

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**AYAT NIZAR RAJA SUMRAIN,  
ESHRAKA NIZAR RAJA SUMRAIN,  
ALAA NIZAR RAJA SUMRAIN AND  
MOHAMED NIZAR RAJA SUMRAIN**  
(Claimants)

and

**STATE OF KUWAIT**  
(Respondent)

**ICSID Case No. ARB/19/20**

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**DECISION ON THE CLAIMANTS' PROPOSAL TO  
DISQUALIFY PROF. ZACHARY DOUGLAS AND MR. V. V. VEEDER**

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*Chairman of the ICSID Administrative Council*  
Mr. David Malpass

*Secretary of the Tribunal*  
Ms. Leah Waithira Njoroge

January 2, 2020

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## **I. INTRODUCTION**

1. This Decision addresses a proposal filed on October 18, 2019 by Ayat Nizar Raja Sumrain, Eshraka Nizar Raja Sumrain, Alaa Nizar Raja Sumrain and Mohamed Nizar Raja Sumrain (the “**Claimants**”), for the disqualification of a majority of the members of the Tribunal, *i.e.*, the President of the Tribunal, Prof. Zachary Douglas, appointed by agreement of the Parties and Mr. V. V. Veeder, the arbitrator appointed by the Respondent (the “**Proposal**”). The State of Kuwait (“**Kuwait**”, or the “**Respondent**”) opposes 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**”), this Decision has been taken by the Chairman of the ICSID Administrative Council (the “**Chairman**”). The Decision sets out the relevant procedural history in Section II, then summarizes the Proposal, the Parties’ submissions and the Arbitrators’ explanations in Section III. In Section IV, the Chairman provides the reasons for the decision contained in Section V.

## **II. PROCEDURAL HISTORY**

3. On June 12, 2019, the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) received a Request for Arbitration submitted by the Claimants against Kuwait. In accordance with Article 36 of the ICSID Convention, the Secretary-General of ICSID registered the Request on June 30, 2019.
4. By email of August 3, 2019, the Claimants informed ICSID that they wished to appoint Mr. N. Fernando Piérola, a national of Peru and Switzerland, as arbitrator. By the same email, the Claimants made a proposal to the Respondent regarding the number of arbitrators and the method of their appointment. By letter of August 5, 2019, ICSID informed the Parties that absent a determination of the method of the constitution of the Tribunal, the Centre could not take further action on the proposed appointment of Mr. Piérola.

5. On September 11, 2019, the Claimants informed ICSID that they had chosen the formula provided by Article 37(2)(b) of the ICSID Convention with respect to the constitution of the Tribunal.
6. On September 12, 2019, ICSID confirmed to the Parties that the Tribunal would be constituted pursuant to Art. 37(2)(b) of the ICSID Convention and would consist of three arbitrators: one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the Parties. ICSID further informed the Parties that it would proceed to seek Mr. Piérola's acceptance of his appointment in accordance with ICSID Arbitration Rule 5(2). By the same letter, ICSID invited the Claimants, in accordance with ICSID Arbitration Rule 3(1)(a)(i) and (ii), to make a proposal for the President of the Tribunal and invited the Respondent to concur in this proposal and to appoint an arbitrator.
7. By letter of September 13, 2019, ICSID informed the Parties that Mr. Piérola had accepted his appointment as arbitrator in this case.
8. On September 16, 2019, by email addressed directly to the Respondent and copied to ICSID, the Claimants proposed a list of candidates to act as President of the Tribunal. That list included Prof. Zachary Douglas, a national of Australia.
9. By letter of September 27, 2019, the Respondent informed ICSID that it appointed Mr. V. V. Veeder, a national of the United Kingdom, as arbitrator. By that same letter, the Respondent agreed with the Claimants' proposal of Prof. Douglas as President of the Tribunal. By letter of the same date, ICSID took note of the Respondent's appointment of Mr. Veeder and of the Parties' agreement to appoint Prof. Douglas as the presiding arbitrator. ICSID further informed the Parties that it would proceed to seek Mr. Veeder's and Prof. Douglas' acceptance of their respective appointments, in accordance with ICSID Arbitration Rule 5(2).
10. Mr. Veeder accepted his appointment on September 28, 2019 and submitted a signed Declaration pursuant to ICSID Arbitration Rule 6(2). By email of the same day, the Claimants stated that they "accept the appointment of Mr. Veeder as the [R]espondent[']s

party-appointed arbitrator [...] [and] confirm the appointment of Prof. Zachary Douglas as the president of the arbitral tribunal.”

11. On September 29, 2019, the Claimants sent two emails. The first email stated: “[W]e regret to inform you that we reject the appointment of Mr. V. V. Veeder QC, and also Prof. Zachary Douglas QC; as they have worked together with the [R]espondent[ ] and [its] legal representative[s]. We shall explain in detail in another email.” The second email contained the Claimants’ explanations for now objecting to the appointments of Prof. Douglas and Mr. Veeder. The Claimants also invited the Respondent to appoint another arbitrator replacing Mr. Veeder and propose another candidate to serve as President of the Tribunal.
12. By email of September 30, 2019, the Respondent stated that it was considering the Claimants’ correspondence of September 29, 2019.
13. By email of September 30, 2019, the Claimants proposed a second list of candidates to act as President of the Tribunal and invited the Respondent to choose one of those candidates. On the same day, ICSID took note of the Parties’ correspondence of September 29 and 30, 2019, and recalled ICSID Arbitration Rule 7, allowing each party to replace an arbitrator appointed by it and the Parties to replace any arbitrator by agreement, at any time before the Tribunal is constituted.
14. On October 1, 2019, ICSID informed the Parties that on September 30, 2019, it had notified Prof. Douglas and Mr. Veeder of the Claimants’ observations of September 29 and 30, 2019. By the same letter, ICSID informed the Parties that Mr. Veeder did not consider the Claimants’ observations of September 29, 2019 to affect his acceptance of the appointment and consequently, he confirmed his acceptance of the appointment as arbitrator in this case.
15. By email of the same day, the Claimants reiterated: (i) their objections to the appointments of Prof. Douglas and Mr. Veeder; and (ii) their invitation to the Respondent to appoint another arbitrator and to propose another candidate for President of the Tribunal. The Claimants also proposed to extend the 90-day period provided for in Art. 38 of the ICSID Convention by 10 days.

