INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

OPTIMA VENTURES LLC, OPTIMA 7171 LLC, AND OPTIMA 55 PUBLIC SQUARE LLC

Claimants

and

UNITED STATES OF AMERICA

Respondent

ICSID Case No. ARB/21/11

DECISION ON THE CLAIMANTS' PROPOSAL TO DISQUALIFY MR. M. AS ARBITRATOR

Chair of the ICSID Administrative Council
Mr. David Malpass

Secretary of the Tribunal
Mr. Gonzalo Flores

Date: December 20, 2022

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I. PROCEDURAL HISTORY

1. On February 8, 2021, **Optima Ventures LLC** and **Optima 7171 LLC**, two companies incorporated in the State of Delaware, indirectly owned and controlled by nationals of Ukraine, filed with ICSID a request for arbitration under the ICSID Convention and the 1994 US-Ukraine Bilateral Investment Treaty, against the United States of America. On February 25, 2021, ICSID received a similar request for arbitration from **Optima Ventures LLC** and **Optima 55 Public Square LLC** (also a Delaware incorporated company).

2. On March 16, 2021, the Secretary-General of ICSID registered both requests for arbitration pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7(a) of the ICSID Institution Rules and notified the parties of the registration. The cases were registered as ICSID cases Nos. ARB/21/11 and ARB/21/12.

3. On June 11, 2021, the parties agreed to discontinue case No. ARB/21/12 and amend case No. ARB/21/11 to include Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC as claimants.

4. On June 16, 2021, the Secretary-General issued a Procedural Order Taking Note of the Discontinuance of case No. ARB/21/12 pursuant to ICSID Arbitration Rule 43(1).[1]

5. By communication of June 16, 2021, the Centre took note that the parties had agreed on the number of arbitrators and the method of their appointment, in accordance with Article 37(2)(a) of the ICSID Convention and Arbitration Rule 2(1). Pursuant to the parties' agreement, the Tribunal would comprise three members, one appointed by the Claimants, one appointed by the Respondent, and the third, presiding, arbitrator who would be appointed by agreement of the parties. Should the parties fail to agree on the presiding arbitrator, the Secretary-General of ICSID would make the missing

[1] All references to Arbitration Rules in the present decision are to the ICSID Rules of Procedure for Arbitration Proceedings which came into effect on April 10, 2006.

appointment, in accordance with a formula agreed by the parties. The parties also agreed to derogate from nationality restrictions, as permitted by Article 39 of the ICSID Convention and ICSID Arbitration Rule (1)(3).

6. In accordance with the parties' agreement, the Claimants appointed Professor Jan Paulsson, a national of Bahrain, France, and Sweden, as an arbitrator. Prof. Paulsson accepted his appointment on June 21, 2021. The Respondent in turn appointed Mr. M., a US national. Mr. M. accepted his appointment on July 30, 2021.

7. Between June 2021 and April 2022, the parties, with the assistance of ICSID, endeavoured to agree on the name of the presiding arbitrator. As the parties failed to reach an agreement, on June 23, 2022, the Secretary-General appointed Prof. Mónica Pinto, a national of Argentina, as president of the tribunal. Prof. Pinto accepted her appointment on July 6, 2022.

8. On July 6, 2022, in accordance with ICSID Arbitration Rule 6(1), the Secretary-General notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted, and the proceeding to have begun, on that date.

9. On July 15, 2022, the Claimants filed a proposal to disqualify Mr. M. as arbitrator. In accordance with Article 58 of the ICSID Convention, the Disqualification Proposal would be decided by Professors Pinto and Paulsson.

10. On July 16, 2022, the Centre confirmed receipt of the Proposal and informed the parties that in accordance with ICSID Arbitration Rule 9(6), the proceeding would be suspended until a decision on the Proposal had been taken.

11. On the same date, the Centre conveyed to the parties and to Mr. M. a schedule for the parties' submissions on the Proposal and for Mr. M.'s explanations (if any), fixed by Professors Pinto and Paulsson.

12. On July 29, 2022, in accordance with the fixed schedule, the Respondent filed comments on the Disqualification Proposal ("**Respondents Comments**").

13. On August 5, 2022, Mr. M. furnished explanations, in accordance with ICSID Arbitration Rule 9(3).

14. On August 15, 2022, the parties simultaneously filed final observations on the Disqualification Proposal (**"Claimants' Observations"** and **"Respondent's Further Observations"**).

15. On August 29, 2022, Professors Pinto and Paulsson informed the Secretary-General that they had failed to reach a decision on the Disqualification Proposal. In accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4), the Disqualification Proposal would be accordingly decided by the Chair of the Administrative Council.

II. THE PARTIES' POSITIONS

A. CLAIMANTS' DISQUALIFICATION PROPOSAL AND OBSERVATIONS

16. The Claimants seek to disqualify arbitrator Mr. M. pursuant to Articles 14 (1) and 57 of the ICSID Convention and ICSID Arbitration Rule 9, on account that he manifestly lacks the impartiality and independence required to serve as an arbitrator due to: [2]

    a. Mr. M.'s prior employment relationship with the United States;

    b. Mr. M.'s current and ongoing employment by the United States;

    c. Mr. M.'s stance on the interplay between customary international law and US domestic law;

    d. Mr. M.'s alleged access to confidential information concerning individuals with interests in this case; and

    e. Mr. M.'s acquiescence to practices contrary to international law.[3]

[2] Disqualification Proposal ¶ 104.

