’ final submission to admit even truly new evidence.”²⁵ The Respondent contrasts this refusal to accept the additional documents it sought to submit with the Tribunal’s active invitation for the Parties to provide additional evidence on matters that the Respondent considers favorable to the Claimants.²⁶

*

74. The Claimants submit that the Respondent’s second ground of challenge is untimely. The Claimants note that the “decisions denying the applications were issued 318, 262 and 175 days, respectively before Germany filed the present proposal for disqualification.”²⁷ According to the Claimants, “these facts cannot now be introduced in support of a proposal for disqualification.”
75. Although the Claimants decline to engage further with what they consider to be an untimely disqualification proposal, they recall that “the Arbitral Tribunal has decided several other issued relating to the introduction of new evidence in favour of Germany,” pointing to decisions in August and September 2016 in which the Tribunal denied the Claimants permission to submit additional documents and to a decision in March 2017 in which the Tribunal granted the Respondent leave to introduce three new documents.²⁸

* *

76. In considering the second ground for disqualification set out in the Respondent’s Proposal, I note first that the Claimants have objected to this ground as untimely, pointing to the long period that has elapsed since the Tribunal’s procedural orders in December 2017 and February and May 2018, denying the Respondent’s requests to introduce additional documents. For my part, I do not understand this ground to relate to the Tribunal’s decisions on these documents as such. Rather I understand the Respondent’s objection to relate to the discrepancy it perceives between the Tribunal denying the Respondent permission to introduce additional documents that it considered favorable to its case and the Tribunal’s questions of 26 October 2016, inviting the Parties to introduce additional materials that the Respondent considers favorable to the Claimants. Given this, I consider that the appropriate point from which to evaluate the timeliness of this ground is 26 October 2018. Accordingly, I consider that the Proposal, with respect to this ground, was filed promptly for the purpose of Rule 9(1) of the ICSID Arbitration Rules.
77. Turning to the substance of the Respondent’s second ground for disqualification, I understand it to rest on the perception that the Tribunal has sought additional documents favorable to the Claimants while taking a firm line in refusing the introduction of additional documents favorable to the Respondent. As set out above with respect to the first ground, however, I do not consider the inference that the Tribunal’s questions of 26 October 2018 favored the Claimants to be reasonable. In my view, the record before me indicates only that the Tribunal remains concerned regarding the issues identified in its questions and does not consider the submissions and argument it has previously received to be sufficient.

²⁵ Respondent’s Proposal, p. 7.

²⁶ Respondent’s Proposal, p. 12; Respondent’s Comments of 11 December 2018, pp. 3-4.

²⁷ Claimants’ Response, p. 9.

²⁸ Claimants’ Response, p. 9.

78. The comparison advanced by the Respondent is thus not between documents favorable to the Claimants and documents favorable to the Respondent. It is rather a case in which the Tribunal has sought additional documents and materials that it considered to be essential to its decision and provided reasoned decisions for not admitting other materials. I do not consider that this record can reasonably be considered to support an inference that the Tribunal treated the Parties unequally or manifestly cannot be “relied upon to exercise independent judgment.”

C. Other Matters Raised by the Respondent

79. In addition to the two grounds of the Respondent’s disqualification proposal set out above, the Respondent raises two additional matters. Although I understand that these are raised to “confirm the Tribunal’s lacking ability for independent judgment” rather than as additional grounds for disqualification, I will address them here for the sake of completeness.

1. The Presiding Arbitrator’s Disclosure

80. In its Proposal, the Respondent recalls its communication of January 2018 regarding the absence of disclosures by the presiding arbitrator.²⁹
81. On 11 January 2018, the Respondent wrote to the ICSID Secretariat regarding public reports of an award issued in an ICC arbitration in respect of “a dispute concerning the German Nuclear Fuel Tax involving PreussenElektra (formerly E.ON Kernkraft GmbH) and E.ON SE as claimants”.³⁰ The Respondent noted that Professor Bernard Hanotiau, a partner in the presiding arbitrator’s law firm, was reported to be one of the co-arbitrators in the arbitration, that payment of the German Nuclear Fuel Tax is at issue in these proceedings, and that entities involved in the ICC proceedings were the same entities “for the economic benefit of which Claimants are claiming EUR 1.8 billion in the present ICSID arbitration.”³¹ Accordingly, the Respondent argued, “there is (partial) identity of subject matter, economic beneficiaries and counsel between the two ICC NFT Arbitration [*sic.*] and the present ICSID arbitration.”³²
82. The Respondent argued that “[b]efore accepting his mandate, Professor Hanotiau should have caused Professor Albert Jan van den Berg to disclose this potential conflict to the Parties of the ICSID arbitration and seek their waivers.”³³ This was not done, and the Respondent observed that “[f]or the avoidance of doubt, had Respondent been informed of the prospective appointment of Professor Hanotiau, Respondent would not have agreed to any waiver, not even subject to the strictest version of any ethical screen.”³⁴ The Respondent concluded its communication as follows:

Given the late stage of the present arbitration and the fact that deliberations have been held, a removal or resignation would not be able to remedy this imbalance. Moreover, a replacement of an arbitrator would necessitate a new hearing giving Claimants (the misconduct of whom has been demonstrated by their behaviour also at the public oral hearing) a second bite at the cherry. It would only increase the burden on Respondent.

²⁹ Respondent’s Proposal pp. 12-13.

³⁰ Respondent’s E-mail Communication to the ICSID Secretariat, 11 January 2018.

³¹ Respondent’s E-mail Communication to the ICSID Secretariat, 11 January 2018.

³² Respondent’s E-mail Communication to the ICSID Secretariat, 11 January 2018.

³³ Respondent’s E-mail Communication to the ICSID Secretariat, 11 January 2018.

³⁴ Respondent’s E-mail Communication to the ICSID Secretariat, 11 January 2018.

Respondent is therefore left with no other choice than to notify its objection under Rule 27 of the Arbitration Rules that the failure to disclose the above mentioned facts gives rise to an annulment ground under Article 52 (1) (a) and (d) of the Convention.³⁵

83. On 14 January 2018, the presiding arbitrator wrote to the Parties as follows:

1. Respondent's email was the first time that I became aware that (a) there was an ICC arbitration concerning German Nuclear Fuel Tax involving PreussenElektra (formerly E.ON Kernkraft GmbH) and E.ON SE, and (b) Professor Bernard Hanotiau was one of the arbitrators.
2. Professor Hanotiau and I never exchange information regarding arbitrations in which we are involved as arbitrators because of confidentiality requirements, with the exception of information that is recorded in the case management system of the firm Hanotiau & van den Berg.
3. In the present case, the information entered into the firm's system consisted of the names of the five Claimants and the Respondent as well as the names of counsel and their law firms. The information does not include PreussenElektra, E.ON Kernkraft GmbH, and E.ON SE as they are not listed as a party.
4. Professor Hanotiau's practice is entirely separate from my practice. We do not share associates nor have we or our staff access to each other's cases.
5. Ms. Emily Hay works for 100% in my practice and is not involved in any of Professor's Hanotiau's cases or practice.
6. My partner Niuscha Bassiri is not involved in any of Professor Hanotiau's cases or practice.³⁶

*

84. The Claimants submit that "the relevance of Germany's note is unclear" and emphasize that the exchange of January 2018 is not raised as a separate ground for disqualification. The Claimants argue that "to the extent that Germany would seek to re-raise it in support of its present proposal, it has clearly not been raised 'promptly'."

85. With respect to the substance of the Respondent's objections, the Claimants submit that "[i]t is sufficient to note that Professor van den Berg was unaware of the commercial arbitration in which Professor Hanotiau was an arbitrator and that the case in any event was initiated after the initiation of the present arbitration and concerned different parties and different issues (a supply agreement dispute)."³⁷

* *

86. As noted above, I do not understand the Respondent to have raised its 11 January 2018 objection as an independent ground for disqualification. To the extent that it is so raised, I note that the Proposal was filed on 12 November 2018, 335 days after the Respondent became aware of the matters set out in its 11 January 2018 objection and that the Respondent expressly declined to seek the disqualification of the presiding arbitrator at that time. Any proposal for disqualification in relation to these matters could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Rule 9(1) of the ICSID Arbitration Rules.

³⁵ Respondent's E-mail Communication to the ICSID Secretariat, 11 January 2018.

³⁶ Presiding Arbitrator's "Observations regarding Respondent's email of 11 January 2018," 14 January 2018.

³⁷ Claimants' Response, p. 10.