16. On October 2, 2019, the Respondent replied to the Claimants' October 1, 2019 email, requesting that the Centre "pay no credence" to the Claimants' most recent correspondence and stating that "[o]nce the Tribunal is constituted, it will be open to either party (including the Claimants) to seek to disqualify any of the members of the Tribunal in accordance with Article 57 of the ICSID Convention and Arbitration Rule 9."
17. By letter of the same day, ICSID noted that given the Respondent's letter, there did not seem to be agreement to replace Prof. Douglas or Mr. Veeder pursuant to ICSID Arbitration Rule 7. ICSID also confirmed that it would convey the Respondent's letter to Prof. Douglas and Mr. Veeder.
18. On October 3, 2019, Prof. Douglas accepted his appointment as President of the Tribunal and provided a Statement accompanying his Declaration pursuant to ICSID Arbitration Rule 6(2). Prof. Douglas confirmed in his Statement that he is currently sitting as an arbitrator in another ICSID case involving the State of Kuwait and that he did not consider this to be a circumstance that might cause his reliability for independent judgment to be questioned by a party.
19. By letter of the same date, the Acting 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.
20. On October 18, 2019, the Claimants submitted the Proposal. ICSID informed the Parties on the same day that the proceeding was suspended pending a decision on the Proposal, pursuant to ICSID Arbitration Rule 9(6). ICSID also provided a procedural calendar for the Parties' submissions on the Proposal and for explanations by Prof. Douglas and Mr. Veeder, pursuant to ICSID Arbitration Rule 9(3). On October 23, 2019, following exchanges between the Parties, the procedural calendar was revised.
21. In accordance with the revised procedural calendar, the Respondent responded to the Proposal on November 6, 2019 together with supporting documentation (the "**Response**").

22. By letter of November 13, 2019, ICSID transmitted the explanations of Prof. Douglas and Mr. Veeder furnished in accordance with Arbitration Rule 9(3).
23. The Claimants filed observations on Prof. Douglas’ and Mr. Veeder’s explanations (the “**Observations**”) on November 20, 2019. By email of November 21, 2019, the Respondent confirmed that it did not wish to submit observations on Prof. Douglas’ and Mr. Veeder’s explanations.

### **III. PARTIES’ POSITIONS AND ARBITRATORS’ EXPLANATIONS**

#### **A. The Claimants’ Proposal and Observations**

24. The Claimants’ arguments on the Proposal to disqualify Prof. Douglas and Mr. Veeder were set forth in their submissions of October 18 and November 20, 2019. These arguments are summarized below.
25. The Claimants contend that Prof. Douglas and Mr. Veeder should be disqualified under Art. 57 of the ICSID Convention for manifest lack of the qualities required by Art. 14(1) of the ICSID Convention.<sup>1</sup>

#### **(1) Relevant Legal Standard**

26. The Claimants state that Art.14(1) of the ICSID Convention requires that the arbitrator “may be relied upon to exercise independent judgement.”<sup>2</sup> They argue that this requires an arbitrator to be “impartial and independent,”<sup>3</sup> meaning that the arbitrator must be lacking in bias, predisposition towards a party, and external control.<sup>4</sup>
27. The Claimants contend that the test for impartiality and independence under the ICSID Convention is an objective one, “based on a reasonable evaluation by an informed third

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<sup>1</sup> Proposal, para. 13.

<sup>2</sup> Proposal, para. 13.

<sup>3</sup> Proposal, para. 17.

<sup>4</sup> Proposal, para. 17.

person of the circumstances and facts that justified doubts about an arbitrator's independence and impartiality.”<sup>5</sup> The Claimants assert that the appearance of bias or dependence is sufficient to satisfy this test. In this regard, they rely on the *Urbaser* case, in which it was held that “[a]n appearance of such bias from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality.”<sup>6</sup>

28. The Claimants also cite the *Raiffeisen* case, which sets out the test for independence and impartiality as follows:

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. All relevant facts shall be taken into account in establishing the appearance of dependence or bias. The legal standard applied to a proposal to disqualify an arbitrator is an ‘objective standard based on a reasonable evaluation of the evidence by a third party [...]’<sup>7</sup>

29. The Claimants refer to the *Tidewater* case and allege that multiple appointments of an arbitrator by the same party give rise to a manifest lack of independence and impartiality when accompanied by “a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases.”<sup>8</sup>

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<sup>5</sup> Proposal, para. 18 (citing *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 (“*Burlington*”), para. 67).

<sup>6</sup> Proposal, para. 18 (citing *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 (“*Urbaser*”) (R-001), para. 43).

<sup>7</sup> Proposal, para. 19 (citing *Raiffeisen Bank International AG and Raiffeisenbank Austria D.D. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov, May 17, 2018 (“*Raiffeisen*”) (R-009), paras. 83-84; *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32, Decision on the Proposal to Disqualify Professor Brigitte Stern, April 23, 2018 (“*Elitech*”) (R-008), paras. 45-46).

<sup>8</sup> Proposal, para. 20 (citing *Tidewater Inc., Tidewater Investment SRL, Tidewater Coribe, C.A. and others. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010 (“*Tidewater*”) (R-002), para. 62).

**(2) The Proposal to Disqualify Prof. Douglas**

30. The Claimants' Proposal to disqualify Prof. Douglas alleges that he "manifestly lacks the quality that an arbitrator may be relied upon to exercise independent judgment."<sup>9</sup>
31. The Claimants base this allegation on two facts: (i) Prof. Douglas presently sits as an arbitrator appointed by Kuwait in one on-going ICSID proceeding; and (ii) Prof. Douglas was appointed by States in the majority of cases in which he has served as arbitrator.