[3] Disqualification Proposal ¶ 105.

(1) Applicable Legal Standard

17. The Claimants recall that Article 57 of the ICSID Convention permits the disqualification of an arbitrator on account of any fact indicating a manifest lack of the qualities required by Article 14 (1) which provides: "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 judgement."[4].

18. The Claimants note that: (i) "[it] is well established that this standard includes both the concepts of impartiality and independence and requires that the arbitrators appointed avoid even the *appearance* of dependence or bias, as evaluated by a third party-observer"[5]; and (ii) disqualification under the ICSID Convention "do[es] not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias." [6]

19. The Claimants submit that ICSID tribunals determining disqualification proposals have looked to the *IBA Guidelines on Conflicts of Interest in International Arbitration* (IBA Guidelines) for guidance.[7]

20. Finally, the Claimants, in response to the Respondent's Comments of July 29, 2022, submit that the assertions in the Disqualification Proposal need to be viewed cumulatively,[8] to enable "all of the circumstances… to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently."[9]

[4] Disqualification Proposal ¶ 97.
[5] Disqualification Proposal ¶ 1.
[6] Disqualification Proposal ¶ 98.
[7] Disqualification Proposal ¶¶ 99-102.
[8] Disqualification Proposal ¶ 106.
[9] Claimants' Observations ¶¶ 7-8.

(2) Mr. M.'s prior employment relationship with the United States

21. The Claimants note that Mr. M. has "an extensive […] employment relationship with the United States federal government," having served for approximately 20 years "as an employee and/or official of the United States government, holding various high-level roles during this time."[10]

22. After describing Mr. M.'s long career in the US public sector – culminating with his tenure as Secretary of Homeland Security from 2005 through 2009 - Claimants assert that this "extensive relationship and alignment with the United States and its policies at the very least creates an appearance that Mr. M. will lack impartiality and/or independence in presiding over this matter."[11]

23. The Claimants refer to the IBA Guidelines to support their position, arguing that Mr. M.'s long tenure as a US Government official falls squarely within item 3.4.2. of the Guidelines *Orange List, i.e.,* "[t]he arbitrator has been associated with a party or an affiliate of one of the parties, in a professional capacity, such as a former employee or partner," creating, at the very least, an appearance of bias.[12]

24. Further, the Claimants allege that: (i) "a review of ICSID decisions on disqualification confirms that it is unprecedented for a party to appoint its own former high-ranking official as an arbitrator;" (ii) "considerable evidence shows that decision-makers are biased in favor of their home countries;" and (iii) "Article 39 of the ICSID Convention implicitly recognizes this reality by providing that '[t]he majority of arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute.'"[13]

25. In conclusion, the Disqualification Proposal claims that "Mr. M.'s decades-long career as a high-ranking United States government official who played an influential role in the development and execution of United States policy—including policy concerning

[10] Disqualification Proposal ¶¶ 2, 29.
[11] Disqualification Proposal ¶ 112.
[12] Disqualification Proposal ¶ 115.
[13] Disqualification Proposal ¶ 117.

conflicts between United States domestic law and international law, as well as the United States' use of asset forfeiture—indisputably raises profound questions about Mr. M.'s ability to remain independent and impartial during the course of this arbitration."[14]

(3) Mr. M.'s current employment with the US Government

26. The Claimants note that Mr. M. has served as a member of the US Homeland Security Advisory Council ("HSAC") since March 2022, assisting the current Secretary of Homeland Security to "develop strategies in the domestic and international domains," and providing him with "independent advice and recommendations."[15]

27. According to the Claimants, members of HSAC are considered to be "'Special Government Employees' as defined in section 202(a) of Title 18 United States Code."[16]

28. Relying on the IBA Guidelines, the Claimants describe Mr. M.'s current relationship with the US as a circumstance that "necessarily raise[s] justifiable doubts as to a candidate's independence and impartiality," which falls in the Non-Waivable and Waivable Red Lists.[17]

29. In addition, the Disqualification Proposal claims that Mr. M. failed to notify ICSID or the parties that he had accepted a role with HSAC. Claimants submit that this failure breached Mr. M.'s continuing obligation to notify the Centre of any subsequent relationship or circumstance that may put in question his reliability for independent judgment, required under Arbitration Rule 6(2).[18]

[14] Disqualification Proposal ¶ 121.

[15] Disqualification Proposal ¶¶ 8, 43-45.

[16] Disqualification Proposal ¶ 47.

[17] Disqualification Proposal ¶ 108. Non-Waivable Red List Items 1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration, and 1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom. Waivable Red List Items 2.3.1. The arbitrator currently represents or advises one of the parties, or an affiliate of one of the parties, and 2.3.7. "The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a significant financial income therefrom."

[18] Disqualification Proposal ¶ 111.

