INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

MISEN ENERGY AB (PUBL) AND MISEN ENTERPRISES AB
(Claimants)

and

UKRAINE
(Respondent)

ICSID Case No. ARB/21/15

DECISION ON THE RESPONDENT'S PROPOSAL TO DISQUALIFY DR. STANIMIR A. ALEXANDROV

Chairman of the Administrative Council
Mr. David Malpass

Secretary of the Tribunal
Ms. Jara Minguez Almeida

April 15, 2022

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I. INTRODUCTION

1. This Decision addresses a letter filed on January 27, 2022 by Ukraine (the "**Respondent**"), proposing the disqualification of Dr. Stanimir Alexandrov (the "**Proposal**"). Misen Energy AB (publ) and Misen Enterprises AB (the "**Claimants**"), oppose the Proposal.

2. In accordance with Article 58 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "**ICSID Convention**") and Rule 9(4) of the Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), this Decision has been taken by the Chair of the ICSID Administrative Council.

II. PROCEDURAL HISTORY

3. On March 24, 2021, the Claimants filed a Request for Arbitration against Ukraine (the "**Request**"). In accordance with Article 36 of the ICSID Convention, the Secretary-General of ICSID registered the Request on March 31, 2021.

4. By emails of April 22-23 and May 5, 2021, the parties agreed that the Tribunal in this case would be composed of three arbitrators, with each party appointing one arbitrator, and the presiding arbitrator to be appointed by agreement of the parties. The Claimants appointed Dr. Stanimir Alexandrov ("**Dr. Alexandrov**"), a national of Bulgaria, as arbitrator.

5. On May 7, 2021, Dr. Alexandrov accepted his appointment and submitted the required declaration pursuant to ICSID Arbitration Rule 6(2). Dr. Alexandrov did not attach a statement to his declaration.

6. On May 13, 2021, the Respondent appointed Professor W. Michael Reisman, a U.S. national, as an arbitrator. On May 16, 2021, Professor Reisman accepted his appointment and submitted his declaration under ICSID Arbitration Rule 6(2), together with a statement.

7. On June 25, 2021, the parties informed ICSID that they had agreed on the appointment of Professor Jan Paulsson, a national of France and Sweden and Bahrain, to serve as President of the Tribunal.

8. On June 29, 2021, Professor Paulsson accepted his appointment and submitted a statement together with his declaration. On the same day, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General of ICSID notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that same date.

9. On September 9, 2021, a First Session was held by videoconference among the Members of the Tribunal only. On October 15, 2021, the President of the Tribunal and the parties held a procedural consultation by videoconference. On October 20, 2021, the Tribunal issued Procedural Order No. 1.

10. On October 29, 2021, the Claimants filed their Memorial together with an Expert Report authored by Dr. Boaz Moselle and Ms. Ruxandra Ciupagea from the consulting company Compass Lexecon (the "**Experts**").

11. On November 18, 2021, the Respondent wrote a letter to the Tribunal inviting Dr. Alexandrov to "confirm whether it remained his intention not to provide a statement alongside his declaration covering information including, but not limited to: (a) any previous appointments in cases involving Ukraine; and (b) any previous appointments by the Claimants' counsel."

12. By letter of November 19, 2021, Dr. Alexandrov declined to provide a statement because, in his view, the information sought was not required to be disclosed. As a matter of courtesy, Dr. Alexandrov conveyed the following to the parties:

    i. He had previously been appointed in three cases involving the Respondent;

    ii. He had been appointed by the Claimants' counsel in one case (*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3) ("***Blusun v. Italy***");

    iii. He had previously been appointed by the Respondent's counsel in one case (*Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32);

iv. He did not have a complete record of his work at his previous law firm, Sidley Austin LLP ("**Sidley Austin**"); and

v. His responses were based on his best recollection and the files currently available to him.

13. On December 9, 2021, Dr. Alexandrov wrote a letter to the parties informing them that:

i. The Experts had been engaged by the Republic of Peru in a currently pending case where Sidley Austin and Dr. Alexandrov are co-counsel for Peru (*IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19) ("***IC Power v. Peru***");

ii. Dr. Moselle had been engaged by Sidley Austin in a commercial arbitration where Dr. Alexandrov also acts as co-counsel with Sidley Austin; and

iii. Dr. Moselle had appeared as an expert in arbitrations in which Dr. Alexandrov had sat or is currently sitting as an arbitrator.

14. Dr. Alexandrov also stated that he believed that these circumstances did not create a conflict and did not require disclosure, but that he was bringing them to the parties' attention out of an abundance of caution.

15. On December 17, 2021, Dr. Alexandrov informed the parties that he had been appointed as arbitrator by the claimant in another case against the Respondent (*SREW N.V. v. Ukraine*, ICSID Case No. ARB/21/52).

16. On December 20, 2021, the Respondent requested additional information about Dr. Alexandrov's professional relationship with the Experts. The Respondent invited Dr. Alexandrov to:

i. Confirm that the two cases he disclosed in his December 9 letter represent an exhaustive list of his professional connections with the Experts;

ii. If not, provide an exhaustive list of cases in which he acts or has acted as counsel where one or both of the Experts have been engaged by his client;

iii. Submit additional details concerning his responsibility for matters regarding the Experts' testimony in the arbitrations in which they were engaged and he acted as co-counsel;

iv. Confirm the number of cases where one or both of the Experts have appeared and he sat or is sitting as an arbitrator; and

v. Confirm the number of cases where he was engaged as counsel or arbitrator and where Compass Lexecon was engaged by the party which engaged him as counsel or appointed him as arbitrator.

17. In response to the Respondent's request, on December 21, 2021, Dr. Alexandrov informed the parties that:

i. The cases he mentioned in his December 9 letter are the only arbitrations in which one or both of the Experts appear and he acts as counsel;

ii. As the lead counsel for his client in the *IC Power v. Peru* case, he has overall responsibility for the representation, but he is not directly responsible for the specific subject matter of the Experts' testimony;

iii. To the best of his knowledge, there are no current matters where he acts as counsel and where experts from Compass Lexecon other than the Experts are involved. In order to provide a list of past such matters, he would need to have access to the historical files of his previous law firms, Sidley Austin and Powell Goldstein Frazer & Murphy LLP ("**Powell Goldstein**"), which he currently does not have;

iv. Dr. Moselle has appeared as an expert in cases in which he sat or is sitting as an arbitrator, and Dr. Moselle is appearing as an expert for the respondents in two consolidated cases in which Dr. Alexandrov was appointed by the claimants; and

v. He is in no position to provide a list of cases in which he has sat as an arbitrator and other experts from Compass Lexecon have been involved. In any event, he does not consider that such situations create a conflict or affect his independence or impartiality, and thus they do not require disclosure. He also notes that, generally, he has not kept records of expert appearances in cases where he is or has been involved as arbitrator.

18. On January 27, 2022, the Respondent filed its Proposal pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9. The Secretariat acknowledged receipt of the Proposal on the same day and informed the parties that the proceedings would be suspended until the Proposal is decided pursuant to ICSID Arbitration Rule 9(6). The parties were also informed that the Proposal would be decided by the other Members of the Tribunal in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

19. A briefing schedule was established for the parties' submissions on the Proposal. The briefing schedule was transmitted to the parties on January 31, 2022.

20. As provided by ICSID Arbitration Rule 9(3), on February 3, 2022, Dr. Alexandrov furnished his explanations to the Proposal (the "**Explanations**"). The Explanations were transmitted to the parties on February 7, 2022.

21. On February 7, 2022, in accordance with the briefing schedule, the Claimants submitted their response to the Proposal (the "**Response**").

22. According to the briefing schedule, the parties were entitled to file simultaneous comments one week from the date of receipt of the Explanations. On February 14, 2022, the Respondent submitted further observations in connection with its Proposal (the "**Further Observations**"). On the same day, the Claimants informed the Tribunal they would not file further comments. In their communication, the Claimants also stated that Dr. Alexandrov's Explanations "reinforce […] Misen's view that Ukraine's proposal to disqualify Dr. Alexandrov is entirely without merit and should be dismissed in the strongest of terms."