**a. Prof. Douglas' Serves as an Arbitrator in One Pending ICSID Arbitration Appointed by Kuwait**

32. The Claimants argue that Prof. Douglas presently sits as the "Kuwait-appointed arbitrator" in one pending ICSID case, *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v State of Kuwait* (ICSID Case No. ARB/17/8) ("**Rizzani**").<sup>10</sup> They argue this "would raise in the mind of an informed and reasonable third party [...] justified doubts as to Professor Douglas's reliability to exercise independent judgement [...]."<sup>11</sup>
33. According to the Claimants, there is a material risk of influence by factors outside of the record, where multiple arbitrator appointments are made by the same party. In the Claimants' view, these factors may impact an arbitrator's independence and impartiality if: (i) similarities exist between the cases on which the challenged arbitrator sits; and (ii) there is a significant overlap in facts and parties.<sup>12</sup> The Claimants submit that these two factors are present in this case.
34. Specifically, the Claimants contend that the present case is similar to the *Rizzani* case, as the treaty provisions in the *Rizzani* case are "almost identically-worded" to the treaty provisions in the present case. The Claimants further contend that the two cases concern "identical facts and conduct of Kuwait," which occurred partially within the same time

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<sup>9</sup> Proposal, para. 14.

<sup>10</sup> Proposal, para. 14.

<sup>11</sup> Proposal, para. 16.

<sup>12</sup> Proposal, para. 21 (citing *Raiffeisen (R-009)*, paras. 83-84); Observations, paras. 10-11.

frame (2010-2017), in the same area (Kuwait City), and involved investments in the same industry (construction).<sup>13</sup>

35. The Claimants assert that the investors in both cases complain of Kuwait’s alleged failings with respect to the issuance of required permits, and of “unexpected and unjustified hostility,” including alleged harassment and arbitrary application of financial penalties toward their joint ventures.<sup>14</sup>
36. In their Observations, the Claimants also noted that: (i) the cases concern projects which were part of the same urban development plan in Kuwait City;<sup>15</sup> (ii) the contracts in this case and the *Rizzani* case were awarded through a tender process;<sup>16</sup> (iii) the location of the two projects are a 11-12 minute-drive apart and the roads on which the two projects are located are connected and hence “practically the same;”<sup>17</sup> and (iv) the witnesses will potentially be the same because of the involvement of the same Kuwaiti governmental bodies in both projects.<sup>18</sup>
37. In response to the Respondent’s arguments that there is not sufficient similarity between the two cases, the Claimants contend that the fact that the construction projects of the investors in the two cases were made under different investment contracts concluded with different government ministries is immaterial in the context of investment treaty claims seeking redress for breach of international obligations.<sup>19</sup>

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<sup>13</sup> Proposal, paras. 22, 14-15; Observations, paras. 11, 13-16, 25.

<sup>14</sup> Proposal, para. 24; Observations, para. 11.

<sup>15</sup> Observations, para. 16.

<sup>16</sup> Observations, para. 21.

<sup>17</sup> Observations, paras. 16, 20.

<sup>18</sup> Observations, para. 19.

<sup>19</sup> Observations, para. 15.

38. In the Claimants' view, the two differences between the two cases raised by the Respondent *i.e.*, that the Respondent is represented by different legal counsel in each case and that the claimant investors in each case are different, are "patently immaterial".<sup>20</sup>
39. According to the Claimants, the two cases involve similar facts, parties and similarly-worded treaty provisions, and clearly and objectively demonstrate that Prof. Douglas cannot be relied upon to exercise independent judgement.<sup>21</sup>
40. The Claimants rely on the *Elitech* case to argue that a disqualifying overlap exists when the other cases on which a challenged arbitrator sits arise in the same industry and appear to arise out of the same State conduct.<sup>22</sup> The Claimants contend that this occurred in the present case.<sup>23</sup>
41. The Claimants also rely on the *Caratube* case to establish that "prior exposure of an arbitrator to similar facts in another already pending arbitration against the same Respondent taint[s]" the arbitrator's "objectivity and open-mindedness, [and] objectively (in the view of a reasonable third person) constitutes a ground for disqualification."<sup>24</sup> They submit that "[t]his ground for disqualification is so well established in ICSID practice that any reasonable and informed third party would have expected Professor Douglas, as an experienced investment arbitrator, to refuse the appointment as President of the Tribunal in this case."<sup>25</sup> Further, they argue that Prof. Douglas, like the arbitrator challenged in *Caratube*, cannot be expected to "maintain a 'Chinese wall' in his own mind" with respect to any information acquired in his capacity as arbitrator in *Rizzani*, and that Prof. Douglas

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<sup>20</sup> Observations, para. 14.

<sup>21</sup> Proposal, para. 25.

<sup>22</sup> Proposal, para. 26 (citing *Elitech* (R-008), para. 54).

<sup>23</sup> Proposal, para. 26.

<sup>24</sup> Proposal, para. 27 (citing *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch, March 20, 2014 ("*Caratube*") (R-004), paras. 45, 90).

<sup>25</sup> Proposal, para. 28.

would prejudice legal issues in the present case based on his knowledge of the facts underlying the *Rizzani* case.<sup>26</sup>

42. Finally, the Claimants take issue with the explanations provided by Prof. Douglas, which they describe as “partial, insufficient, and defective.” They assert that Prof. Douglas’ description of events leading to the Tribunal’s constitution contradicts the relevant correspondence and that he “deliberately” ignored the Claimants’ objections to his appointment, reinforcing the view that a reasonable third party would have justifiable doubts about Prof. Douglas’ reliability for independent judgment.<sup>27</sup>

**b. Multiple Appointments of Prof. Douglas by Respondent States**

43. The second basis for the Claimants’ Proposal to disqualify Prof. Douglas is that he has been appointed by Respondent States as an arbitrator in 44 cases, contrasted with just two cases in which he was appointed by claimant investors and one case in which he was appointed by the appointing authority.<sup>28</sup> In addition, the Claimants state that Prof. Douglas has served as a presiding arbitrator in only two prior cases.<sup>29</sup> In the Claimants’ view, Prof. Douglas’ multiple arbitrator appointments by Respondent States are “not a neutral and irrelevant factor in considering the present challenge.”<sup>30</sup>
44. The Claimants argue that Prof. Douglas’ multiple arbitrator appointments by Respondent States demonstrates his established status as a “pro-State arbitrator” and causes him to lack the impartiality required of an ICSID presiding arbitrator.<sup>31</sup> Referring to the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, the Claimants argue that the appointment of a “truly impartial presiding arbitrator” goes to the core of the legitimacy

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<sup>26</sup> Proposal, paras. 31-32 (citing *Caratube (R-004)*, paras. 89-90).

<sup>27</sup> Observations, paras. 31-42.

<sup>28</sup> Proposal, para. 36, *see fn.* 24-25.