30. In response to Respondent's Comments, the Claimants' assert that Mr. M.'s affiliation with HSAC is an "unwaivable conflict that mandates [his] disqualification." Addressing Mr. M.'s explanations of August 5, 2022, the Claimants assert that his conditional offer to resign from HSAC if the Tribunal approves his continued role as arbitrator further demonstrates this conflict.[19]

(4) Mr. M.'s stance on the interplay between customary international law and US domestic law

31. The Claimants note that while employed by the US Government, Mr. M. gave lectures and wrote articles setting forth his views on the interplay between the domestic enforcement of US law and customary international law.[20]

32. In these articles and lectures, Mr. M. expressed scepticism towards customary international law, suggesting that it has developed in a manner that is biased against the United States and advocating against its encroachment on the ability of the United States to manage its domestic affairs.[21]

33. In particular, the Disqualification Proposal points to an explicit statement made by Mr. M. in 2009, that the US domestic system for justice should not be subject to any limitations imposed by international law.[22]

34. In addition, the Claimants note that as a federal prosecutor, Mr. M. advocated for the US Government's use of asset forfeitures, especially when the asset was allegedly obtained using funds gained as a result of illegal activity, an issue that is central to this arbitration.[23]

[19] Claimants' Observations ¶ 3.

[20] Disqualification Proposal ¶ 48.

[21] Disqualification Proposal ¶ 49; Mr. M., *The Responsibility to Contain: Protecting Sovereignty Under International Law*, Foreign Affairs, Jan.-Feb. 2009 [C-28]; *Mr. M. on International Law,* Nov. 17, 2006 (Audio Recording). [C-29].

[22] Disqualification Proposal ¶ 52; [C-28].

[23] Disqualification Proposal ¶¶ 54-57.

35. Claimants affirm that an arbitrator can be disqualified on the basis of public statements[24] and that a "reasonable interpretation" of Mr. M.'s comments "give rise to justifiable doubts about his impartiality," making disqualification appropriate.

(5) Mr. M.'s alleged access to confidential information concerning individuals with interests in this case

36. The Claimants submit that, as a result of his prominent position as Secretary of Homeland Security, Mr. M. was likely privy to confidential information about the Claimants. Given the political turmoil in Ukraine while he was in office, the Claimants assert that a reasonable observer would presume that Mr. M. acquired information about the Claimants that might influence his decision in this case.[25]

37. The Claimants also allege that Mr. M. may have gained access to additional confidential information following his return to the private sector, as he was affiliated with and represented competitors of the main shareholders of the Claimants in this case.

38. According to the Claimants, Mr. M. must be disqualified because his access to confidential information contributes to the "appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case."[26]

(6) Mr. M.'s acquiescence to practices contrary to international law

39. The Disqualification Proposal claims that following the events of September 11, 2001, agencies from the US Government engaged in interrogation techniques of suspected terrorists that were contrary to a "reasonable interpretation of international law."[27]

40. The Disqualification Proposal extensively describes the events that followed the September 11 attacks, US inter-agency discussions and legal reports on the interrogation techniques used, and Mr. M.'s alleged contribution, in his capacity as Assistant Attorney General at the Criminal Division of the US Department of Justice,

[24] Claimants' Observations ¶ 9.
[25] Disqualification Proposal ¶ 148.
[26] Disqualification Proposal ¶ 150.
[27] Claimants' Observations ¶ 11.

to an aggressive interpretation of international law that authorized these practices. According to the Claimants, this evidences "…a willingness to tolerate excesses and oversteps in favor of the policy preferences of his home country."[28]

41. The Disqualification Proposal asserts that Mr. M. acquiesced in and contributed to legal interpretations that are indefensible under international law, with the intention of benefitting the public interests of his home country, which evidence a lack of impartiality.[29]

B. THE RESPONDENT'S OBSERVATIONS AND RESPONSE

42. The Respondent opposes the proposal to disqualify Mr. M., arguing that:

    a. Mr. M.'s former employment with the US does not present a conflict;

    b. Mr. M.'s role on the HSAC does not require his disqualification;

    c. None of Mr. M.'s public statements concerning international law and prosecution of asset forfeiture give rise to an "issue conflict;"

    d. Allegations that Mr. M. may have obtained confidential information about the claimants are mere speculation and should be rejected; and

    e. Mr. M.'s contribution to an allegedly wrongful interpretation of certain conduct is irrelevant.

(1) Applicable Legal Standard

43. Like the Claimants, the US submits that the standard for disqualification of an arbitrator under the ICSID Convention is enshrined in Articles 14(1) and 57 of the ICSID Convention, pursuant to which arbitrators shall be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may

[28] *Ibid*.

[29] Claimants' Observations ¶ 13.

be relied upon to exercise independent judgment." The US also agrees that this standard encompasses the requirements of independence and impartiality.[30]

44. The US submits that: (i) Article 57 requires a party to establish facts "indicating a manifest lack of the qualities required" by Article 14(1); (ii) the burden of proof on a challenge lies with the party bringing the proposal to disqualify; (iii) facts indicating a manifest lack of those qualities must be established through "objective evidence that a reasonable third party would uphold"; (iv) manifest lack of those qualities cannot be based on the subjective perceptions of the challenging party; and (v) a party seeking to disqualify an arbitrator may not rely on speculation or unfounded assertions to prove the facts in support of its challenge.[31]

(2) Mr. M.'s former employment with the US does not present a conflict

45. The Respondent disagrees that Mr. M.'s former employment with the US government must result in his disqualification.[32]

46. The Respondent notes that Mr. M.'s employment with the US ended in 2009, twelve years prior to his appointment in this case. Mr. M. has worked solely in the private sector since then.