23. On February 15, 2022, the parties were notified that the unchallenged arbitrators had failed to reach a decision on the Proposal, and that the Proposal would be decided by the Chair of the Administrative Council in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

III. THE PARTIES' POSITIONS AND DR. ALEXANDROV'S EXPLANATIONS

A. The Respondent's Proposal

24. The Proposal is based on Dr. Alexandrov's alleged failure to comply with his disclosure obligations. According to the Respondent, this failure raises "reasonable doubts as to whether Dr. Alexandrov can be relied upon to exercise independent judgement due to an appearance of a lack of impartiality or bias."[1]

25. In its Proposal, the Respondent first sets out the legal standard applicable to disqualification of arbitrators (*see* Subsection 1). It then posits that a failure to disclose can give rise to disqualification (*see* Subsection 2) and addresses the instances in which, in its view, Dr. Alexandrov failed to meet his disclosure obligations. These are: (i) Dr. Alexandrov's failure to attach a statement to his declaration when first accepting his appointment, despite there being circumstances that might cause his reliability for independent judgement to be questioned (*see* Subsection 3); (ii) his incomplete and piecemeal disclosure subsequent to his disclosure (*see* Subsection 4); (iii) the withholding of critical information regarding Dr. Alexandrov's professional, business and other relationships despite the fact that this information was specifically requested by the Respondent (*see* Subsection 5).

(1) The Applicable Legal Standard

26. According to the Respondent, Articles 14 and 57 of the ICSID Convention govern the disqualification of arbitrators in ICSID proceedings.[2]

27. The Respondent observes that pursuant to Article 57 of the ICSID Convention, a party may propose the disqualification of any member of the tribunal on the basis of any fact

[1] Proposal, ¶ 17.
[2] Proposal, ¶ 18.

indicating a manifest lack of the qualities required by Article 14(1) of the ICSID Convention. Article 14(1) of the ICSID Convention states that an arbitrator must possess "high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment".

28. Based on investment case law, the Respondent argues that the word "manifest" in Article 57 of the ICSID Convention means "evident" or "obvious", and that the term relates "to the ease with which the alleged lack of qualities can be perceived".[3]

29. Relying on the Spanish, French and English versions of Article 14 of the ICSID Convention and case law, the Respondent asserts that arbitrators are required to be both impartial and independent.[4] The Respondent defines impartiality as "the absence of bias or predisposition towards a party" and independence as "the absence of external control." It submits that independence and impartiality "protect parties against arbitrators being influenced by factors other than those related to the merits of the case"[5]

30. The Respondent argues that the standard applicable to the disqualification of arbitrators is an objective standard based on a reasonable evaluation of the evidence by a third party. The Respondent observes that this standard is reflected in the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (the "**IBA Guidelines**").[6]

31. The Respondent further contends that it is not required to prove actual dependence or bias, and that it is sufficient to establish the appearance of dependence or bias. On this point, the Respondent argues that "impartiality may be compromised not only through a specific act but also where the appearance of impartiality has not been strongly guaranteed".[7]

[3] Proposal, ¶ 19.
[4] Proposal, ¶ 20.
[5] Proposal, ¶ 21.
[6] Proposal, ¶ 22.
[7] Proposal, ¶ 23, *citing to Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment, June 11, 2020, ¶ 225, (*citing to Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, PCA Opinion, ¶ 54; *citing to* Opinions of the Lord of Appeal for Judgment in re: Pinochet; Hrvaška v. Slovenia, ICSID Case No. ARB/05/24, Decision on the disqualification of a counsel, May 6, 2008, ¶ 22).

32. In sum, the Respondent submits that the standard to be applied is whether a reasonable observer would have reasonable doubts about an arbitrator's impartiality or independence due to an appearance of dependence or bias.[8]

(2) Failure to Disclose as a Ground for Disqualification

33. The Respondent asserts that under ICSID Arbitration Rule 6(2) arbitrators are required to disclose: (i) their past and present professional, business and other relationships (if any) with the parties; and (ii) any other circumstance that might cause their reliability for independent judgement to be questioned by a party.[9]

34. The Respondent observes that the disclosure obligations of arbitrators are becoming more stringent. To support its point, the Respondent relies on the disclosure obligation included in the most recent version of the Draft Code of Conduct for Adjudicators in International Investment Disputes jointly issued by the ICSID and UNCITRAL Secretariats. The Respondent acknowledges that this draft Code "does not apply in the strict legal sense".[10]

35. The Respondent notes that the Draft Code of Conduct requires arbitrators to "disclose any interest, relationship or matter that may, in the eyes of the disputing parties, give rise to doubts as to their independence or impartiality", and to "make reasonable efforts to become aware of such interest, relationship, or matter".[11] Furthermore, the Draft Code of Conduct increases the time frame for which arbitrators must make disclosures to five or ten years in comparison to the three-year timeframe provided for by the Orange List of the IBA Guidelines for disclosures of certain information.

36. The Respondent also notes that the ongoing obligation to disclose cannot be construed narrowly in favour of the arbitrator, but must be approached from the point of view of a party.[12] In the Respondent's view, Dr. Alexandrov's approach to disclosure "has been narrow and does not reflect the levels of full and frank disclosure expected by Ukraine, or

[8] Proposal, ¶ 25.
[9] Proposal, ¶ 26.
[10] Proposal, ¶ 35(ii).
[11] Proposal, ¶¶ 28-29, *citing to* ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Three (September 2021).
[12] Proposal, ¶ 27.

even the minimum required" for Ukraine to assess Dr. Alexandrov's reliability to exercise independent judgment.[13]

(3) Dr. Alexandrov's Failure to Make Disclosures When Accepting His Appointment

37. The Respondent submits that Dr. Alexandrov failed to make any disclosures when first accepting his appointment despite there being information to be disclosed. According to the Respondent, Dr. Alexandrov's failure to provide a statement with his declaration raises "reasonable doubts" as to his compliance with his disclosure obligations and, accordingly, his compliance with his duties of independence and impartiality.[14]

38. The Respondent argues that arbitrators ought to disclose information that may be relevant from the perspective of the parties, rather than information they subjectively consider to be relevant. The Respondent alleges that the information Dr. Alexandrov disclosed in his November 19, 2021, letter - as a matter of courtesy - proved to be objectively relevant to the parties and, thus, should have been disclosed earlier.[15]

(4) Dr. Alexandrov's Submission of Incomplete and Piecemeal Disclosure

39. The Respondent contends that since his appointment Dr. Alexandrov has provided incomplete and piecemeal information concerning his prior professional relationship with the Experts and work at his previous law firms, Sidley Austin and Powell Goldstein.[16]

40. In particular, the Respondent notes that Dr. Alexandrov only made certain vague disclosures about his relationship with the Experts in his December 9, 2021 letter, and that he only disclosed further details on this relationship in his December 21, 2021 letter upon the Respondent's invitation to do so.

[13] Proposal, ¶ 30.
[14] Proposal, ¶ 33.
[15] Proposal, ¶ 32.
[16] Proposal, ¶ 35.

41. In the Respondent's view, this second disclosure was still unsatisfactory for the following reasons:

42. *First*, Dr. Alexandrov failed to provide additional information on his professional relationship with the Experts on the cases where he is acting as co-counsel and the Experts have been retained by his client.[17]

43. In this regard, the Respondent suggests that, as a lead counsel in the matter, Dr. Alexandrov is in all probability working closely with the Experts and maintaining a professional relationship with them. In the Respondent's view, this makes it appropriate for him to disclose further details on the extent of his day-to-day professional relationship with the Experts.[18]

44. To support its argument, the Respondent relies on the decision of the *ad hoc* Committee in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36 ("***Eiser v. Spain***"), which held that "damages experts work closely with counsel in the preparation of a case […] They do not and cannot possibly maintain between them the kind of professional distance which is required to be maintained between a party, its counsel and its experts in a case, one the one hand, and the members of the tribunal hearing that case on the other".[19]

45. *Second*, Dr. Alexandrov failed to provide a list of past matters in which he acted as counsel and experts from Compass Lexecon, other than the Experts, were involved, on the basis that he does not have access to historical files of Sidley Austin and Powell Goldstein.[20]

46. According to the Respondent, it cannot be correct that arbitrators are absolved from their duties to disclose only because they do not have access to files of their previous law firms. Based on the "spirit" of the Draft Code of Conduct, which establishes that arbitrators shall make reasonable efforts to become aware of any interest, relationship or matter that may

[17] Proposal, ¶ 35(i).
[18] *Id*.
[19] *Id*, *citing to Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment, June 11, 2020, ¶ 227.
[20] Proposal, ¶ 35(ii).