<sup>29</sup> Proposal, para. 37.

<sup>30</sup> Proposal, para. 38; Observations, para. 62.

<sup>31</sup> Proposal, para. 40; Observations, para. 63.

of the tribunal,<sup>32</sup> and that the right to a “truly impartial arbitrator” cannot be waived by any disputing party.<sup>33</sup> The Claimants refer to the *OPIC* case in which the unchallenged arbitrators held that, “[...] multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case.”<sup>34</sup>

45. The Claimants conclude that Prof. Douglas’ multiple appointments by Respondent States and his current service as a State-appointed arbitrator in a related case would cause any reasonable third party observer to conclude that Professor Douglas manifestly lacks the qualities required by Article 14(1) of the ICSID Convention.<sup>35</sup>

**(3) *The Proposal to Disqualify Mr. Veeder***

46. The Claimants’ Proposal for the disqualification of Mr. Veeder alleges that he manifestly lacks the qualities required by Art. 14(1) of the ICSID Convention<sup>36</sup> for two reasons, namely: (i) multiple arbitrator appointments of Mr. Veeder by the firm of Baker & McKenzie LLP (representing the Respondent in this arbitration) in several ICSID cases; and (ii) because Mr. Veeder served with Prof. Douglas on other ICSID tribunals.<sup>37</sup>
47. As to the first point, the Claimants identify two concluded ICSID cases in which the Claimants allege Mr. Veeder was appointed by Baker & McKenzie LLP *i.e.*, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (ICSID Case

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<sup>32</sup> Proposal, para. 42 (referring to ICCA, “Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration”, in ICCA Reports No. 3, March 17, 2016 (the “**ASIL-ICCA Report**”) (R-006), para. 34).

<sup>33</sup> Proposal, paras. 42-43.

<sup>34</sup> Proposal, para. 39 (citing *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Phillippe Sands, Arbitrator, May 5, 2011 (“*OPIC*”) (R-003), para. 47).

<sup>35</sup> Proposal, para. 44.

<sup>36</sup> Proposal, para. 45.

<sup>37</sup> Proposal, para. 46.

No. ARB(AF)/04/3) (“**Gemplus**”) and *Talsud, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/04/4) (“**Talsud**”).<sup>38</sup>

48. On the second point, the Claimants assert that Mr. Veeder served as arbitrator with Prof. Douglas in three ICSID cases: (i) *Mercer International, Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3) (“**Mercer**”); (ii) *Orange SA v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/15/10) (“**Orange SA**”); and (iii) *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19) (“**Koch**”).<sup>39</sup>
49. In their Observations, the Claimants allege that Mr. Veeder failed to disclose other “relations with the respondents’ legal counsels” and other professional or educational interactions with Prof. Douglas.<sup>40</sup> With regard to the former, the Claimants allege that: (i) one of the Respondent’s counsel, Mr. Poulton, and Mr. Veeder are both in the Law Society of England and Wales; (ii) another member of Respondent’s counsel team, Ms. Finkel is in Essex Court Chambers with Mr. Veeder, was working at King’s College London when Mr. Veeder was a visiting professor, and was an arbitrator in the Skadden Arps FDI moot court competition in 2011, when Mr. Veeder was also an arbitrator in that competition.<sup>41</sup> The Claimants also note that Mr. Veeder and Prof. Douglas were both in Jesus College at Cambridge University but do not mention the relevant dates in this regard.<sup>42</sup>
50. The Claimants allege that Mr. Veeder intentionally failed to disclose his prior appointments by Baker & McKenzie LLP and his prior work with Prof. Douglas. They argue that

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<sup>38</sup> Proposal, para. 46.

<sup>39</sup> Proposal, para. 46.

<sup>40</sup> Observations, para. 74.

<sup>41</sup> Observations, para. 74.

<sup>42</sup> Observations, para. 74.

paragraph 3.3.8 of the IBA Guidelines applies to investment treaty arbitration and required Mr. Veeder to disclose such information.<sup>43</sup>

51. To support their conclusion, the Claimants refer to the proposal to disqualify Prof. Francisco Orrego Vicuña in *Burlington* which discusses multiple appointments of Prof. Vicuña by the firm of Freshfields Bruckhaus Deringer LLP.<sup>44</sup> In the Claimants' view, this case established that there is a material risk that an arbitrator may be influenced by external factors where there is "excessive dependence on" the firm which appointed the arbitrator and a significant overlap in facts and parties.<sup>45</sup>
52. Moreover, the Claimants compare *Burlington* and the present case, asserting that the two cases concerned similarly-worded treaty provisions, and the same conduct by the State consisting in "a series of actions purportedly taken by the Respondent to delay and disrupt the regular progress of the works [...]".<sup>46</sup>
53. According to the Claimants, Mr. Veeder's repeat appointments by Baker & McKenzie LLP, together with his "defective" disclosure, would raise justifiable doubts in the mind of an informed third party concerning his reliability to exercise independent judgment. The Claimants submit that this would justify his disqualification pursuant to Art. 14(1) of the ICSID Convention.<sup>47</sup>

#### **(4) The Respondent's Request for Costs**

54. The Claimants did not request their costs incurred in connection with their Proposal. The Claimants also argue that the Respondent's request for its costs is frivolous and abusive.<sup>48</sup>

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<sup>43</sup> Proposal, paras. 47-48; Observations, paras. 78-79. The relevant section of the IBA Guidelines require disclosure where: "[t]he arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm."

<sup>44</sup> Proposal, para. 50 (referring to *Burlington*).

<sup>45</sup> Proposal, para. 50.

<sup>46</sup> Proposal, para. 50.

<sup>47</sup> Proposal, para. 49.

<sup>48</sup> Observations, para. 55.

Consequently, the Claimants request that the Chairman dismiss the Respondent's request for costs.<sup>49</sup>

**B. The Respondent's Response**

55. The Respondent's response to the Claimants' Proposal to disqualify Prof. Douglas and Mr. Veeder was set forth in its submission of November 6, 2019. These arguments are summarized below.

