

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

**IN THE ARBITRATION PROCEEDING BETWEEN**

**MATHIAS KRUCK AND OTHERS  
CLAIMANTS**

and

**KINGDOM OF SPAIN  
RESPONDENT**

**ICSID Case No. ARB/15/23**

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**DECISION ON THE PROPOSAL TO DISQUALIFY  
MR. GARY B. BORN**

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Issued by

Prof. Vaughan Lowe QC  
Prof. Zachary Douglas QC

*Secretary of the Tribunal*  
Ms. Mairée Uran Bidegain

*Date:* 16 March 2018

## THE PARTIES' REPRESENTATIVES

### REPRESENTING CLAIMANTS:

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### REPRESENTING RESPONDENT:

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Ms. Amaia Rivas Kortazar  
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## A. INTRODUCTION AND THE PARTIES

1. Claimants are 108 legal entities established in Germany (including sixty-five limited liability partnerships and forty-three private companies), and eight individuals of German nationality, including Mathias Kruck (the “**Claimants**”).
2. Respondent is the Kingdom of Spain (the “**Respondent**” or “**Spain**”).
3. Claimants and Respondent are hereinafter collectively referred to as the “**Parties.**”
4. This decision rejects Respondent’s Proposal to disqualify Mr. Gary Born as arbitrator in the present proceedings.

## B. PROCEDURAL HISTORY

5. On 4 June 2015, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”).
6. The Tribunal is composed of Vaughan Lowe, a national of the United Kingdom, President, appointed by agreement of the Parties; Gary B. Born, a national of the United States of America, appointed by Claimants; and Zachary Douglas, a national of Australia, appointed by Respondent.
7. On 19 January 2016, 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 on that date, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”). Ms. Mairée Uran Bidegain, ICSID Team Leader/Legal Counsel, was designated to serve as Secretary of the Tribunal.
8. On 19 February 2016, Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41(5).
9. On 14 March 2016, the Tribunal issued a decision dismissing Respondent’s preliminary objections pursuant to ICSID Arbitration Rule 41(5).

10. On 15 March 2016, the Tribunal held a first session by telephone conference.
11. Following the first session, on 30 March 2016, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 set out a schedule for the jurisdictional/merits phase of the proceedings.
12. Pursuant to Annex A, of Procedural Order No. 1, as modified by agreement of the Parties, the main pleadings were submitted as follows: Claimants' Memorial on the Merits, 28 July 2016; Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, 31 October 2016; Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, 26 April 2017; Respondent's Rejoinder on the Merits and Reply on Jurisdiction, 27 June 2017; and Claimants' Rejoinder on Jurisdiction, 23 July 2017.
13. Pursuant to Annex A, of Procedural Order No. 1, as modified by agreement of the Parties, the hearing was scheduled to take place from 26 February to 1 March 2018.
14. On 13 February 2018, Respondent proposed the disqualification of Gary B. Born, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the '**Proposal**'). On that date, the Centre informed the Parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6).
15. The Parties were also informed that the Proposal would be decided by Professors Lowe and Douglas (the '**Two Members**'), in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).
16. On 14 February 2018, Claimants submitted preliminary observations to the Proposal, to which Respondent responded by 15 February 2018.
17. On 15 February 2018, the Two Members ordered that the hearing dates be vacated and established a procedural calendar for the Parties' submissions on the Proposal. In compliance with that procedural calendar, Claimants submitted their Response to Spain's Application to Disqualify Professor Born, on 20 February 2018.

18. Gary B. Born furnished his explanations on 27 February 2018 as envisaged by ICSID Arbitration Rule 9(3).
19. The Parties filed a simultaneous round of comments on 5 March 2018.