give rise to doubts as to their independence or impartiality, the Respondent contends that Dr. Alexandrov should at least explain whether and how he sought to gain access to such information.[21]

47. *Third*, Dr. Alexandrov failed to provide a list of cases in which he sat as an arbitrator and experts from Compass Lexecon other than the Experts, were involved.[22]

48. In this regard, the Respondent takes issue with Dr. Alexandrov's remarks that, even if he were in a position to disclose this information, it would be unnecessary to do so because professional relationships between arbitrators and experts do not create a conflict.[23] The Respondent argues that pursuant to ICSID Arbitration Rule 6(2), the information required to be disclosed is not information arising in circumstances that would create a conflict of interest, but rather circumstances that might cause a party to question the arbitrator's reliability for independent judgment. According to the Respondent, these circumstances may also arise from the professional relationship between an arbitrator and an expert.[24]

(5) Dr. Alexandrov's Failure to Disclose Critical Information That Should Have Been Disclosed

49. The Respondent asserts that Dr. Alexandrov withheld critical information concerning his professional, business and other relationships despite the fact that the Respondent specifically requested this information.[25]

50. The Respondent submits that, when asked to confirm the number of cases where one or both of the Experts appeared and Dr. Alexandrov sat or is currently sitting as an arbitrator, Dr. Alexandrov failed to disclose at least one ICSID case that also involved the Respondent's counsel.[26] The Respondent refers to this case as the "Undisclosed ICSID Case". The Respondent argues that, even if a lack of access to Sidley Austin's historical files could justify Dr. Alexandrov's failure to disclose this case, such a justification would

[21] *Id*.
[22] Proposal, ¶ 35(iii).
[23] *Id*.
[24] *Id*.
[25] Proposal, ¶ 4.
[26] Proposal, ¶¶ 37-38.

be inapposite here because the Undisclosed ICSID Case was registered and Dr. Alexandrov accepted his appointment as arbitrator in that case after his departure from Sidley Austin.[27] Furthermore, the Respondent argues that the fact that Dr. Alexandrov had disclosed another case involving Ukraine's counsel but not the Undisclosed ICSID Case "raises serious concerns as to what else Dr. Alexandrov may have failed to mention" and "highlights the arbitrary approach to disclosure taken by Dr. Alexandrov in this Arbitration."[28]

51. The Respondent submits that a failure to disclose demonstrates an arbitrator's lack of impartiality and independence when it is a part of a pattern of circumstances that raises doubts as to impartiality.[29] In this regard, the Respondent contends that Dr. Alexandrov failed to disclose relationships with quantum experts in several previous arbitration proceedings. The Respondent notes that Dr. Alexandrov was challenged in four of these proceedings for this reason, and that recently a respondent in another case had filed for annulment of an award on the basis of Dr. Alexandrov's alleged failure to disclose his ties with an expert.[30]

52. Viewed in the context of these examples, the Respondent submits that Dr. Alexandrov's failure to disclose details concerning his relationship with the Experts "casts reasonable doubt from the perspective of an independent observer on his impartiality and independence".[31]

53. Similarly, the Respondent contends that Dr. Alexandrov provided incomplete information when asked by Ukraine to confirm any previous appointments by the Claimants' counsel.[32] While he disclosed one case, *Blusun v Italy*, the Respondent posits that Dr. Alexandrov failed to mention at least two other ICSID cases where he was likewise appointed by the Claimants' counsel (*Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia*, ICSID Case No. ARB/17/29 and *Gardabani Holdings B.V., Inter RAO UES PJSC, Telasi*

[27] Proposal, ¶ 38.
[28] Proposal, ¶ 39.
[29] Proposal, ¶ 40.
[30] *Id*.
[31] Proposal, ¶ 41.
[32] Proposal, ¶ 42.

JSC v. Government of Georgia, Ministry of Economy and Sustainable Development of Georgia, State Service Bureau Ltd, SCC Case No. V2018/039 and ICSID Case No. ADM/18/1) (together, the "***Gardabani Cases***").[33]

54. The Respondent observes that these two cases might be the consolidated cases which Dr. Alexandrov referred to when disclosing information on his relationship with the Experts. In the Respondent's view, the fact that Dr. Alexandrov mentioned the *Gardabani Cases* with respect to one aspect of his disclosure but omitted it regarding another aspect shows his arbitrary approach to his disclosure obligations.[34]

55. The Respondent concludes that, based on Dr. Alexandrov's pattern of behaviour, it does not and cannot know whether there is other relevant information that Dr. Alexandrov has not disclosed. Even if such disclosure was made, the Respondent contends that it would have reasonable doubts as to whether it is as complete as it should be.[35]

B. The Claimants' Response

56. The Claimants' position is that the Proposal is without merit and "falls so far below the demanding standard for disqualification required under the ICSID Convention that it can only be understood as dilatory".[36]

57. In particular, they claim that the Proposal does not meet the legal standard for disqualification proposals (*see* Subsection 1), and that it was untimely filed (*see* Subsection 2). The Claimants also argue that a failure to disclose fails as a matter of law to qualify as a ground for disqualification (*see* Subsection 3) and that, in any event, none of the circumstances the Proposal relies on suggest that Dr. Alexandrov failed to meet his disclosure obligations. In particular: (i) the Claimants' counsel did not appoint Dr. Alexandrov multiple times and, in any event, such circumstance does not warrant disqualification (*see* Subsection 4); (ii) no personal relationship exists between Dr. Alexandrov and the Experts that could give rise to disqualification (*see* Subsection 5);

[33] *Id*.
[34] Proposal, ¶ 43.
[35] Proposal, ¶ 44.
[36] Response, ¶ 1.

and (iii) Dr. Alexandrov did not withhold critical information that should reasonably have been disclosed (*see* Subsection 6).

(1) The Applicable Legal Standard

58. The Claimants agree with the Respondent that the relevant test to disqualify an arbitrator in an ICSID proceeding is whether the record establishes a "manifest" lack of impartiality or independence. However, they argue that the Respondent's discussion on the standard "is incomplete or erroneous in several aspects".[37]

59. In particular, they stress that Article 57 of the ICSID Convention establishes a "very high" standard, which imposes a relatively heavy burden of proof on the challenging party. In their view, the challenging party must prove facts indicating the lack of independence and that the lack of independence is "manifest", "highly probable", and not just "possible" and "quasi certain".[38] According to the Claimants, mere doubts or an appearance of bias are thus insufficient to meet the standard.[39]

(2) The Proposal Was Untimely Filed

60. The Claimants posit that the Proposal was not filed promptly as required by ICSID Arbitration Rule 9(1).[40] It is their contention that the Proposal should be dismissed on this ground alone.[41]

61. The Claimants observe that while the current ICSID Arbitration Rules do not define 'promptness' in number of days, the Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings, which had been recently been submitted to the ICSID Administrative Council for adoption, do define the number of days.[42] The Claimants particularly refer to Rule 22(1) of the Amended ICSID Arbitration Rules, which introduces a 21-day deadline for filing a disqualification request. Based on the explanations offered

[37] Response, ¶ 11.
[38] Response, ¶ 12.
[39] *Id*.
[40] Response, ¶ 7.
[41] Response, ¶ 10.
[42] Response, ¶ 8. The Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings were approved by the ICSID Administrative Council on March 21, 2022.

in the Working Paper of the Proposals for Amendment of the ICSID Rules, the Claimants submit that the 21-day deadline aims at providing greater clarity concerning filing deadlines by replacing the term 'promptly' in ICSID Arbitration Rule 9(1).[43]

62. The Claimants conclude that the Proposal was untimely because it was submitted seven weeks after Dr. Alexandrov's letter of December 9, 2021.[44]

(3) Failure to Disclose as a Ground for Disqualification

63. The Claimants take issue with the fact that the Proposal only relies on Dr. Alexandrov's alleged failure to disclose. In their view, "[t]his is inadequate as a matter of established ICSID jurisprudence".[45]

64. The Claimants submit that there is a distinction between the parameters that govern the duty to disclose pursuant to ICSID Arbitration Rule 6(2) and the standard to uphold a challenge pursuant to Article 57 of the ICSID Convention.[46]

65. In particular, on the basis of two comments to the IBA Guidelines and decisions of ICSID arbitral tribunals, the Claimants contend that: (i) non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that were not disclosed can; and (ii) no presumption regarding disqualification should arise from a failure to disclose.[47]

66. Finally, the Claimants submit that none of the underlying facts or circumstances supposedly not disclosed by Dr. Alexandrov give rise to doubts about his independence or impartiality.[48]

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[43] *Id*.
[44] Response, ¶ 9. The Claimants do not consider Dr. Alexandrov's December 21, 2021 letter for purposes of calculating the time period because, according to them, the additional details Dr. Alexandrov provided in that letter did not change the circumstances he disclosed in his December 9 communication.
[45] Response, ¶ 15.
[46] *Id*.
[47] Response, ¶ 16.
[48] Response, ¶ 18.