47. The Respondent further notes that Mr. M.'s prior employment with the US Government was disclosed in his résumé at the time of his appointment and acceptance. According to the US, the Claimants could have requested clarifications or further disclosures from Mr. M. at any time since July 2021, if his employment history had been a concern to them.[33]

48. The US submits that the Claimants have not pointed to any decision disqualifying an arbitrator solely based on their prior government service and that there are many

[30] Respondent's Comments ¶ 2.
[31] Respondent's Comments ¶ 3.
[32] Respondent's Comments ¶ 21.
[33] Respondent's Comments ¶ 24.

instances where former government officials served as arbitrators in investor-State arbitrations.[34]

49. Finally, the US addresses Claimants' suggestion that Mr. M. cannot be unbiased simply because he possesses US nationality, noting that the parties' agreed method of constitution of the Tribunal expressly derogated from any nationality requirement.[35]

(3) Mr. M.'s advisory role with the Department of Homeland Security does not require his disqualification

50. The US disagrees with Claimants' submission that Mr. M.'s role in HSAC mandates his disqualification. The US accepts, however, that Mr. M. may not continue serving in both roles concurrently.[36]

51. The US claims that the subject matter covered by HSAC differs from the issues in dispute in this case and that there is no indication on the record that Mr. M. is advising on any issue that could plausibly be related to this arbitration. The US further states that "HSAC members receive no compensation, no per diem, and no honorarium, and although some travel expenses may be reimbursable, our understanding from a recent inquiry with DHS is that Mr. M. has neither requested nor received any such reimbursement."[37]

52. In its Further Observations, the Respondent acknowledges that the IBA Guidelines Waivable Red List concerns *concurrent* advisory services to a party, but contends that Mr. M.'s advisory role with HSAC does not present grounds for disqualification because (i) he offered to resign from the HSAC position in his August 5, 2022 explanations; (ii) the overlap between his role in HSAC and as an arbitrator in this matter was brief; (iii) this arbitration is at an early stage; and, (iv) no reasonable third

[34] Respondent's Comments ¶ 25.
[35] Respondent's Comments ¶ 26.
[36] Respondent's Comments ¶ 14.
[37] Respondent's Comments ¶ 17.

party would conclude that Mr. M.'s short period of overlapping service indicates a manifest lack of independence or impartiality in these proceedings.[38]

(4) Mr. M.'s public statements concerning international law and prosecution of asset forfeiture cannot give rise to a conflict

53. The US asserts that it "has long been recognized that the mere expression of an opinion, even where the issue may be relevant in a particular arbitration, cannot without more sustain an arbitrator challenge for lack of independence or impartiality" and that "scholarly expressions of views that do not address a specific case, standing alone, are not normally cause for removal." [39]

54. The US claims that Mr. M.'s statements "did not amount to legal advice, expert opinion, or advocacy of a position on this dispute or in this specific case" and that his generalized statements concerning the relationship between international and domestic law or his statements or prior advocacy concerning asset forfeiture in general, are not sufficient bases to uphold a challenge.[40]

55. Finally, the Respondent rejects the Claimants' assertions that Mr. M. cannot be impartial on asset forfeiture issues due to his former roles with the US Department of Justice.[41] Respondent notes that Claimants did not point to any opinions or public advocacy of Mr. M. on the issue of asset forfeiture.[42]

(5) Mr. M.'s alleged access to confidential information concerning individuals with interest in the case

56. Respondent submits that (i) the Claimants failed to establish that Mr. M. obtained confidential information about the Claimants through his previous positions, portraying

[38] Respondent's Further Observations ¶ 4.

[39] Respondent's Comments ¶ 28, referring to the *Report of the ASIL-ICCA Joint Taskforce on Issue Conflicts in Investor-State Arbitration*, the ICCA Reports No. 3, ¶¶ 116-17.

[40] Respondent's Comments ¶¶ 28, 34.

[41] Respondent's Comments ¶ 33.

[42] Respondent's Comments ¶ 34

Claimants' allegations as "unwarranted presumptions"; and (ii) no link was established between the Claimants' speculations and the qualities required by Art. 14(1).[43]

(6) Claimants' arguments concerning interrogation techniques are irrelevant and should be stricken from the record.