**(1) Relevant Legal Standard**

56. The Respondent accepts the Claimants' submission that the term "independent judgment" in Art. 14(1) of the ICSID Convention includes both impartiality and independence.<sup>50</sup> It also agrees that the test for this requirement is an objective one, based on a reasonable evaluation by an informed third party.<sup>51</sup> Further, the Respondent accepts that there is no requirement to prove actual dependence or bias, although it emphasizes that Art. 57 of the ICSID Convention requires that "the lack of impartiality or independence must appear to an informed third party to be manifest."<sup>52</sup> In support, the Respondent cites the *Urbaser* case.<sup>53</sup> The Respondent further notes the decision on the challenge to Prof. Philippe Sands in *OPIC* stating that:

There thus exists a relatively high burden for those seeking to challenge ICSID arbitrators. The Convention's requirement that the lack of independence be "manifest" necessitates that this lack be clearly and objectively established. Accordingly, it is not sufficient to show an appearance of a lack of impartiality or independence.<sup>54</sup>(Emphasis in original)

57. The Respondent also refers to the *Raiffeisen* case, on which the Claimants' rely, stating:

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<sup>49</sup> Observations, sec. VIII.

<sup>50</sup> Response, para. 5.5 (referring to Proposal, para. 17).

<sup>51</sup> Response, para. 5.2 (referring to Proposal, para. 18).

<sup>52</sup> Response, paras. 5.2, 5.5-5.6 (referring to Proposal, paras. 17-20).

<sup>53</sup> Response, paras. 5.5-5.6 (citing *Urbaser (R-001)*, paras. 34, 43).

<sup>54</sup> Response, para. 5.7 (citing *OPIC (R-003)*, para. 45).

The legal standard applied to a proposal to disqualify an arbitrator is an ‘objective standard based on a reasonable evaluation of the evidence by a third party.’ As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.<sup>55</sup> (Emphasis in original)

58. The Respondent submits that the mere fact of repeat appointments is insufficient, in and of itself, to establish a manifest lack of independence or impartiality.<sup>56</sup> In this regard, the Respondent rejects the Claimants’ reliance on the *Tidewater*, *Elitech*, *OPIC* and *Caratube* cases.
59. First, the Respondent disputes the Claimants’ reliance on the *Tidewater* case to establish that multiple appointments by the same party give rise to a manifest lack of independence and impartiality if combined with other factors.<sup>57</sup> The Respondent clarifies that in *Tidewater*, the “arbitrators’ measured view was that a ‘potential’ conflict ‘may’ arise if multiple appointments were accompanied with other objective circumstances where, together, these gave rise to a manifest lack of independence or impartiality.”<sup>58</sup> The *Tidewater* arbitrators elaborated a cautious approach to disqualification based on multiple appointments by the same party.<sup>59</sup> In rejecting the proposal to disqualify the challenged arbitrator in *Tidewater*, the arbitrators found that the mere fact of being named in three other cases by the same party did not, without more, indicate a manifest lack of independence or impartiality on her part.<sup>60</sup>
60. Second, the Respondent rejects the Claimants’ arguments based on *Elitech*. According to the Respondent, *Elitech* rejects the view that the existence of repeat appointments by the same party or their legal counsel is, in and of itself, a reason to question the independence or impartiality of an arbitrator.<sup>61</sup> According to the Respondent, the *Elitech* case also sets a

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<sup>55</sup> Response, para. 5.8 (citing *Raiffeisen (R-009)*, para. 84).

<sup>56</sup> Response, para. 5.11.

<sup>57</sup> Response, para. 5.12 (referring to Proposal, para. 20).

<sup>58</sup> Response, para. 5.13.

<sup>59</sup> Response, para. 5.13 (citing *Tidewater (R-002)*, paras. 63-64).

<sup>60</sup> Response, para. 5.14 (citing *Tidewater (R-002)*, para. 64).

<sup>61</sup> Response, paras. 5.15-5.17 (citing *Elitech (R-008)*, paras. 12, 18(ii), 50, 52, 54).

high standard for the other circumstances that must be present for a disqualification proposal to succeed under the ICSID Convention.<sup>62</sup>

61. Third, the Respondent takes issue with the Claimants' reliance on the *OPIC* case. In the Respondent's view, although the arbitrators in *OPIC* disagreed with the finding in the *Tidewater* case by holding that the mere fact of multiple appointments by the same party is *not* neutral,<sup>63</sup> arbitrators before and after the *OPIC* decision have "taken a strikingly different approach."<sup>64</sup> In any event, the Respondent argues, the *OPIC* decision does not assist the Claimants. In all three cases cited (*Tidewater*, *Elitech* and *OPIC*), the disqualification proposal was dismissed, despite repeat appointments by the same party and certain overlaps between cases.<sup>65</sup>
62. In the Respondent's submission, a finding of manifest lack of independence and impartiality arising from multiple appointments by the same party (or the same legal counsel), requires a significant overlap in the factual and legal issues in the cases.<sup>66</sup>
63. The Respondent submits that its approach is consistent with paragraph 3.1.3 of the IBA Guidelines, requiring disclosure if: "[t]he arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties."<sup>67</sup>
64. On this basis, the Respondent concludes that it is not sufficient for there to have been multiple appointments by the same party and some overlap in the relevant cases. The Respondent submits that the threshold is a high one and past ICSID decisions on this issue have demonstrated that the following additional circumstances do not give rise to a disqualification: (i) the arbitrator was appointed several times by the same party or same

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<sup>62</sup> Response, para. 5.17.

<sup>63</sup> Response, para. 5.18 (citing *OPIC (R-003)*, para. 47).

<sup>64</sup> Response, para. 5.19.

<sup>65</sup> Response, para. 5.19.

<sup>66</sup> Response, para. 5.20.

<sup>67</sup> Response, para. 5.21 (citing IBA Guidelines (**R-005**), para. 3.1.3).

legal counsel; (ii) the arbitrator was appointed in “parallel” cases where disputes arose out of the same treaty; and (iii) the arbitrator was appointed by the same party in a related case.<sup>68</sup> The Respondent notes that this high threshold has only been met in one case on which the Claimants rely, *Caratube*.<sup>69</sup>

65. Fourth, the Respondent rejects the Claimants’ reliance on the *Caratube* case. Although the challenged arbitrator in *Caratube* was disqualified, the case applies a very high threshold to the meaning of “significant overlap” between cases in which an arbitrator has been appointed by the same party.<sup>70</sup> The Respondent states that the *Caratube* case involved “(a) a clear finding that the fact of multiple appointments does not give rise to apparent bias or dependence; and (b) a significant overlap in both underlying facts and the relevance of these facts for the determination of the legal issues in the other arbitration.”<sup>71</sup> As a result, the Respondent concludes that the circumstances of the *Caratube* case “could not be further removed from the present matter.”<sup>72</sup>

**(2) The Proposal to Disqualify Prof. Douglas**

66. The Respondent addresses arguments raised by the Claimants concerning: (i) Prof. Douglas’ involvement as arbitrator in other ICSID proceedings; and (ii) Prof. Douglas’ arbitrator appointment history.