(4) The Appointments of Dr. Alexandrov by the Claimants' Counsel

67. In the Claimants' view, "[i]t is well settled in ICSID jurisprudence that 'multiple appointments as arbitrator by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent function'".[49] They posit that the same rationale applies in the case of multiple appointments by different claimants, even if they are in cases against the same respondent, and multiple appointments by the same counsel.[50]

68. The Claimants allege that proof of a lack of independence or impartiality in relation to multiple appointments would require the Respondent to demonstrate that "the prospect of continued and regular appointments might have created a relationship of dependence or otherwise influenced the arbitrator's judgment, or that the arbitrator may be influenced by factors outside the case record by virtue of his or her knowledge derived from other cases".[51] The Claimants allege that none of these scenarios apply here because the Claimants have never appointed Dr. Alexandrov, and Dentons only appointed Dr. Alexandrov once in 2014.

69. In particular, the Claimants argue that it was Freshfields, not Dentons, that appointed Dr. Alexandrov in the *Gardabani Cases*. The Claimants note that in those cases, Dentons' Tiblisi office only provided support in local law and did not plead at any hearing.[52]

(5) The Professional Relationship Between Dr. Alexandrov and the Experts

70. In the Claimants' view, the Respondent neither attempted to explain nor prove how Dr. Alexandrov's prior and present professional relationship with the Experts could evidence a manifest lack of impartiality or independence.[53]

71. With respect to this issue, the Claimants criticize the Respondent's reliance on the decision of the *ad hoc* Committee in *Eiser v. Spain*. The Claimants argue that the decision is controversial, and that it does not explain its reasoning "in terms of previously recognized

[49] Response, ¶ 19.
[50] *Id*.
[51] *Id*.
[52] Response, ¶ 21.
[53] Response, ¶ 28.

grounds for disqualification".[54] In their view, the decision extended the principle reflected in paragraph 3.3.6 of the IBA Guidelines, which refers to instances in which "[a] close personal friendship exists between an arbitrator and a counsel of a party", to arbitrator/expert relationships and that the *ad hoc* Committee "appeared to infer an analogous close relationship from the fact that Dr. Alexandrov (the arbitrator) and Mr. Lapuerta (the expert) worked in four cases as counsel and expert for the same party, and that two of those cases were pending while Dr. Alexandrov was sitting as an arbitrator in the *Eiser* case".[55]

72. While the Claimants disagree with the *ad hoc* Committee's appreciation of the facts and its extension of arbitrator/counsel conflicts principles to arbitrator/expert relationships, they contend that, in any event, nothing in the record of this case suggests a close personal relationship between Dr. Alexandrov and the Experts like the one inferred in *Eiser*.[56] They posit that Dr. Alexandrov played no role in engaging the Experts in the *IC Power v. Peru* case, and that he is not responsible for the specific matters addressed by their testimony. Moreover, the Claimants observe that the hearing in that case has already been held, which means that Dr. Alexandrov's co-counsel will have little future interaction with the Experts.[57]

(6) Dr. Alexandrov's Alleged Failure to Disclose Critical Information

73. The Claimants disagree with the Respondent's position that Dr. Alexandrov failed to disclose matters that should reasonably have been disclosed.[58]

74. The Claimants note that, generally, arbitrators appointed in an arbitration should disclose appointments to other arbitral tribunals made by the party to the arbitration or its counsel within the previous three years. Furthermore, in their view it is well-established in ICSID jurisprudence that it is unreasonable to impose the duty to disclose on an arbitrator if he or

[54] Response, ¶¶ 24-25.
[55] Response, ¶ 25.
[56] Response, ¶ 26.
[57] Response, ¶ 27.
[58] Response, ¶ 29.

she "has no reasons to conjecture that a possible compromising situation exists".[59] Finally, they submit that even if it such an obligation exists, failure to disclose could be the result of an honest exercise of judgment rather than part of a pattern of circumstances raising doubt as to the arbitrator's impartiality.[60]

75. The Claimants posit that the Respondent has neither argued nor demonstrated that the cases which Dr. Alexandrov disclosed indicated a relationship of dependence, which could manifestly affect his independence or impartiality in this arbitration. In their view, the disclosed cases do not concern similar facts or disputed measures and, thus, the decisions rendered in those cases would not prejudge the merits of this arbitration.[61]

76. Finally, with respect to the Undisclosed ICSID Case, the Claimants reiterate that the mere fact that an expert appears before an arbitrator in an arbitration does not give rise to circumstances that would require disclosure, and that no relationship of dependence exists between an arbitrator and an expert appointed by a party to the arbitration.[62]

C. Dr. Alexandrov's Explanations

77. In his Explanations, Dr. Alexandrov asserts that: "where disclosure was necessary, I made a complete disclosure without being prompted. Where disclosure was not necessary, I nevertheless made a good faith effort to provide accurate responses to Respondent's questions"[63]

78. Specifically, Dr. Alexandrov raises three points:

79. *First*, he rejects the Respondent's argument that he failed to disclose his appointment by the Claimants' counsel in the *Gardabani Cases*. Dr. Alexandrov notes that he was appointed by Freshfields, not the Claimants' counsel. He further states that at the time of his appointment he was unaware that Dentons' Tbilisi office would serve as local counsel

[59] Response, ¶ 30.
[60] *Id*.
[61] Response, ¶ 33.
[62] Response, ¶ 35.
[63] Explanations, p. 3.

to the claimants, and that he did not, and does not, have reason to believe that Dentons was involved in his appointment.[64]

80. Dr. Alexandrov also submits that, even if he had been appointed by the Claimants' counsel, such information would not have required disclosure. He observes that Section 3.3.8 of the IBA Guidelines (the Orange List) requires disclosure when the arbitrator has been appointed by the same counsel on more than three occasions or by the same law firm within the past three years. In his view, this scenario is inapplicable in this case because his appointments in the *Gardabani Cases*, as well as his appointment by the Claimants' counsel in the *Blusun v. Italy* case, all occurred more than three years ago.[65]

81. *Second*, Dr. Alexandrov states that the Undisclosed ICSID Case might be the arbitration *Cunico Resources N.V. v. Republic of North Macedonia*, ICSID Case No. ARB/17/46 ("***Cunico v. Republic of North Macedonia***"). He states that he does not recall whether Dr. Moselle submitted an expert report in that case. Further, he has no way of knowing this information because the proceeding has already concluded and he does not keep records of concluded cases beyond the deadlines set out in the ICSID Convention and Rules for interpretation, revision and annulment.[66] He observes that if the Undisclosed ICSID Case is indeed the *Cunico v. Republic of North Macedonia* case, then the Respondent would have known whether Dr. Moselle submitted an expert report given that Respondent was counsel for the claimant in that case.[67]

82. In this regard, Dr. Alexandrov reiterates that he is unable to provide a list of cases in which he sat as arbitrator and a specific expert from a specific company was involved because he does not keep records of expert appearances in cases in which he participated as an arbitrator. He posits that, in any event, this information would not require disclosure because the arbitrator/expert relationship does not create a conflict and cannot affect his independence and impartiality.[68]

[64] Explanations, pp. 1-2.
[65] Explanations, p. 2.
[66] *Id*.
[67] Explanations, pp. 2-3.
[68] Explanations, p 2.

83. *Third*, Dr. Alexandrov rejects the Respondent's allegation that he provided piecemeal, incomplete, and arbitrary disclosure, and that he only submitted information when prompted to do so by Ukraine. With respect to his Rule 6(2) Declaration, he explains that he did not submit a statement because he had nothing to disclose. Further, he recalls that he made disclosures on his own initiative about his relationship with Dr. Moselle in his role as counsel when he learned about Dr. Moselle's involvement in this arbitration, and concerning another case involving Ukraine, in which he was appointed as arbitrator.[69]

D. The Respondent's Further Observations

84. In its Further Observations, the Respondent first posits that (i) its Proposal was filed timely (*see* Subsection 1), and that it meets the applicable legal standard (*see* Subsection 2). The Respondent then addresses several arguments raised in the Claimants' Response and Dr. Alexandrov's Explanations (*see* Subsection 3).