57. The US submits that the Claimants' arguments on issues related to interrogation techniques have no bearing on Mr. M.'s ability to remain impartial and are an attempt to discredit Mr. M. and undermine his standing within the Tribunal.[44]

58. The Respondent requests that the Tribunal strike these arguments in the Claimants' submission from the record, as they amount to "…an unsolicited submission and is wholly irrelevant to the proposal to disqualify Mr. M."[45]

C. MR. M.'S COMMENTS

59. In accordance with the schedule and ICSID Arbitration Rule 9(3), Mr. M. furnished explanations on August 5, 2022, as follows:

> *"I, Mr. M., respectfully submit these comments in response to Claimants' Proposal to disqualify me as Arbitrator and the Comments by the United States.*
>
> *To be clear: I have no partiality for or against any party in this case, have no knowledge of the underlying facts other than what was set forth in filings in this arbitration, and have no settled views on the legal issues presented herein. The Tribunal is familiar with the relevant law, and I will simply set forth facts that are relevant to the pending proposal.*
>
> *I.*
>
> *Regarding my financially uncompensated role as a member of the Homeland Security Advisory Committee, no element of my participation has involved any subject matter or people related to the current arbitration. Nevertheless, if the Tribunal approves my*

[43] Respondent's Comments ¶¶ 35-36.
[44] Respondent's Comments ¶ 7.
[45] Respondent's Comments ¶¶ 7-12.

continued role as an arbitrator, I will withdraw from and terminate participation in the Homeland Advisory Committee.

II.

Regarding the speculation regarding any connection between myself and Dmitry Firtash and Victor Pinchuk:

I represented Firtash in contesting the United States Department of Justice effort to extradite him on US criminal charges alleging improper payments to officials in India. That representation ended in 2019. The issues in that matter had nothing to do with the Claimants or claims at issue here. Indeed, I had never heard of the current Claimants until I was invited to this arbitration, well after the Firtash representation ended.

I have never represented Pinchuk and my only contact with him has been because both he and I are members of the Transatlantic Commission on Election Integrity, which is focused on efforts to safeguard democratic elections, and which is populated by a number of former senior public officials. Pinchuk has never discussed with me the Claimants or claims in this matter.

III.

My service as a Federal prosecutor and as Assistant Attorney General did not involve the issues or individuals that are part of this proceeding. I left the US Department of Justice over a decade ago, and during much of my legal career I was a defense attorney representing individuals who challenged and were adverse to the Justice Department. Thus, as a lawyer I have both supported and contested the positions of the Department.

In particular, as Assistant Attorney General I did not direct the disposition of terrorist detainees. I did specifically decline to provide any advance immunity for anyone who committed a criminal violation in the treatment of detainees.

IV.

Regarding the claims that years ago I expressed a generally negative view of international law, the quoted remark is extracted from a 2009 Foreign Affairs article which I authored. The article does not generally oppose application of international

law and does not speak to the issues in this arbitration. Indeed, the article endorses bilateral agreements and international law, especially as they relate to "activities involving the transport of goods, people, or money from one country to another — such as air travel, cargo transportation, and cross-border financial transactions. International law is particularly appropriate for regulating such activities due to their quintessentially international character." [Foreign Affairs, Volume 88, No. 1, p. 130, at p.141 (Jan/Feb 2009]

V.

In short, I have no prior personal or professional connection with the individuals or factual or legal issues presented in this Arbitration. I have adopted no views as to the issues involved. As a former appellate Judge, I am well aware of how important it is that adjudication be free of bias or prejudgment I can assure the Tribunal and parties here that I am and will be impartial. There is no reasonable basis to doubt that."

III. ANALYSIS

60. The Chair of the Administrative Council has considered all of the parties' submissions but will refer to them only to the extent that they are relevant for the present Decision.

A. TIMELINESS

61. Arbitration Rule 9 (1) requires a proposal for disqualification to be filed "promptly."[46] As the ICSID Convention and Arbitration Rules do not specify a number of days within which a disqualification proposal must be filed, the timeliness of a disqualification proposal must be determined on a case-by-case basis.[47]

62. The Proposal was filed on July 15, 2022, *i.e.,* 9 days after the Tribunal constitution. The parties have not challenged the promptness of the Proposal, nor have they

[46] ICSID Arbitration Rule 9(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."

[47] *See, e.g., Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine* (ICSID Case No. ARB/21/15), Decision on the Respondent's Proposal to Disqualify Dr. Stanimir A. Alexandrov of April 15, 2022, ¶114 ("*Misen*"), and cases cited therein.

addressed timeliness in their submissions. Based on the information reviewed, the Chair is satisfied that the Proposal was submitted in a timely manner as required by ICSID Arbitration Rule 9 (1).

B. THE APPLICABLE LEGAL STANDARD

63. The Proposal seeks to disqualify arbitrator Mr. M. pursuant to Article 57 of the ICSID Convention. The Proposal does not question Mr. M.'s high moral character or that he has competence in the fields of law, commerce, industry, or finance, as required by Article 14 (1) of the ICSID Convention. The Proposal challenges Mr. M.'s reliability to exercise independent and impartial judgement.[48]

64. As noted above, Article 57 of the ICSID Convention provides in relevant part that:

> *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.*

65. A number of decisions have concluded that the word "manifest" in this provision means "evident" or "obvious", and that it relates to the ease with which the alleged lack of the required qualities can be perceived. [49]

66. 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. [50]

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[48] Disqualification Proposal ¶ 104.

[49] *See Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, November 12, 2013 ("*Blue Bank*"), ¶61; *Misen* ¶101; *VM Solar Jerez GmbH and others v. Kingdom of Spain* (ICSID Case No. ARB/19/30), Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil, October 18, 2022, ("*VM Solar*"), ¶ 83*; Orazul International España Holdings S.L. v. Argentine Republic* (ICSID Case No. ARB/19/25), Decision on Disqualification of Dr. Inka Hanefeld, September 11, 2022, ("*Orazul*") ¶ 47; and cases cited therein; *See also* C. Schreuer The ICSID Convention: A Commentary, Third Edition (2022), p. 1578-1579 ¶¶ 37-42.