### C. THE DECISION TO VACATE THE HEARING

20. The Two Members gave urgent and careful consideration to the question whether it was possible to preserve the scheduled hearing dates of 26 February to 1 March 2018. Rule 9(6) of the ICSID Arbitration Rules, under which this proposal for disqualification of Mr Born was brought, stipulates that “[t]he proceeding shall be suspended until a decision has been taken on the proposal.” The question was, therefore, whether the proceeding could in practice be suspended in order for the decision on the proposal for disqualification to be taken in a manner that was procedurally fair, and then unsuspended so that, if the proposal was ultimately rejected, the proceeding could go ahead as planned. Of course, if the proposal was ultimately accepted, the proceeding would not go forward.
21. The Two Members recognised that there was a need to approve the introduction of the *Masdar* transcript<sup>1</sup> into the record, and for that filing to take place before Claimants and Mr Born could respond to Respondent’s application. That filing could not realistically be secured before 15 February. There would then have been only about six working days available before the scheduled start of the hearing, within which provision would have to be made for Claimants’ response, Mr Born’s response, additional observations by the Parties, and the consideration and the submissions and deliberation and taking and communication of the decision.
22. The Two Members certainly could not assume that each Party had said all that it had to say about the matter. Indeed, Respondent had expressly reserved the right to make further submissions. There was a possibility that Claimants and/or Mr Born might make submissions based upon parts of the transcripts other than those identified by Respondent; and it was possible that new arguments might be developed.

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<sup>1</sup> See *infra* ¶¶29 and 34.

23. Bearing in mind also that under Procedural Order No 1, paragraph 11, communications could be filed in either English or Spanish, provided that a filing in Spanish must be accompanied within two business days by a translation into English, and considering that the Parties needed to travel to Paris some time in advance of the opening of the hearing, the Two Members concluded that they could not guarantee procedural fairness if they were to plan to decide on the challenge prior to the date scheduled for the opening of the hearing.
24. Moreover, the Two Members could not, of course, know whether the challenge would be upheld or rejected; and a decision rendered a day or two before the scheduled opening of the hearing, even if it were practically possible (which it was considered it was not), could have caused more, rather than less, disruption.
25. Though conscious of the disruption and expense that might be caused, on 15 February 2018 the Two Members ordered that the hearing dates be vacated.

#### **D. SUMMARY OF THE PARTIES' POSITIONS**

26. As set forth above, on 13 February 2018, Respondent wrote to the Tribunal proposing the disqualification of Mr Gary Born, the arbitrator appointed by Claimants.
27. Respondent's letter said that:

*“The disqualification is grounded upon the, respectfully said, lack of the qualities required by Article 14(1) of the ICSID Convention, evidenced by different circumstances described herein below and which manifestly preclude the challenged arbitrator from being relied upon to exercise independent judgment.”*

28. In the 13 February 2018 letter, Respondent alleged that Mr Born's dissenting opinion in Case No. 2014-03 *Mr Jürgen Wirtgen and others v Czech Republic* (**“Wirtgen”**), dated 11 October 2017: (i) demonstrated Mr Born's manifestly biased opinion regarding other EU countries' feed-in tariffs, (ii) misapplied the applicable law, and (iii) showed his manifestly biased opinion regarding the expectations derived from highly regulated sectors. The letter alleged that the dissent shows that Mr Born “has already prejudged the result” of later arbitrations, including the present arbitration.

29. The 13 February 2018 letter also referred to what it said was Mr Born's "biased examination" of counsel and witnesses in two other cases, *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* (ICSID Case No. ARB/14/1) ('*Masdar*'), and *KS Invest GmbH and TLS Invest GmbH v Kingdom of Spain* (ICSID Case No. ARB/15/25) ('*KS Invest*'). Respondent sought "for the sake of good procedural order" permission to introduce into the record the relevant parts of the transcripts of the hearings in *Masdar* and *KS Invest*, and brief comments thereon by Respondent.

30. Further, Respondent stated in its 13 February 2018 letter that:

*"... the Kingdom of Spain expressly reserves its right to expand the arguments set forth in this Request for Disqualification, in particular after receiving the explanations of the challenged arbitrator in accordance with Arbitration Rule 9(3)."*

31. On 14 February 2018 Claimants wrote to the Tribunal asserting that:

*"Spain's proposal to disqualify Mr. Born is utterly groundless. It is 'based' in its entirety on: 1) Mr. Born's dissenting opinion in an award involving the Czech Republic; and 2) unspecified allegations of 'bias' that Spain says can be found in questions posed by Mr. Born at hearings in other cases against Spain (held in September 2016 and October 2017), but which Spain has failed to disclose on the spurious ground that it needs this Tribunal's 'permission' to submit the relevant transcripts."*

32. In that letter Claimants submitted that "it would be a violation of due process and Claimants' right to an efficient disposition of this case if Spain's proposal to disqualify Mr Born were to result in a postponement of the final hearing scheduled to begin in 11 days." Claimants also asked in that letter that "Spain should be required to immediately submit the transcript references to which it refers."