(1) The Proposal Was Timely Filed

85. The Respondent takes issue with the Claimants' reliance on the Amended ICSID Rules to argue that the Proposal was untimely filed.

86. In particular, the Respondent notes that it is not required to follow the 21-day time period in Rule 22(1) of the Amended ICSID Arbitration Rules because that rule is currently not in force. In its view, the rule that applies to this arbitration is ICSID Arbitration Rule 9(1), which only requires the Proposal to be filed "promptly". The Respondent submits that, contrary to the Claimants' position, Rule 22(1) of the Amended ICSID Arbitration Rules does not clarify what 'promptly' in ICSID Rule 9(1) means in terms of days, but rather, if approved, would replace ICSID Arbitration Rule 9(1) altogether.[70]

87. In the Respondent's view, numerous arbitral tribunals have held that the requirement of promptness ought to be assessed on a case-by-case basis from the date the challenging party knew the facts underlying the challenge.[71]

[69] Explanations, p 3.
[70] Further Observations, ¶ 9.
[71] Further Observations, ¶ 11, *citing* Ch. Schreuer, The ICSID Convention: A Commentary (2 ed, 2009), p. 1200.

88. The Respondent submits that the Proposal was timely because it was filed shortly after Dr. Alexandrov's disclosure of December 21, 2021 and the customary holiday period in Ukraine and the United Kingdom, where the Respondent's counsel is located. The Respondent notes that the 5-week period between the Dr. Alexandrov's last disclosure of December 21, 2021 and the filing of the Proposal "is significantly shorter than those deemed to be untimely by tribunals".[72]

89. In this regard, the Respondent takes issue with the fact that the Claimants calculate the time period from Dr. Alexandrov's December 9, 2021 letter. The Respondent recalls that its Proposal was made based on Dr. Alexandrov's incomplete and piecemeal disclosure, and that it had sought full disclosure from Dr. Alexandrov up to December 21, 2021.[73]

(2) The Applicable Legal Standard

90. The Respondent argues that the Response artificially heightens the applicable legal standard based on dated international practice and that, by doing so, the Claimants attempt to move the relevant assessment away from the objective standard. The Respondent stresses that the objective standard has been re-affirmed by significantly more recent examples of international arbitral practice.[74]

91. The Respondent agrees with the Claimants that a challenging party only needs to show that the relevant facts "*indicate*" a lack of impartiality or independence. In the Respondent's view, it is therefore not required to prove that Dr. Alexandrov is, as a matter of fact, dependent or biased.[75]

[72] *Id*.
[73] Further Observations, ¶ 11.
[74] Further Observations, ¶ 17.
[75] Further Observations, ¶ 16.

(3) The Respondent's Observations on the Response and Dr. Alexandrov's Explanations

92. The Respondent submits that the Response and Dr. Alexandrov's Explanations "have served only to increase Ukraine's doubts as to Dr. Alexandrov's reliability to exercise independent judgement in this Arbitration."[76]

93. The Respondent disagrees with the Claimants that nothing in the record suggests that Dr. Alexandrov failed to meet his disclosure obligations. In the Respondent's view, because the record only comprises the limited and piecemeal disclosure of Dr. Alexandrov, it cannot assist in deciding the Proposal.[77] According to the Respondent, it "does not know and cannot know how many more issues which could or should have been disclosed exist and, based on this pattern of behaviour has reason to believe that there could be other relevant information that Dr. Alexandrov has not disclosed to the Parties".[78]

94. With respect to the Explanations, the Respondent observes that Dr. Alexandrov failed to disclose the *Cunico v. Republic of North Macedonia* case until prompted to do so in this disqualification proposal.[79] In the Respondent's view, Dr. Alexandrov's remarks that the Respondent must have known this case because its counsel was involved "misses the point".[81] The Respondent notes that even if Ukraine's counsel participated in that case, the Claimants' counsel did not and, thus had no way of knowing this information.[80] In the Respondent's view, if Dr. Alexandrov did not disclose his appointment in the *Cunico* case because one party might already be aware of that information, it "has serious concerns that Dr. Alexandrov may be withholding information known to the Claimants and their counsel and not to Ukraine and its counsel".[81]

95. Relatedly, the Respondent contends that Dr. Alexandrov's failure to disclose the *Cunico* arbitration further demonstrates his lack of record-keeping. According to the Respondent,

[76] Further Observations, ¶ 3.
[77] Further Observations, ¶ 19.
[78] *Id*.
[79] Further Observations, ¶ 20.
[80] Further Observations, ¶ 21.
[81] *Id*.

this is concerning because it may lead to a failure to disclose additional matters where Dr. Alexandrov has been appointed by the Claimants' counsel.[82]

96. The Respondent also denies that Dr. Alexandrov made full disclosures on his own initiative. Concerning his disclosure of his appointment as an arbitrator in another case involving Ukraine, the Respondent notes that such appointment is made public on ICSID's website once the Tribunal is constituted and that, therefore, such a disclosure "is the bare minimum".[83] The Respondent states that it is concerned with Dr. Alexandrov's failure to disclose matters which would not have been readily available to the parties.

97. As to Dr. Alexandrov's appointment in the *Gardabani Cases*, the fact that Dr. Alexandrov knew that the Claimants' counsel was allegedly not involved in his appointment nor in any advocacy at the hearings provides no comfort to the Respondent. The Respondent submits that from publicly available information it could only see that Dr. Alexandrov had not disclosed information relating to a case in which the party that appointed Dr. Alexandrov had included the Claimants' counsel as counsel of record.[84]

98. In conclusion, the Respondent states that it cannot be ruled out that additional details calling into question Dr. Alexandrov's independence and impartiality might emerge in the future and submits that it cannot be forced to expend considerable sums and resources, including on potential annulment proceedings, when doubts as to Dr. Alexandrov's independence and impartiality remain.

IV. THE CHAIR'S ANALYSIS

99. The Chair has considered all of the parties' submissions as well as Dr. Alexandrov's Explanations but will refer to them only inasmuch as they are relevant to reach this Decision.

[82] Further Observations, ¶ 24.
[83] Further Observations, ¶ 25.
[84] Further Observations, ¶ 23.

A. The Applicable Legal Standard

100. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It provides in relevant part as follows:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.

101. A number of decisions have concluded that the word "manifest" in this provision means "evident" or "obvious,"[85] and that it relates to the ease with which the alleged lack of the required qualities can be perceived.[86]

102. The required qualities are stated in Article 14(1) of the ICSID Convention as follows:

> 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

[85] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20 Annulment Proceeding, Decision on the Proposal to Disqualify Álvaro Castellanos Howell, March 2, 2018 ("***Blue Bank 2018 Decision***"), ¶ 78; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify all Members of the Tribunal, December 28, 2016 ("***BSG***"), ¶ 54; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal for Disqualification of Arbitrator L. Yves Fortier, Q.C., March 28, 2016 ("***Fábrica de Vidrios Los Andes 2016 Decision***") ¶ 33; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, July 1, 2015 ("***Conoco 2015 Decision***"), ¶ 82; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014 ("***Conoco 2014 Decision***"), ¶ 47; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, March 20, 2014 ("***Caratube Disqualification Decision***"), ¶ 55; *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014 ("***Abaclat***"), ¶ 71; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, December 13, 2013, ¶ 73 ("***Burlington***"), ¶ 68; *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser, December 13, 2013 ("***Repsol***"), ¶ 73; *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, November 12, 2013 ("***Blue Bank 2013 Decision***"), ¶ 61.

[86] *Blue Bank 2018 Decision*, ¶ 78; *BSG*, ¶ 54; *Fábrica de Vidrios Los Andes 2016 Decision*, ¶ 33; *Conoco 2014 Decision*, ¶ 47; *Abaclat*, ¶ 71; C. Schreuer, *The ICSID Convention: A Commentary*, Second Edition (2009), p. 1202 ¶¶ 134-154.

> particular importance in the case of persons on the Panel of Arbitrators.