[50] *See, e.g; Misen* ¶105*; VM Solar ¶ 87; Orazul ¶ 39*; and cases cited therein.

67. The parties agree that Article 14 of the ICSID Convention requires arbitrators to be both independent and impartial.[51]

68. It is also common ground between the parties that 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." Accordingly, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[52]

69. Both parties have referred to the IBA Guidelines. 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.

(1) Mr. M.'s prior employment relationship with the United States

70. Claimants' *first* proposed ground to disqualify Mr. M. is that his extensive career in the US public sector would affect his impartiality.

71. The US disagrees, noting that (a) Mr. M.'s prior employment with the US Government ended in 2009; and (b) this fact was known by the Claimants at the time Mr. M. was appointed to the Tribunal in June 2021 and that they did object to it.

72. The Chair is mindful that under the ICSID Convention and Rules, the Claimants could not raise a formal challenge to Mr. M.'s appointment until the Tribunal was constituted and that, as noted in ¶62 above, they promptly did so.

73. In the Chair's view, Mr. M.'s prior service in the US administration does not, by itself, justify his exclusion from the Tribunal.

[51] See *supra* ¶¶ 18 and 43.

[52] *See, e.g; Blue Bank* ¶60, *VM Solar* ¶88; *Misen* ¶105-106; and cases cited therein.

74. Nothing in the ICSID Convention, Rules or Regulations restricts the appointment as arbitrators of individuals who have served in government.[53] The ICSID Panels of Conciliators and Arbitrators include individuals appointed by Contracting States who have served in the public sector in their respective countries of origin or other States.[54]

75. In fact, parties in investor-State dispute settlement (ISDS) proceedings frequently appoint individuals with experience in the public sector as arbitrators. There are numerous examples of ISDS cases, under the ICSID Convention, ICSID Additional Facility Rules and other sets of arbitration rules, where prior government service has not been seen, in and of itself, as a basis to exclude a person from service as an arbitrator.[55]

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[53] Article 12 of the ICSID Convention refers to "qualified persons" who "are willing to serve as arbitrators or conciliators." Pursuant to Article 14 appointees 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." Article 39, in turn, establishes nationality limitations to the appointment of arbitrators. The *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, highlights the flexible character of ICSID proceedings, which gives the parties freedom to select arbitrators, as long as the appointees possess the qualities stated in Article 14 (1).

[54] *See Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels* in the ICSID website, where it is stated: "Designees can be identified from a broad range of professional backgrounds and experiences that may include …former government officials and diplomats with experience in international matters" and "[w]hile the ICSID Convention does not prohibit designation of currently serving government officials, their designation may pose a higher risk of a challenge based on their employment relationship with a State. Former government officials do not pose a similar risk and have acted frequently in ICSID cases."

[55] *E.g.,* in *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1) and in *Robert Azinian et al v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2), the US claimants appointed Benjamin R. Civiletti a former US Attorney General, as arbitrator; in *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1), the Canadian claimants appointed Edwin Meese III, also a former US Attorney General; in *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), the claimants appointed Stuart E. Eizenstat, a former US Ambassador to the European Union and Deputy Secretary of the Treasury; in *Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain* (ICSID Case No. ARB/12/17), the parties jointly appointed Rodrigo Oreamuno, a former vice-president of Costa Rica as the sole arbitrator; in *Vento Motorcycles, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/17/3), Mexico appointed as arbitrator Hugo Perezcano Diaz, formerly Mexico's lead counsel in NAFTA Chapter 11 cases and Head of Mexico's Trade Remedy Authority; in *Ethyl Corporation v. The Government of Canada*, the first NAFTA Chapter 11 case against Canada, the State appointed Marc Lalonde, a former Minister of Finance, Justice and Attorney-General of Canada; in the NAFTA Article 1126 consolidated proceedings of *Canfor/Tembec/Terminal Forest Ltd. v. United States of America*, the US appointed Davis R. Robinson, a former Legal Adviser to the US Department of State; in *José Alejandro Hernández Contreras v. Republic of Costa Rica (ICSID Case No. ARB(AF)/20/2)*, the parties jointly appointed Felipe Bulnes Serrano, a former Minister of Education and Justice of Chile, as president of the Tribunal; and in *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda* (ICSID Case No. ARB/18/21), the parties jointly appointed Sir Nicholas Phillips, who served as the first president of the Supreme Court of the United Kingdom, as the president of the Tribunal. It is noted that Mr. M. himself served as arbitrator appointed by the Claimant in the case of *Detroit International Bridge Company v. Government of Canada*.

76. In the present case, this conclusion is reinforced by the fact that the governmental service concerned concluded more than 12 years ago, following Mr. M.'s tenure as Secretary of Homeland Security from 2005 through 2009.