33. On 14 February 2018, the Two Members invited Respondent to provide a response to Claimants' letter, by close of business on 15 February 2018. Respondent replied on 15 February 2018, stating that its challenge to Mr Born had been issued promptly and as soon as possible, and asserting its "right to be judged by impartial and independent arbitrators" which "also means appearing to be impartial and independent for any reasonably and well informed third party."



34. Respondent's 15 February 2018 letter included the extract from the transcript of the *KS Invest* hearing, stating that because Claimants had asked in their 14 February that "Spain should be required to immediately submit the transcript references to which it refers", and because Claimants counsel in the present case were also counsel for the claimants in *KS Invest*, Respondent understood that it had counsel's consent to introduce the transcript into the present case. The request to introduce part of the transcript in *Masdar* remained.

### 1. The Basis for Respondent's Disqualification Proposal

35. The bases for the challenge in Respondent's letter of 13 February 2018 were, in essence:
- i. that Mr Born's dissenting opinion in the *Wirtgen* case demonstrated that he has already reached an immutable and biased opinion on issues at the core of the present arbitration, notably on the question of the nature and effect of government commitments to maintain prices paid for electricity, and on the question of the applicability and effect of EU Law;
  - ii. that Mr Born's questioning of counsel in the *Masdar* case and of a fact witness in the *KS Invest* case was intended to obtain admissions on questions that Mr Born had already prejudged, and demonstrated Mr Born's unwillingness or apparent inability to consider alternative viewpoints.
36. Respondent submitted that Mr Born has already reached firm and incorrect decisions on a number of points of law and fact which are liable to be applied to similar issues in the present case, contrary to the arguments being advanced in this case by Respondent. It pointed to paragraph 47 of Mr Born's dissenting opinion in *Wirtgen* as "one of the most important" indications evidencing this. Paragraph 47 states that:

*"47. **In my view**, it is essential to appreciate this background, both regulatory and commercial. Put simply, the entire renewable energy sector in the Czech Republic (as in **a number of other states**) was **based in the commitment of the state, like the commitments of other states**, that the prices paid for electricity produced from renewable energy sources **would be maintained unchanged** (except for upward adjustments to reflect inflation) for a specified period of time, **regardless of market conditions or regulatory judgments**. In turn, this provided investors and lenders with the security that was otherwise*

*absent in the renewable energy sector.*” [Emphasis supplied by Respondent]

37. Respondent considers this passage to indicate a finding extending to the Spanish electricity tariff scheme in issue in the present case.
38. On these bases, Respondent asserted that “Mr Born has arrived to an immutable conclusion and this conclusion will not change whatever the effort expended by the Respondent to prove or to argue otherwise.”<sup>2</sup> In the view of the Two Members, that formulation of the submission—which will be referred to as “immutable prejudgment”—fairly encapsulates the essence of Respondent’s challenge as developed through the instances and arguments set out in its submissions.
39. In its 5 March 2018 letter, Respondent explained that it did not challenge Mr Born because he had decided against Spain in earlier cases but rather because, as would be objectively assessed by any third person, he has prejudged issues relevant to the present case, thereby undermining Respondent’s right to present its case to an impartial and open-minded arbitrator. It said that Mr Born’s subjective intentions were irrelevant to this question, which concerns the objective appraisal of his impartiality and the question whether there is an appearance of bias. Respondent repeated that the evidence of Mr Born’s opinion in the *Wirtgen* dissent, and of his attitude in the *Masdar* and *KS Invest* cases would lead a reasonable third party to find it highly likely that Mr Born would not be an impartial and open-minded arbitrator in the present case.

## **2. Claimants’ Submission**

40. In their letter dated 20 February 2018, Claimants responded to the challenge. The main points made in that letter are that ‘prejudgment’ of certain legal issues is an aspect of an arbitrator’s knowledge of the law, and no basis for a finding that the arbitrator lacks independence, and that an arbitrator’s prior decisions in other cases are no ground for disqualification, even if they involve issues similar to those pending. Claimants argued further that neither the *Wirtgen* dissent nor the questioning in the *Masdar* and *KS Invest* cases in fact demonstrate any manifest lack of independence, prejudgment of any issues,

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<sup>2</sup> Respondent’s 13 February 2018 letter, ¶44.

or refusal to consider Spain's arguments, and that the factual and legal issues in the present case are in any event different from those in the *Wirtgen*, *Masdar* and *KS Invest* cases.