103. In this case, the Proposal alleges that Dr. Alexandrov cannot be relied upon to exercise independent judgment.[87]

104. The parties agree on the meaning of independence and impartiality. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both "protect parties against arbitrators being influenced by factors other than those related to the merits of the case." [88]

105. 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.[89] A finding of apprehension of bias must be based on facts, and cannot be based on speculation, presumption or the subjective belief of the requesting party.[90]

106. 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."[91]

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[87] While the English version of Article 14 of the ICSID Convention refers to "independent judgment," and the French version to "toute garantie d'indépendance dans l'exercice de leurs fonctions" (guaranteed independence in exercising their functions), the Spanish version requires "imparcialidad de juicio" (impartiality of judgment). Given that all three versions are equally authentic, it is understood that pursuant to Article 14(1) arbitrators must be both impartial and independent (*Blue Bank 2018 Decision*, ¶ 77; *BSG*, ¶ 56; *Fábrica de Vidrios Los Andes 2016 Decision*, ¶ 28; *Conoco 2015 Decision*, ¶ 80; *Conoco 2014 Decision*, ¶ 50; *Abaclat*, ¶ 74; *Burlington*, ¶ 65; *Repsol*, ¶ 70; *Blue Bank 2013 Decision*, ¶ 58).

[88] *Blue Bank 2018 Decision*, ¶ 77; *BSG*, ¶ 57; *Fábrica de Vidrios Los Andes 2016 Decision*, ¶ 29; *Conoco 2015 Decision*, ¶ 81; *Conoco 2014 Decision*, ¶ 51; *Caratube Disqualification Decision*, ¶ 53; *Blue Bank 2013 Decision*, ¶ 59; *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, May 20, 2011, ¶ 70 ("***Universal***"); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, August 12, 2010, ¶ 43 ("***Urbaser***").

[89] Response, p. 3; Further Observations, *See BSG*, ¶ 57; *Conoco 2015 Decision*, ¶ 83; *Conoco 2014 Decision*, ¶ 52; *Caratube Disqualification Decision*, ¶ 57; *Abaclat*, ¶ 76; *Burlington*, ¶ 66; *Repsol* ¶ 71; *Blue Bank 2013 Decision*, ¶ 59.

[90] *Blue Bank 2018 Decision*, ¶ 79; *BSG*, ¶ 58; *Fábrica de Vidrios Los Andes 2016 Decision*, ¶ 28; *Conoco 2015 Decision*, ¶ 84; *Conoco 2014 Decision*, ¶ 53.

[91] *Blue Bank 2018 Decision*, ¶ 79; *BSG*, ¶ 58; *Fábrica de Vidrios Los Andes 2016 Decision*, ¶ 30; *Conoco 2015 Decision*, ¶ 84; *Conoco 2014 Decision*, ¶ 53; *Caratube Disqualification Decision*, ¶ 54; *Blue Bank 2013 Decision*, ¶ 60; *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine Republic*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, ¶ 28 ("***Suez***").

107. The Respondent has referred to the IBA Guidelines and the Draft Code of Conduct. While the IBA Guidelines may serve as a useful reference, the Chair is bound by the standard set forth in the ICSID Convention. Accordingly, this Decision is made in accordance with Articles 57 and 58 of the ICSID Convention. With respect to the Draft Code of Conduct, the Chair observes that it is a work in progress and, thus, he is likewise not bound by it.

108. Relatedly, the Claimants have relied on the Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings. While these amendments were approved by the ICSID Administrative Council on March 21, 2022, they are currently not in force, are not applicable in this case, and, therefore, do not apply to this disqualification decision.

109. In conclusion, for the Proposal to be upheld there must be a showing that there is an evident or obvious appearance of a lack of independence or impartiality, based on a reasonable evaluation of the relevant facts.[92]

B. The Timeliness of the Proposal

110. The parties disagree as to the timeliness of the Proposal. While the Claimants posit that the Proposal is untimely because it was filed seven weeks after Dr. Alexandrov's last disclosure,[93] the Respondent contends that the Proposal was filed promptly following Dr. Alexandrov's final piece of piecemeal disclosure and the customary holiday periods in Ukraine and the United Kingdom, where the Respondent's counsel is located.[94]

111. The Chair recalls that the timeliness of a disqualification proposal is ruled by ICSID Arbitration Rule 9(1), which reads as follows:

> 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.

[92] *Blue Bank 2018 Decision*, ¶ 79; *Caratube Disqualification Decision*, ¶ 56.
[93] Response, ¶ 9.
[94] Further Observations, ¶ 12.

112. Promptly means that the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification.[95]

113. The ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed. For instance, in *Urbaser v. Argentina*, the tribunal decided that a challenge filed within ten days of learning the underlying facts fulfilled the promptness requirement.[96] In *Suez v. Argentina*, a challenge filed 53 days after learning the relevant facts was held to be too long.[97] In *Burlington v. Ecuador*, two grounds for challenge were dismissed because they related to facts which had been public for more than four months prior to filing the challenge.[98] The tribunal in *Azurix v. Argentina* found that a delay of eight months was not prompt filing.[99] In *CDC v. Seychelles*, a filing after 147 days was deemed untimely,[100] and in *Cemex v. Venezuela*, six months was considered too long.[101]

114. Accordingly, the timeliness of a proposal must be determined on a case-by-case basis.[102]

115. The Proposal arises from the following facts: (i) Dr. Alexandrov's alleged failure to make disclosures when first accepting his appointment despite there being issues to be disclosed;[103] and (ii) Dr. Alexandrov's piecemeal disclosure and withholding of allegedly critical information in his December 9 and December 21, 2021 letters.[104]

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[95] C. Schreuer, The ICSID Convention: A Commentary (2nd ed. 2009), p. 1200.
[96] *Urbaser*, ¶ 19.
[97] *Suez*, ¶¶ 22-26.
[98] *Burlington*, ¶¶ 71-76.
[99] *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Decision on the Challenge to the President of the Tribunal, February 25, 2005 (reported in the Decision on Annulment, September 1, 2009, ¶¶ 33-36, 268-269).
[100] *CDC Group PLC v. Republic of Seychelles,* ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005, ¶ 53.
[101] *Cemex Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*. ARB/08/15*,* Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, November 6, 2009, ¶ 41.
[102] *See Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify a Majority of the Tribunal, June 16, 2015, ¶ 40; *Conoco 2014 Decision*, ¶ 39; *Abaclat*, ¶ 68; *Burlington*, ¶ 73.
[103] Proposal, ¶¶ 31-33.
[104] Proposal, ¶¶ 34-44.

116. With respect to the first allegation – Dr. Alexandrov's failure to make disclosures when accepting his appointment – the Respondent states that it first became aware of this ground for challenge with Dr. Alexandrov's November 19, 2021 letter. According to the Respondent, in this letter Dr. Alexandrov disclosed certain information it asserts "would certainly objectively have been relevant to the Parties and therefore, should have been disclosed earlier and not only once requested by Ukraine."[105] The Chair observes that the Proposal does not rely on any other event to sustain this ground for challenge. Therefore, the Chair analyses the timeliness of this ground separately from the other disqualification grounds raised in relation to Dr. Alexandrov's letters of December 2021.

117. Sixty-nine days elapsed between Dr. Alexandrov's November 19, 2021 letter and the filing of the Proposal on January 27, 2022. The Proposal does not proffer any explanation as to why the Respondent waited over two months to make this allegation, nor does the Chair see any reason in the record that would justify such a delay. Further, the Chair observes that the time period of 69 days exceeds the delay found to be unacceptable in prior decisions on disqualification proposals.[106]

118. In light of the foregoing, the Chair concludes that the first ground for challenge regarding Dr. Alexandrov's alleged failure to make disclosures when first accepting his appointment was not raised promptly, as required under ICSID Arbitration Rule 9(1).

119. With respect to Dr. Alexandrov's alleged piecemeal disclosure and withholding of critical information, the parties disagree as to the *dies a quo* to calculate the relevant time period. While the Claimants use the date of Dr. Alexandrov's December 9, 2021 letter[107], in which Dr. Alexandrov disclosed to the parties his professional relationship with the Experts, the Respondent relies on the date of Dr. Alexandrov's letter of December 21, 2021, in which Dr. Alexandrov responded to the Claimants' follow-up questions of December 20 regarding the scope and extent of his December 9 disclosures.[108]

[105] Proposal, ¶ 32.
[106] *See, e.g.*, *Suez*, ¶¶ 22-26.
[107] Response, ¶ 9.
[108] Further Observations, ¶ 12.