77. The Disqualification Proposal appears to suggest additionally that Mr. M. cannot be unbiased because he is a US national. The Claimants have not proposed Mr. M.'s disqualification on the ground that he was ineligible for appointment to the Tribunal for reasons of nationality, as envisaged in Article 57 of the ICSID Convention. While Article 39 of the ICSID Convention restricts in principle the appointment of arbitrators of the same nationality as the disputing parties, the restriction does not apply in the present case, where the parties agreed to derogate from the nationality rules, as expressly permitted under Article 39.

78. Based on the circumstances of this case, the Chair concludes that an objective third party undertaking a reasonable evaluation of the facts would not conclude that Mr. M..'s prior service in the US Government would evidence, by itself, a manifest lack of the impartiality and independence required under Article 14(1) of the ICSID Convention. Accordingly, this aspect of the disqualification proposal is rejected.

(2) Mr. M.'s current employment with the US Government

79. *Second*, the Claimants argue that Mr. M. maintains a professional relationship with the Respondent following his March 2022 appointment to the US HSAC. According to the Claimants, this appointment makes Mr. M. a "Special Government Employee" under US law.

80. It its reply, the US asserts that the subject matter covered by HSAC is different from the issues in dispute in this case[56] and challenges the existence of an "employment relationship" between Mr. M. and the US, noting that HSAC members receive no compensation for their service.

[56] Respondent's Comments ¶16 "[t]here is no indication that Mr. M. is advising on any issues that could plausibly be the subject matter of the present arbitration in his capacity on the HSAC."

81. The US, however, acknowledges that "Mr. M. should not serve in both capacities concurrently," understanding "that Mr. M. will address this issue … [and] advise the parties as to whether he intends to resign from the HSAC or from this Tribunal."[57]

82. In his explanations, quoted in full above, Mr. M. states: "*Regarding my financially uncompensated role as a member of the Homeland Security Advisory Committee, no element of my participation has involved any subject matter or people related to the current arbitration. Nevertheless, if the Tribunal approves my continued role as an arbitrator, I will withdraw from and terminate participation in the Homeland Advisory Committee."*

83. There is no dispute about whether Mr. M. received compensation for his service at HSAC. It is also clear from the record that Mr. M.'s functions at HSAC and as arbitrator overlapped only for a short period. More importantly, the parties and Mr. M. appear to agree that there is an inherent incompatibility between these two roles.

84. The parties disagree however, as to whether Mr. M. is an "employee" of the US and, more substantially, if the fact that Mr. M. is presently advising the US, a party to the dispute, is a sufficient ground to disqualify him

85. In the Chair's view, this second disqualification ground is well-founded. By serving on a tribunal in an arbitration while simultaneously acting as an advisor to one of the disputing parties, albeit in different matters, the arbitrator inevitably risks creating an appearance that he lacks impartiality and independence.

86. The fact that Mr. M. has received no compensation does not remove this appearance. While the arbitrator may be confident in his/her own impartiality, the arbitrator could reasonably be perceived by an objective third party as more attentive to the interests of the party being advised and his/her judgment may appear to be impaired by the potential interest of the advised party in the proceeding.

[57] Respondent's Comments ¶19.

87. The Chair notes that under the IBA Guidelines, which both parties have referred to with approval, this situation would fall under the Waivable Red List, *i.e.,* situations that, while serious, could be waived only if and when the parties, being aware of the conflict, "expressly state their willingness to have such a person act as arbitrator." That is not the case in the present situation, where the Claimants strongly oppose Mr. M.'s continued participation in the Tribunal.

88. Mr. M. has indicated that "*if the Tribunal approves my continued role as an arbitrator, I will withdraw from and terminate participation in the Homeland Advisory Committee*." The US has argued that "[t]here are no grounds to disqualify Mr. M. solely on the basis of his membership on the HSAC given his offer to resign immediately from that Committee …[u]pon Mr. M.'s resignation, there will no longer be any concurrent service or possible conflict."

89. Mr. M.'s explanations and the US' comments suggest that the appearance of conflict arising from Mr. M.'s concurrent roles as arbitrator and HSAC member could be cured by resigning from the HSAC. The Claimants disagree. The Chair disagrees as well.

90. The Chair is called to determine, based on the facts and arguments before it, whether the challenged arbitrator manifestly lacks or appears to lack one or more of the qualifications in Article 14 (1) of the ICSID Convention. The determination is made considering the proven facts and not alternative but-for scenarios. At the time of this decision, Mr. M. continues to hold two, incompatible, positions.

91. Considering the above, the Chair concludes that an objective third party would find an evident or obvious appearance of lack of impartiality of the challenged arbitrator on a reasonable evaluation of the facts in this case.

92. In the Proposal, the Claimants submitted an additional argument that Mr. M. failed to notify ICSID and the parties of his appointment with HSAC, breaching his continuing obligation to notify the Centre of any subsequent relationship or circumstance that may put in question his reliability for independent judgment, as required under Arbitration Rule 6(2).

93. The US replied indicating that "nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so." Given the Chair's determination to uphold the Disqualification Proposal based on Mr. M.'s incompatible concurrent roles, it is unnecessary to decide on the issue of non-disclosure.

94. In the circumstances considered above, the Chair finds that there is a manifest appearance that Mr. M. lacks impartiality as required by Article 14 (1) of the ICSID Convention, and the Chair upholds the Disqualification Proposal on this basis.