**a. Other ICSID Proceedings**

67. The Respondent makes two arguments with respect to the Claimants’ assertion that Prof. Douglas manifestly lacks independence because he presently serves as an arbitrator appointed by Kuwait in the *Rizzani* case.

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<sup>68</sup> Response, para. 5.22 (referring to *Elitech* (R-008), para. 54).

<sup>69</sup> Response, para. 5.23.

<sup>70</sup> Response, para. 5.23.

<sup>71</sup> Response, para. 5.27.

<sup>72</sup> Response, paras. 5.24-5.27.

68. First, the Respondent asserts that Prof. Douglas has not been appointed multiple times in ICSID proceedings by either the Respondent or by its legal counsel.<sup>73</sup> According to the Respondent, Prof. Douglas has been appointed as co-arbitrator once by Kuwait in the *Rizzani* case, and by appointment of the Parties in the present case as presiding arbitrator.<sup>74</sup>
69. The Respondent also notes that even though the Claimants do not dispute that repeat appointments *by the same party* is one of the pre-requisites to alleging a manifest lack of bias on the basis of multiple appointments, the Claimants have not satisfied this requirement in the present case. In the Respondent's view, the Claimants failed to explain how their own proposal of Prof. Douglas to serve as presiding arbitrator by agreement of the Parties constitutes an appointment by the Respondent.<sup>75</sup>
70. Further, the Respondent observes that Prof. Douglas was appointed to serve as arbitrator in the *Rizzani* case on June 7, 2017, two years before the present case commenced, and that his appointment was a matter of public record. As a result, the Claimants may not claim that they were unaware of Prof. Douglas' appointment in the *Rizzani* case before they proposed him as presiding arbitrator in this case on September 16, 2019.<sup>76</sup>
71. Second, the Respondent rejects the Claimants' arguments that there is significant overlap between the *Rizzani* case and the present case. According to the Respondent, the two cases: (i) involve unrelated projects – while the Claimants' project relates to Heritage Village, the *Rizzani* case relates to the construction of a large highway; (ii) the projects are located in different geographical areas;<sup>77</sup> (iii) are managed by different government ministries of the Respondent; (iv) involve different parties; and (v) invoke different treaties.<sup>78</sup>

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<sup>73</sup> Response, para. 6.5.

<sup>74</sup> Response, paras. 3.3 and 6.5.

<sup>75</sup> Response, para. 6.5(b).

<sup>76</sup> Response, para. 6.5(c).

<sup>77</sup> Response, para. 6.7(a).

<sup>78</sup> Response, paras. 3.4 and 6.6.

72. The Respondent also asserts that the claims arise out of two different contracts, concluded at different times and with different entities. The contract in the present case was concluded with the Ministry of Finance and was for a private sector development of an urban development project. By contrast, the claims in the *Rizzani* case arise out of a contract concluded with the Ministry of Public Works for a joint venture road construction project.<sup>79</sup>
73. The Respondent also rejects the Claimants' argument that the two cases are similar because both involve Kuwait.<sup>80</sup> The Respondent argues that unlike in the *Caratube* case, there is no relationship between the claimants in the two cases. The present case involves four Egyptian nationals with interests in the Heritage Village Real Estate Company, whereas the claimants in the *Rizzani* case are Italian and Spanish companies.<sup>81</sup>
74. With reference to the Claimants' assertion that there is significant overlap because the underlying treaties in both cases are similarly worded, the Respondent observes that the claims in the two cases arise from three different treaties: the Kuwait-Egypt BIT in the present case, and the Kuwait-Italy and Kuwait-Spain BITs in the *Rizzani* case.<sup>82</sup> Further, the Respondent argues that past ICSID decisions have found that no significant overlap between cases exists, even if the cases arise out of the same treaty.<sup>83</sup>
75. In response to the Claimants' assertion that the claims in the two cases relate to events which occurred within the same time frame, *i.e.*, in 2010-2017, the Respondent points out that the contracts were concluded several years apart. The Heritage Village project contract was concluded in 2004 while the *Rizzani* project contract was concluded in 2011.<sup>84</sup> In the Respondent's view, the fact that some of the conduct complained of occurred "in part"

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<sup>79</sup> Response, paras. 6.7(b) and (c)(ii).

<sup>80</sup> Response, para. 6.7(c) (referring to Proposal, paras. 14 and 25).

<sup>81</sup> Response, para. 6.7(c)(i).

<sup>82</sup> Response, para. 6.7(d) (referring to Proposal, para. 23).

<sup>83</sup> Response, para. 6.7(d) (referring to *Elitech*, para. 54).

<sup>84</sup> Response, para. 6.7(e).

within the same seven-year period, “has no bearing on any assertion that the two cases are similar.”<sup>85</sup>

76. Finally, the Respondent states that the relevance of the projects being in the same geographical area is not clear, but in any event, they are in different areas. The Claimants’ project, Heritage Village, is located on Abdullah Al Ahmed Street, whereas the *Rizzani* case concerns the replacement of the existing Jamal Abdul Nasser Street, stopping short of the Heritage Village site.<sup>86</sup>
77. The Respondent also notes that Kuwait has instructed two different legal counsel to represent it in the two cases. It also underlines that this decision to appoint counsel was taken by Kuwait before the Claimants proposed Prof. Douglas as presiding arbitrator.<sup>87</sup>
78. As a result, the Respondent concludes that even if there were multiple appointments by the same party, there is no significant overlap between the present case and the *Rizzani* case. In the Respondent’s view:

By virtue of the different factual matrixes, the conduct complained of arises out of distinct circumstances and any factual determinations in the *Rizzani* case will have no bearing on the present proceedings. Contrary to the circumstances in the *Caratube* case, the claimants in the two cases are not related, there will be no overlap between the evidence that is presented to the Tribunal in either case, and the allegations are made under different contracts and different investment treaties.<sup>88</sup>

### **b. Appointment History**

79. The Respondent submits that it is unclear whether the Claimants’ allegation that Prof. Douglas manifestly lacks the required independence and impartiality as a result of previous multiple appointments by a State party is a self-standing one or whether it goes toward the

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<sup>85</sup> Response, para. 6.7(e).