41. Claimants' 5 March 2018 letter repeated their assertion that the mere fact that an arbitrator holds views on the legal consequences of a particular fact pattern or has previously decided the same issue in another case does not mean that he will not exercise 'independent judgment'. It also said that the *Wirtgen* case is not the same or even substantially similar to the present case; and it points out that Spain made no objection to Mr Born's questions in the *Masdar* and *KS Invest* cases at the time.

#### **E. EXPLANATIONS FURNISHED BY MR. BORN**

42. Mr. Born provided his explanations on 27 February 2018.
43. In his letter dated 26 February 2018, Mr Born reiterated his commitments to be both independent and impartial, and to maintain an open mind as regards the issues in the present case, which he said is different from the *Wirtgen* case. Specifically, he said that general comments made in the *Wirtgen* dissent were generic references to situations, not intended to refer to Spain or any other EU jurisdiction. Further, he said that his questioning in the *Masdar* and *KS Invest* cases was intended solely to understand and clarify the evidence and issues being put forward in those cases.

#### **F. ANALYSIS**

44. The Two Members have considered all of the Parties' respective submissions, but in this decision, they refer to them only in so far as is necessary for an understanding of the decision.

##### **1. The Legal Standard for the Disqualification of an Arbitrator**

45. The proposal for Mr Born's disqualification is made under Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules. Article 57 reads as follows:

*“Article 57*

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

46. Section 2 of Chapter IV of the ICSID Convention is not material in the present context. The disqualification proposed in this case alleges that Mr. Born manifestly lacks the qualities required by Article 14(1). Paragraph 1 of Article 14 reads as follows:

*“Article 14*

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

47. 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 accepted that arbitrators must be both impartial and independent.<sup>3</sup>
48. 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

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<sup>3</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013 (“*Burlington*”) (Respondent’s Annex 12), ¶65; *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, 12 November 2013 (“*Blue Bank*”) (Respondent’s Annex 11), ¶58; *Suez Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, and *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, *Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal*, 22 October 2007 (together “*Suez*”) (Respondent’s Annexes 4 and 5), ¶28.

“protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”<sup>4</sup>

49. In their submissions, the Parties argued in some detail what the exact roles of ‘impartiality’ (emphasised by Respondent) and ‘independence’ (emphasised by Claimants) are in this context, and what the standard of proof is in relation to the question. The Two Members have considered those arguments but are satisfied that they make no material difference to the outcome in the present context.
50. The Two Members are 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. As set forth in past decisions, “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.”<sup>5</sup>
51. Moreover, both Respondent and Claimants seem to agree that the legal standard to be applied to the Proposal is an “objective standard based on a reasonable evaluation of the evidence by a third party.”<sup>6</sup> As a consequence, “the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.”<sup>7</sup>
52. Thus, the test that the Two Members have applied is whether it has been shown that there are any circumstances that would cause a reasonable third party to conclude that Mr Born cannot be relied upon to exercise independent judgment. Those circumstances could include, for example, evidence of partiality, or of a lack of independence from a party or some other interested person, or of a personal interest in some aspect of the subject-matter of the proceedings, or of an unwillingness on the part of an arbitrator “to consider views that oppose his preconceptions, and remain open to persuasion.”<sup>8</sup>

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<sup>4</sup> Burlington ¶66, Blue Bank ¶59.

<sup>5</sup> Burlington ¶66, Blue Bank ¶59.

<sup>6</sup> Respondent’s 13 February Letter, ¶66; Claimants’ 20 February Letter, ¶10.

<sup>7</sup> Burlington ¶67, Blue Bank ¶60.

<sup>8</sup> To borrow the language of the US Supreme Court, quoted by Respondent in its 5 March 2018 letter: *Republican Party of Minnesota v. White*, 536 U.S. 765, 778 (2002) (Claimants’ Annex 9).