(3) Mr. M.'s stance on the interplay between customary international law and US domestic law

95. In its *third* proposed ground for disqualification, the Claimants draw attention to (a) lectures and articles by Mr. M. while employed by the US Government, in which he allegedly stated that international law should not interfere with the US justice system; and (b) positions adopted by Mr. M. as a federal prosecutor concerning the US Government's use of asset forfeitures, an issue that, according to the Claimants, is central to this arbitration.

96. The US replies that (a) it is generally accepted that scholarly expressions of views that do not address specific issues in dispute cannot justify, by themselves, the removal of an arbitrator; and (b) as decided in prior disqualification decisions, Mr. M.'s "prior professional advocacy is not indicative of any presumption of a lack of independence or impartiality."

97. In his explanations, Mr. M. stated:

a. "*My service as a Federal prosecutor and as Assistant Attorney General did not involve the issues or individuals that are part of this proceeding. I left the US Department of Justice over a decade ago, and during much of my legal career I was a defense attorney representing individuals who challenged and were adverse to the Justice Department. Thus, as a lawyer I have both supported and contested the positions of the Department."* and

b. *"Regarding the claims that years ago I expressed a generally negative view of international law, the quoted remark is extracted from a 2009 Foreign Affairs article which I authored. The article does not generally oppose application of international law and does not speak to the issues in this arbitration. Indeed, the article endorses bilateral agreements and international law, especially as they relate to "activities involving the transport of goods, people, or money from one country to another — such as air travel, cargo transportation, and cross-border financial transactions. International law is particularly appropriate for regulating such activities due to their quintessentially international character."*

98. In this regard, the Chair notes with approval the *Urbaser v. Argentina* case,[58] where the co-arbitrators deciding a challenge stated, "[w]hat matters is whether the opinions expressed by [the challenged arbitrator] on the two issues qualified as crucial by Claimants are *specific and clear enough* that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the parties in the proceeding." (emphasis added).

99. The Chair also refers to the disqualification decision in *Saint-Gobain v Venezuela,*[59] in which the co-arbitrators deciding the challenge stated that "[i]t is at the core of the job description of legal counsel—whether acting in private practice, in-house for a company, or in government—that they present the views which are favorable to their instructor and highlight the advantageous facts of their instructor's case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case."

100. In the Chair's view, the fact that Mr. M. espoused certain views as an advocate, acting on behalf of a client (in this case, the US Government), does not lead to the conclusion that he would not approach the matters in dispute in this case with an open mind. Likewise, these general statements made by Mr. M. in academic fora would not

[58] *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 an Arbitrator of August 12, 2010, ¶44.

[59] *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimant's Proposal to Disqualify an Arbitrator of February 27, 2013, ¶80.

lead an objective observer to conclude that he is manifestly unreliable to exercise impartial judgement in the present case.

101. On the basis of the arguments and evidence before him, the Chair rejects the third ground proposed for the disqualification of Mr. M.

(4) Allegations that Mr. M. may have obtained confidential information about the Claimants are mere speculation

102. *Fourth*, the Claimants submit that in his private and public capacities, Mr. M. likely had access to confidential information about the Claimants that would affect his views of the issues in dispute. The US portrayed these allegations as speculative and not established by the evidence on the record.

103. The Chair agrees with the Respondent and finds that the Claimants' allegations are not supported by the record and thus could not be a basis to disqualify Mr. M.

(5) Mr. M.'s acquiescence to practices contrary to international law

104. The *fifth* ground for disqualification proposed by the Claimants concerns Mr. M.'s alleged acquiescence in legal interpretations that authorized practices contrary to international law and to the benefit of his home country during his tenure at the US Department of Justice.

105. The US submits that the Claimants' arguments on issues related to interrogation techniques have no relationship with Mr. M.'s reliability to exercise independence and impartiality. The US accordingly requests that all arguments and evidence supporting these arguments be deleted from the case record.

106. Before addressing the merits of this ground for disqualification, the Chair must determine whether the facts and evidence before him are relevant to determine whether Mr. M. manifestly lacks or appears to lack the required reliability to exercise independent and impartial judgement.

107. The Chair is not persuaded by the arguments and evidence advanced in connection with this ground. In view of the Chair's decision to uphold the Disqualification

Proposal due to Mr. M.'s ongoing advisory relationship with the Respondent, it has become moot to make a determination on this ground.

108. Finally, as to the Respondent's request that certain portions of the Disqualification Proposal be struck from the record, the Chair notes that pursuant to Articles 57 and 58 of the ICSID Convention, he is tasked with deciding the disqualification proposal filed by the Claimants. Any additional determination as to the contents of the record will have to be addressed to the Tribunal once the proceedings are resumed.

IV. DECISION

109. Having considered all of the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Chair decides as follows:

a. Claimants' Proposal to Disqualify arbitrator Mr. M. pursuant to Article 57 of the ICSID Convention is upheld, on the basis that his concurrent relationship with the Respondent and service as arbitrator in this case would create the appearance of manifest lack of impartiality;

b. All the other grounds proposed for the disqualification of Mr. M. pursuant to Article 57 of the ICSID Convention are rejected.

[signature]

David Malpass
Chair of the ICSID Administrative Council