87. Insofar as the Respondent has raised its 11 January 2018 objection for the purpose of confirming the two grounds for disqualification set out above, I am not convinced that inferences regarding the Tribunal's collective decision to pose the questions of 26 October 2018 to the Parties can reasonably be drawn from the very different circumstances of the presiding arbitrator's disclosures.

2. Judge Brower's Conduct during the Hearing

88. The Respondent submits that during the hearing in October 2016, "Judge Brower left the role of neutral arbitrator and took the position of advocate in Claimants' interest. He conducted lengthy, hostile additional cross-examinations of Respondent's experts when he found Claimants' counsel's cross-examination lacking. He remarked depreciatingly about them as well as Claimants' counsel off the record."³⁸
89. The Respondent contrasts this with Judge Brower's limited questioning of the Claimants' witnesses and experts and contends that, with the Claimants' witnesses, "[a]ll of these questions were non-critical, friendly towards the respective expert and phrased in a leading matter that sought to advance Claimants' case."³⁹ The Respondent appends an extensive annex of excerpts from the hearing transcript that, it contends, "illustrate the disparity in treatment by Judge Brower."⁴⁰
90. Additionally, the Respondent points to criticism of Judge Brower in set aside proceedings in U.S. courts in *Vantage Deepwater Company and Vantage Deepwater Drilling, Inc. v. Petrobras America Inc., Petrobras Venezuela Investments & Services, BV, and Petróleo Brasileiro S.A. – Petrobras*, in which Petrobras complained of similar "inappropriate conduct" by Judge Brower.⁴¹

*

91. The Claimants submit that the Respondent's assertions regarding Judge Brower are untimely. The Respondent notes that "[t]he hearing ended on 21 October 2016, which is 752 days before Germany brought its present proposal for disqualification."⁴² The Claimants also consider the Respondent's assertions to be "not credible", noting that the Respondent did not raise any objection at the time, despite raising "numerous objections and applications at the hearing", including threatening to apply to disqualify the presiding arbitrator and seeking to exclude the testimony of Claimants' valuation expert.⁴³ The Claimants also consider the Respondent's assertion to be unsupported by a complete review of the hearing transcript.⁴⁴
92. The Claimants further submit that post-award criticism by the losing party in an unrelated commercial arbitration is "irrelevant for the present matter" and note that "the losing party [in

³⁸ Respondent's Proposal, p. 15.

³⁹ Respondent's Proposal, p. 15.

⁴⁰ Respondent's Proposal, p. 15.

⁴¹ Respondent's Proposal, pp. 13-14.

⁴² Claimants' Response, p. 11.

⁴³ Claimants' Response, p. 11.

⁴⁴ Claimants' Response, p. 11.

that case] apparently raised its grievances with the ICDR, which rejected the challenge against Judge Brower.”⁴⁵

* *

93. As noted above, I do not understand the Respondent to have raised its assertions regarding Judge Brower as an independent ground for disqualification. To the extent that it is so raised, I note that the Proposal was filed on 12 November 2018, 752 days after the close of the hearing. Any proposal for disqualification in relation to these matters could have been filed much earlier in the proceedings and was not filed promptly for the purposes of Rule 9(1) of the ICSID Arbitration Rules.
94. Insofar as the Respondent has raised its assertions regarding Judge Brower for the purpose of confirming the two grounds for disqualification set out above, I am not convinced that inferences regarding the Tribunal’s collective decision to pose the questions of 26 October 2018 to the Parties can reasonably be drawn from the very different circumstances of the Judge Brower’s questioning of witnesses and experts during the hearing.

V. Conclusion

95. It follows from the legal principles set out above that a party proposing the disqualification of an arbitrator must prove the existence of objective facts from which a reasonable third person may infer a manifest lack of the arbitrator’s impartiality or independence. Subjective inferences or beliefs are insufficient.
96. As set out above, I do not consider that the record before me can reasonably be considered to support an inference that the Tribunal manifestly cannot be “relied upon to exercise independent judgment.” Therefore, I conclude that the Respondent has not discharged its burden of proving that any of the three members of the Arbitral Tribunal manifestly lacks any of the qualities required under Article 14(1) of the ICSID Convention in relation to the two grounds on which the Proposal is based.

* * *

⁴⁵ Claimants’ Response, pp. 11-12.

VI. Recommendation

97. For the foregoing reasons, I recommend that the proposal to disqualify the Tribunal be rejected.

[signed]

Hugo Hans Siblesz
Secretary-General
Permanent Court of Arbitration

The Hague, 4 March 2019