<sup>86</sup> Response, para. 6.7(f).

<sup>87</sup> Response, paras. 6.8-6.9.

<sup>88</sup> Response, para. 6.8.

general matrix of facts.<sup>89</sup> The Respondent contends that, “[w]hichever the case, the Claimants’ submissions on this point are hopeless.”<sup>90</sup>

80. The Respondent rejects the Claimants’ assertions with regard to Prof. Douglas’ alleged multiple appointments by Respondent States, for three reasons.
81. First, the facts of the *OPIC* case on which the Claimants rely are inapposite to the facts of the present case.<sup>91</sup> In *OPIC*, the claimants in that case referred to multiple arbitrator appointments by the same party or their legal counsel, whereas in the present case Prof. Douglas has not been appointed several times by the Respondent or its legal counsel.<sup>92</sup>
82. Second, the Respondent argues that prior ICSID decisions considering the issue, including those cited by the Claimants, concluded that “the mere fact of having been appointed multiple times by the same party does not (in and of itself) give rise to a finding of bias.”<sup>93</sup> The Respondent argues that there must be objective circumstances demonstrating that prior arbitrator appointments manifestly influence the arbitrator’s ability to exercise independent judgment in the present arbitration.<sup>94</sup> According to the Respondent, the Claimants failed to demonstrate any objective circumstances that would lead an informed third party to conclude that prior appointments influenced Prof. Douglas’ ability to exercise independent judgment in the present case.<sup>95</sup>
83. Third, the Respondent argues that it selected Prof. Douglas from the list of individuals proposed by the Claimants for presiding arbitrator because he had the most significant ICSID experience, and not because of his alleged State affiliation. In addition, the

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<sup>89</sup> Response, para. 6.11.

<sup>90</sup> Response, para. 6.11.

<sup>91</sup> Response, para. 6.13.

<sup>92</sup> Response, para. 6.13.

<sup>93</sup> Response, para. 6.14.

<sup>94</sup> Response, para. 6.14.

<sup>95</sup> Response, para. 6.14.

Respondent notes that some of the other candidates proposed by the Claimants had only been appointed by Respondent States in ICSID proceedings.<sup>96</sup>

84. Finally, the Respondent dismisses the Claimants' allegation that a presiding arbitrator requires an elevated level of independence or impartiality. The Respondent states that the ASIL-ICCA Report on which the Claimants rely in this regard, confirms that all arbitrators are subject to the same obligations of impartiality and independence.<sup>97</sup>

**(3) The Proposal to Disqualify Mr. Veeder**

85. The Respondent rejects the Claimants' arguments regarding their Proposal to disqualify Mr. Veeder.<sup>98</sup> The Respondent's arguments are summarized below.

86. First, the Respondent clarifies that the two cases involving Baker & McKenzie LLP, *Gemplus* and *Talsud*, were joined (*i.e.*, *de facto* consolidated), and that Mr. Veeder was appointed as presiding arbitrator by agreement of the parties in those joined cases, and not solely by Baker & McKenzie LLP.<sup>99</sup> The Respondent further notes that *Gemplus* and *Talsud* resulted in the issuance of an award in 2010, almost 10 years ago.<sup>100</sup>

87. Second, the Respondent explains that even if Mr. Veeder's appointments were considered appointments by Baker & McKenzie LLP alone, these would still only be two prior appointments occurring more than three years ago. As such, no disclosure would be required under the IBA Guidelines, should these be applicable.<sup>101</sup>

88. Third, the Respondent rejects the Claimants' assertions that Prof. Douglas and Mr. Veeder having served together on the same arbitral tribunal in past ICSID cases would affect their impartiality and independence. In the Respondent's view, the suggestion that Mr. Veeder

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<sup>96</sup> Response, paras. 6.15-6.17.

<sup>97</sup> Response, paras. 6.18-6.20 (citing the ASIL-ICCA Report (**R-006**), para. 35).

<sup>98</sup> Response, para. 7.2.

<sup>99</sup> Response, paras. 3.6 and 7.3.

<sup>100</sup> Response, para. 3.6.

<sup>101</sup> Response, para. 7.4.

cannot form an independent view because he sat on a tribunal with Prof. Douglas in the past is untenable.<sup>102</sup>

**(4) The Respondent's Request for Costs**

89. The Respondent states that the Chairman ought to order the Claimants to pay its legal costs of dealing with the challenge “because this process is plainly a waste of resources.”<sup>103</sup>

**C. The Arbitrators' Explanations**

90. Prof. Douglas and Mr. Veeder furnished explanations to the Chairman pursuant to ICSID Arbitration Rule 9(3).

**(1) Prof. Douglas' Explanations**

91. Prof. Douglas notes that he was informed that he had been appointed as presiding arbitrator by agreement of the Parties by ICSID's letter of September 27, 2019, and he accepted the appointment on that basis.<sup>104</sup>
92. In Prof. Douglas' view, the correspondence exchanged in this case establishes that he was appointed by agreement of the Parties. Prof. Douglas notes that the Claimants proposed his candidacy on September 16, 2019 and that the Respondent accepted the Claimants' proposal by letter of September 27, 2019. The Claimants subsequently confirmed Prof. Douglas' appointment on September 28, 2019.<sup>105</sup>
93. Prof. Douglas adds no further explanations, noting that the grounds for disqualification are based on information in the public domain.<sup>106</sup> Prof. Douglas confirms that he can be relied upon to exercise independent judgment and to act fairly and impartially as between the Parties in discharging his duties.

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<sup>102</sup> Response, paras. 3.7 and 7.5.

<sup>103</sup> Response, para. 8.1(b).

<sup>104</sup> Letter from Prof. Douglas to the Secretary-General dated November 12, 2019, para. 2.

<sup>105</sup> Letter from Prof. Douglas to the Secretary-General dated November 12, 2019, para. 3.