## 2. Application of the Standard to the Facts of the Case

53. The Proposal is based upon the proposition that Mr Born's dissenting opinion in *Wirtgen* and his questioning of counsel and witnesses in the *Masdar* and *KS Invest* cases indicate—and would indicate to a reasonable third party—a degree of partiality that means that he cannot be relied upon to exercise independent judgment.
54. The Two Members have considered Mr Born's dissenting opinion in *Wirtgen* carefully, in general and with particular attention to the passages identified by Respondent as indicating Mr Born's lack of partiality. The dissenting opinion is tightly focused upon the specific detail of the situation in the Czech Republic and the specific content of Czech legislation and conduct of the Czech Government. It is a long and detailed dissent, with many references to the documentary record in the case and extensive quotations from that record. The dissenting opinion contains a very close and precise analysis, based firmly on the specific facts of the case before the *Wirtgen* tribunal. The Two Members do not consider that it lends any support to the suggestion that Mr Born would not be an impartial arbitrator in the present case.
55. The Two Members have considered Mr Born's questioning of counsel and witnesses in the *Masdar* and *KS Invest* cases. Again, they have considered the transcripts from those case generally and with particular attention to the passages identified by Respondent as indicating Mr Born's lack of partiality and his disdain for Respondent's witnesses. Mr Born's questioning appears to them to be in each case an entirely reasonable attempt to clarify the points being presented to the tribunal concerned. It is commonly—perhaps invariably—the case that members of tribunals have in mind some legal or factual issues that they consider are likely to be important for the decision in the case, and which may have been left unclear in the written submissions on the record. In the Two Members' view, far from being objectionable, it is desirable that members of a tribunal put such issues as precisely as they can to counsel and witnesses and give them the opportunity to have a clear answer put on the record. The Two Members see nothing in Mr Born's questioning that goes beyond that perfectly proper process.

56. In sum, and taking the submissions of the two Parties as a whole, the Two Members are clearly of the view that there is no basis for the suggestion that Mr Born cannot be relied upon to exercise independent judgment, or is not impartial, or does not have a mind open to the arguments to be presented in this case, or has any bias against Respondent in this case. That finding disposes of the matter, whether the precise formulations of the standard and the burden of proof advanced by Respondent or by Claimants are preferred.

### **G. COSTS**

57. The Two Members invited the Parties to make submissions in their 5 March 2018 filings regarding the costs flowing from this challenge. Claimants asked for an order that Spain bear all costs arising out of or in connection with its disqualification application and gave as an interim figure €124,644.90 for those costs, which they requested permission to update by 4 April 2018. Respondent submitted a cost figure of €2,515.25, corresponding to non-refundable travel expenses of Respondent's counsel and its witness (€1,095.48) and of Respondent's experts (€1,419.77).
58. In addition, the administrative costs associated with cancelling the hearing amount to US\$27,198.90, and €5,220.<sup>9</sup> These costs have been paid out of the advances made by the Parties in equal parts.
59. Before a decision is taken on the costs arising directly from this challenge, the Two Members wish to receive a more complete and detailed explanation from Claimants of what those costs are and how they arose directly from the challenge rather than from the general preparation of the case, and also a further submission from Respondent on the reasons why the challenge could not have been made earlier. The Two Members invite each Party to file its submission by 30 April 2018. Those submissions will lie on the record, and a decision on costs arising specifically from this proposal to disqualify Mr Born will be taken in due course when other questions of costs are decided. Each Party may respond

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<sup>9</sup> The amounts covered by the cancellation fees, include the following: Interpretation US\$27,198,90; venue cancellation fee: €900; English court reporter: €4,320,00. The Spanish court reporter did not charge for the cancellation of services.

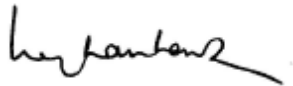
to the submission made by the other Party at the time that it makes its more general submissions on costs in due course.

60. For the reasons given above the Two Members dismiss the proposal to disqualify Mr Born. The Two Members urge the Parties to make every effort to reschedule the proceedings as quickly and as soon as possible.


## **H. DECISION**

61. Having considered all the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Two Members:
- (1) reject Respondent's Proposal to Disqualify Gary B. Born;
  - (2) invite both Parties to file by no later than 30 April 2018 supplementary submissions as specified in paragraph 60 above; and
  - (3) determine that a final decision on the costs associated with the Proposal will be made at a later stage.





Prof. Vaughan Lowe QC



Prof. Zachary Douglas QC