120. The Claimants' position rests on the allegation that the additional details furnished in Dr. Alexandrov's December 21, 2021 letter "did not change the circumstances disclosed in [Dr. Alexandrov's] 9 December 2021 letter."[109] The Chair is not persuaded by this argument. The Proposal particularly relies on Dr. Alexandrov's failure to provide satisfactory responses to the Respondent's December 20 questions to argue that Dr. Alexandrov did not comply with his disclosure obligations. Specifically, it claims that it is Dr. Alexandrov's failure to furnish further details on his professional relationship with the Experts and provide information on his involvement in past matters in which he acted as arbitrator or counsel and other experts from Compass Lexecon were involved, which substantiate the Respondent's allegation that Dr. Alexandrov engaged in a piecemeal disclosure.[110]

121. In the Chair's view, Dr. Alexandrov's December 21, 2021 letter raises matters additional to those in Dr. Alexandrov's letter of December 9, 2021. The Chair thus concludes that December 21, 2021 is the appropriate starting date to assess the timeliness of the Proposal.

122. In the circumstances of the case, the 37 days that elapsed between Dr. Alexandrov's letter of December 21, 2021 and the Proposal do not exceed acceptable margins of timeliness. Thus, with respect to this ground for challenge, the Chair holds that the Proposal was filed promptly for purposes of ICSID Arbitration Rule 9(1).

C. Failure to Disclose As A Ground For Disqualification

123. The Respondent argues that Dr. Alexandrov's approach towards his disclosure obligations raises reasonable doubts as to his reliability to exercise independent judgment.[111] As noted above, the Respondent posits that Dr. Alexandrov provided piecemeal and incomplete disclosure and withheld critical information that should have been disclosed.

124. The arbitrator's disclosure obligations are governed by ICSID Arbitration Rule 6(2), which provides the form of the declaration that each arbitrator must sign and requires that an arbitrator "shall judge fairly as between the parties". The provision requires an arbitrator

[109] Response, ¶ 9.
[110] Proposal, ¶ 35.
[111] Proposal, ¶ 1.

to provide a statement of "(a) [his/her] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [his/her] reliability for independent judgment to be questioned by a party."

125. The Chair has held in past cases that the mere absence of disclosure cannot *in and of itself* make an arbitrator partial or lacking in independence; only the facts and circumstances that the arbitrator did not disclose may call into question the existence of the qualities required by Article 14(1) of the ICSID Convention. The disqualification decision in *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45 is instructive on this point. This decision held that:

> [w]here the undisclosed facts do not themselves support a finding of manifest lack of independence or impartiality (as the Chair has concluded in this case), failure to disclose them may not serve as a ground for disqualification.[112]

126. The focus of the analysis is therefore on whether any of the facts that not disclosed in themselves support a finding of manifest lack of independence or impartiality.

127. In this regard, the Chair observes that in its Proposal the Respondent states that it has reason to believe that there could be relevant information that Dr. Alexandrov has not disclosed to the parties that could manifestly influence Dr. Alexandrov's ability to exercise independent judgment, and that even if such disclosure were made, "Ukraine would have reasonable doubts as to whether any such disclosure would then be as comprehensive as it should be."[113]

128. In the Chair's view, these assumptions are inherently speculative. The Chair recalls that a finding that a lack of impartiality or independence is manifest "must exclude reliance on speculative assumptions or arguments and that the circumstances actually established…

[112] *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Second Proposal to Disqualify All Members of the Tribunal, ¶ 152; *see also Getma International and others v. Republic of Guinea [II]*, ICSID Case No. ARB/11/29, Decision on Proposal to Disqualify Mr. Bernardo Cremades, June 28, 2021, ¶ 84.
[113] Proposal, ¶ 44.

must negate or place in clear doubt the appearance of impartiality."[114] Because these speculative allegations cannot sustain a disqualification proposal, they will not be taken into consideration for purposes of this Decision.

129. Thus, the Chair's analysis will focus on the following facts: (i) Dr. Alexandrov's professional relationship with the Experts; (ii) Dr. Alexandrov's previous appointments by the parties' counsel; and (iii) Dr. Alexandrov's professional relationship with experts from Compass Lexecon other than the Experts.

(1) Dr. Alexandrov's Professional Relationship with the Experts

130. The Respondent argues that Dr. Alexandrov failed to: (i) provide sufficient details concerning his professional relationship with the Experts; and (ii) disclose an ICSID case in which Dr. Alexandrov sat as an arbitrator and Dr. Moselle was involved.

131. With respect to the first allegation, the Chair observes that in his December 9, 2021 letter Dr. Alexandrov disclosed that he was acting in one arbitration as co-counsel alongside Sidley Austin in which his client had retained the Experts (the *IC Power v. Peru* case), and that Dr. Moselle has been engaged in a commercial arbitration matter in which Dr. Alexandrov is likewise acting as co-counsel with Sidley Austin.[115]

132. The Proposal states that Dr. Alexandrov "did not explain what his professional relationship with the Experts does look like on those matters"[116] and posits that "it would have been appropriate for Dr. Alexandrov to disclose further details as to the extent of his day-to-day professional relationship with the Experts on those cases where he is acting as co-counsel."[117]

133. The issue in dispute here is not whether Dr. Alexandrov did or did not disclose his professional relationship with the Experts, which he undoubtedly did. Rather, the Respondent's position is that there *might* exist further details on the professional

[114] *Raiffeisen*, ¶ 88, *citing Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, October 3, 2001, ¶ 25.
[115] Letter from Dr. Alexandrov to the parties, December 9, 2021.
[116] Proposal, ¶ 35(i).
[117] Proposal, ¶ 35(i).

relationship between Dr. Alexandrov and the Experts in the two disclosed cases that *might* objectively demonstrate Dr. Alexandrov's manifest lack of independence or impartiality.

134. In the Chair's view, this is the type of speculative allegation that cannot support a disqualification proposal.

135. In particular, the Respondent's position rests on the presumption that damages experts work closely with counsel, and therefore that they cannot maintain "the required professional distance which is required to be maintained between a party, its counsel and its experts in a case, one [sic] on the one hand, and the members of the tribunal hearing the case, on the other."[118] However, the Respondent does not argue that this conclusion applies to the professional relationship in this case. While the Respondent asserts that "[i]t is likely that as 'lead counsel' in the matter, Dr. Alexandrov will be working closely with the Experts, maintaining a professional relationship with them"[119], it does not argue that a relationship of dependence exists between Dr. Alexandrov and the Experts that could encroach on Dr. Alexandrov's independence and impartiality in this arbitration. Nor does the Respondent put forward that the cases disclosed concern similar facts or similar legal issues to the ones in this arbitration, or that the relationship could otherwise cause prejudgment of the merits of this proceeding.

136. The Chair is bound to decide this Proposal on the basis of the evidence that the parties have adduced. Based on this evidence, the Chair concludes that there is nothing to suggest that the professional relationship between Dr. Alexandrov and the Experts creates an obvious appearance of lack of independence or impartiality of Dr. Alexandrov.

137. Further, the Chair observes that Dr. Alexandrov did in fact provide comprehensive details on his professional relationship with the Experts when invited to do so by the Respondent.

138. In particular, as a response to Dr. Alexandrov's disclosures of December 9, 2021, the Respondent asked Dr. Alexandrov whether his responsibility in those cases encompassed

[118] Proposal, ¶ 35(i), *citing Eiser v. Spain*, Decision on the Kingdom of Spain's Application for Annulment, June 11, 2020, ¶ 227.
[119] Proposal, ¶ 35(i).

"any of the following non-exhaustive aspects, such as responsibility over (a) key valuation matters such as valuation method, appropriate interest rates, or assessments of appropriate valuation date(s); and/or (b) matters such as the relationship between the counsel team and the Expert team."[120] On December 21, 2021, Dr. Alexandrov responded that he "ha[s] not been directly involved in working with the experts to assist them in preparing their written and oral testimony", that "as a lead counsel in those matters [he] necessarily ha[s] an overall responsibility of the representation" and that he has "no involvement in making decisions regarding the 'key valuation matters' stated in para. 4(a) of the Respondent's letter."[121] Finally, he also noted that in the commercial arbitration he disclosed, Dr. Moselle acts as an industry expert rather than an expert in damages.[122]

139. The Chair considers that the level of detail provided by Dr. Alexandrov is satisfactory for purposes of assessing his reliability to exercise independent judgment, and that this information would not lead a third party undertaking a reasonable evaluation of the facts to conclude that Dr. Alexandrov manifestly lacks the qualities required by Article 14(1) of the ICSID Convention.

140. With respect to the second allegation, the Respondent argues that when it asked Dr. Alexandrov to confirm the number of cases involving the Experts and the cases on which Dr. Alexandrov sat or is sitting as arbitrator, Dr. Alexandrov failed to disclose at least one ICSID case in which he appeared as arbitrator and Dr. Moselle was instructed by the party that appointed him (the Undisclosed ICSID Case).[123]

141. The Chair observes that it is not uncommon for the same expert to appear before the same arbitrator on multiple occasions. Quantum experts specialised in the field, such as Dr. Moselle, are few in number. Some interaction between arbitrators and experts is thus to be expected.

[120] Letter from the Respondent to the Members of the Tribunal, December 20, 2021, ¶ 4.
[121] Letter from Dr. Alexandrov to the parties, December 21, 2022, p. 1.
[122] Letter from Dr. Alexandrov to the parties, December 21, 2022, p. 1.
[123] Proposal, ¶¶ 37-41.

142. As a result, multiple appearances of an expert before an arbitrator are, *per se*, insufficient to sustain a disqualification decision. This is particularly so considering that in each case the arbitrator exercises the same independent arbitral function. Thus, something more is required; *i.e*. that because of the proximity, dependence, intensity and/or materiality, a specific connection between an arbitrator and an expert create an obvious appearance of lack of independence or impartiality.[124]

143. The Chair notes that the Respondent does not contend that the professional relationship between the Experts and Dr. Alexandrov compromises *per se* Dr. Alexandrov's ability to exercise independent and impartial judgment in this case. Rather, the Respondent posits that, when viewed in the context of Dr. Alexandrov's alleged previous failures to disclose his professional relationships with similar experts, the Undisclosed ICSID Case evidences a manifest lack of independence or impartiality.

144. The Chair is not persuaded by the Respondent's position. As noted above, the Chair is bound to decide the Proposal based on the evidence presented, rather than on Dr. Alexandrov's alleged conduct in other cases involving different facts and relating to a different professional relationship with other experts.

145. The Chair therefore concludes that, based on the available evidence, the prior and present professional relationship between Dr. Alexandrov and the Experts does not evidence a manifest lack of independence or impartiality on Dr. Alexandrov's part.

a. Appointments by the Parties' Counsel

146. The Respondent argues that Dr. Alexandrov failed to disclose: (i) at least two ICSID cases – the *Gardabani Cases* –in which Dr. Alexandrov was allegedly appointed by the Claimants' counsel; and (ii) at least one ICSID case in which Dr. Alexandrov was appointed by Ukraine's counsel (the *Cunico v. North Macedonia* case).

[124] *See*, *e.g*., *Suez*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, May 12, 2008, ¶ 35.

147. The Chair notes that the Respondent does not argue that any of these undisclosed cases present similar facts or legal issues, or would otherwise prejudge the merits of this case.

148. With respect to the *Gardabani Cases*, the parties disagree as to whether Dr. Alexandrov was appointed by the Claimants' counsel in those cases. In this regard, the Chair takes note of the Claimants' position that "Dentons did not appoint Dr. Alexandrov in those cases; Freshfields did" and that Dentons only "provides local law support in that case and has not pleaded at any hearing."[125] Furthermore, in his Explanations, Dr. Alexandrov states that he only communicated with Freshfields' lead counsel on those cases in relation to his appointment, he was not aware that Dentons' Tbilisi office would serve as local counsel to the claimants in those cases, and he had and still has "no reasons to believe that Dentons (Tbilisi) played any role in [his] appointment."[126]

149. The Chair observes that the Respondent does not challenge the Claimants' position. With respect to Dr. Alexandrov's explanations, the Respondent only claims that it takes no comfort from the fact that Dr. Alexandrov knew that the Claimants' counsel was not involved in his appointment in the *Gardabani Cases*.[127]

150. In the Chair's view, there is nothing on the record that would raise questions about the veracity of the Claimants' and Dr. Alexandrov's statements that the Claimants' counsel did not appoint Dr. Alexandrov in the *Gardabani Cases*. Therefore, the Chair takes them as true.

151. With respect to the *Cunico v. North Macedonia* case, the Chair notes that in that case Dr. Alexandrov was appointed by Ukraine's counsel.[128] The Chair observes that neither the Respondent nor the Claimants argue that this appointment raises any issues evidencing Dr. Alexandrov's manifest lack of independence or impartiality.

[125] Response, ¶ 21.
[126] Explanations, p. 1.
[127] Further Observations, ¶ 23.
[128] Further Observations, ¶¶ 20-21.

152. In light of the foregoing, the Chair concludes that Dr. Alexandrov's appointments in the *Gardabani Cases* and the *Cunico v. North Macedonia* case do not create an obvious appearance of lack of independence or impartiality.

b. Dr. Alexandrov's Professional Relationships With Other Experts from Compass Lexecon

153. The Proposal argues that Dr. Alexandrov failed to provide: (i) a list of matters in which Dr. Alexandrov acted as counsel and experts from Compass Lexecon, other than the Experts, were retained by his client; and (ii) a list of cases in which Dr. Alexandrov sat as arbitrator and experts from Compass Lexecon, other than the Experts, have been involved.

154. As to the first list, in his letter of December 21, 2021, Dr. Alexandrov explained that he was unable to provide a list of such cases because he would need to have access to the historical files of his previous law firms, which he currently does not have. He further stated that he "doubt[s] that such information was ever recorded in a systematic way because those circumstances have not been considered as creating conflicts" and that "[t]o the best of [his] present recollection […] [he] believe[s] it is very likely that there were not such matters."[129] Based on the evidence available to it, the Chair considers that there is no reason not to take Dr. Alexandrov's statement regarding the unlikelihood of the existence of these cases as true.

155. With respect to the second list of matters, in his December 21, 2021 letter Dr. Alexandrov explained that he has not been keeping records of expert appearances in such cases because he does not consider these situations to create a conflict. He also noted that he has been an arbitrator in more than 80 cases and that experts from Compass Lexecon have appeared before him in a number of those cases.[130]

156. The Chair observes that the Proposal does not suggest that a relationship between other experts from Compass Lexecon and Dr. Alexandrov in his capacity as arbitrator could, *per se*, evidence a manifest lack of independence or impartiality. Rather, the Respondent only

[129] Letter from Dr. Alexandrov to the parties, December 21, 2021.
[130] Letter from Dr. Alexandrov to the parties, December 21, 2021.

takes issue with the fact that Dr. Alexandrov failed to furnish these lists because of his lack of access to firm files and record-keeping.[131] However, as the Chair noted above, a mere failure of disclosure does not suffice to disqualify an arbitrator if the undisclosed facts do not themselves support a finding of manifest lack of independence or impartiality.

157. The Chair observes that the information the Respondent sought refers to past matters, which do not involve the same experts, and in which Dr. Alexandrov acted as arbitrator, thus acting with the same duty of independence and impartiality. There is no indication that these cases could compromise Dr. Alexandrov's reliability to exercise independent judgment in the present case.

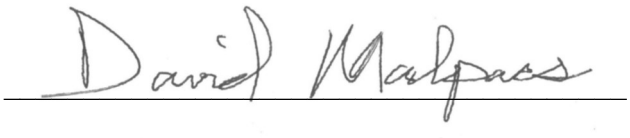
V. DECISION

158. Having considered all the facts alleged and the submissions of the parties, and for all the reasons stated above, the Chair finds that a third party undertaking a reasonable evaluation of the facts alleged and the parties' arguments on each ground would not conclude that they evidence a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Nor does the Chair find that the cumulation of the facts alleged and the parties' arguments lead to such a conclusion.

159. Because none of these facts create an obvious appearance of lack of independence or impartiality, Dr. Alexandrov's failure to disclose some of these facts cannot serve as a ground to disqualify him.

160. Accordingly, the Proposal is rejected.

[131] Proposal, ¶¶ 35(i)-(ii).



David Malpass
Chairman of the ICSID Administrative Council