<sup>106</sup> Letter from Prof. Douglas to the Secretary-General dated November 12, 2019, para. 4.

**(2) Mr. Veeder's Explanations**

94. In his explanations, Mr. Veeder confirms his independence and impartiality as an arbitrator in these proceedings. Mr. Veeder's explanations also address the facts of the five cases referenced in the Proposal, *Gemplus*, *Talsud*, *Orange SA*, *Koch* and *Mercer*.<sup>107</sup>
95. Mr. Veeder states that *Gemplus* and *Talsud* were heard together as one arbitration, and that he was appointed as presiding arbitrator by agreement of the three disputing parties.<sup>108</sup> Mr. Veeder notes that the claimants' legal representatives in these cases included the law firm of Baker & McKenzie LLP. Further, these cases concluded on June 18, 2010 upon the issuance of an award. Mr. Veeder clarifies that Prof. Douglas was not involved in these two cases.
96. With respect to the three previous ICSID cases in which the Claimants allege that Mr. Veeder and Prof. Douglas served together as arbitrators on the same tribunal, Mr. Veeder further notes:
- a. As regards the first case, *Orange SA*, Mr. Veeder was appointed by agreement of the parties and Prof. Douglas served as one of the co-arbitrators. Baker & McKenzie LLP was not involved in this case. Further, this case was suspended soon after the constitution of the tribunal and was discontinued in 2016 following an amicable settlement between the parties.<sup>109</sup>
  - b. In the second case, *Koch*, Mr. Veeder was appointed as presiding arbitrator by agreement of the parties. Prof. Douglas replaced the initial co-arbitrator and the case was partially reheard for the benefit of Prof. Douglas. The tribunal issued its award on October 30, 2017, by a majority, and Prof. Douglas dissented from the award. Again, Baker & McKenzie LLP was not involved in this arbitration.<sup>110</sup>

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<sup>107</sup> Mr. Veeder's Explanations dated November 3, 2019, p. 1.

<sup>108</sup> Mr. Veeder's Explanations dated November 3, 2019, p. 1.

<sup>109</sup> Mr. Veeder's Explanations dated November 3, 2019, p. 1.

<sup>110</sup> Mr. Veeder's Explanations dated November 3, 2019, p. 2.

c. As regards the third case, *Mercer*, Mr. Veeder notes that he was appointed jointly by the parties as presiding arbitrator. He served with Prof. Douglas on that tribunal which rendered an award on March 6, 2018, with a supplementary decision on December 10, 2018. Baker & McKenzie LLP was not involved in the arbitration.<sup>111</sup>

97. Mr. Veeder states that, as an arbitrator, he has not hitherto considered it necessary to disclose the participation of a law firm in an arbitration concluded long ago or any prior involvement with a co-arbitrator in earlier arbitration proceedings where he had been a member of the same tribunal.<sup>112</sup> Mr. Veeder notes that the full information regarding his involvement as an arbitrator with both Baker & McKenzie LLP and Professor Douglas “lies in the public record, having been publicly recorded on the ICSID and other websites readily available to any disputing party to an arbitration.”<sup>113</sup>

98. Finally, Mr. Veeder states that he does not consider that the mere participation of a legal representative or arbitrator in previous ICSID cases where he served as an arbitrator affect his independence, impartiality or suitability as an arbitrator in a later arbitration.<sup>114</sup>

#### **IV. ANALYSIS**

##### **A. The Applicable Legal Standard**

99. Art. 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.

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<sup>111</sup> Mr. Veeder’s Explanations dated November 3, 2019, p. 2.

<sup>112</sup> Mr. Veeder’s Explanations dated November 3, 2019, p. 2.

<sup>113</sup> Mr. Veeder’s Explanations dated November 3, 2019, p. 2.

<sup>114</sup> Mr. Veeder’s Explanations dated November 3, 2019, pp. 1-2.

100. A number of decisions have concluded that the word “manifest” in this provision means “evident” or “obvious,”<sup>115</sup> and that it relates to the ease with which the alleged lack of the required qualities can be perceived.<sup>116</sup>
101. The Proposal for the disqualification of Prof. Douglas and Mr. Veeder alleges that both arbitrators manifestly lack the qualities required by Art. 14(1) of the ICSID Convention and hence should be disqualified under Art. 57 of the ICSID Convention.
102. The required qualities are stated in Art. 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 particular importance in the case of persons on the Panel of Arbitrators.
103. In this case, the Proposal alleges that Prof. Douglas and Mr. Veeder cannot be relied upon to exercise independent judgment.
104. While the English version of Art. 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 Art. 14(1) arbitrators must be both impartial and independent.<sup>117</sup> Indeed, both Parties in this case accept that understanding.<sup>118</sup>

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<sup>115</sup> *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**”) para. 61; *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**”) para. 54; *Caratube* para. 55.

<sup>116</sup> *BSG*, para. 54; C. Schreuer, *The ICSID Convention: A Commentary*, Second Edition (2009), p. 1202, paras. 134-154.

<sup>117</sup> *Blue Bank*, para. 58; *BSG*, para. 56.

<sup>118</sup> *See above* at paras. 26-29; 56-57.

105. 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.”<sup>119</sup>
106. As the Parties agree, Arts. 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>120</sup>
107. The Parties also agree 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.”<sup>121</sup> As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.<sup>122</sup>
108. For the Proposal to be accepted, the Claimants must show that there is an evident or obvious appearance of a lack of impartiality or independence, based on a reasonable evaluation of the relevant facts by a third party.<sup>123</sup>
109. The Parties have referred in their arguments to the IBA Guidelines on Conflicts of Interest in International Arbitration and the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration. While rules or guidelines such as these may serve as useful references, the Chairman is bound by the standard in the ICSID Convention. Accordingly, this decision is made in accordance with Arts. 57 and 58 of the ICSID Convention.

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<sup>119</sup> *BSG*, para. 57; *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 (“*Universal*”) para. 70; *Urbaser (R-001)* para. 43.

<sup>120</sup> Proposal, para. 19; Response, para. 5.2; see also *Blue Bank* para. 59; *BSG*, para. 57; *Caratube (R-004)* para. 57.

<sup>121</sup> Proposal, paras. 17-20; Response, para. 5.5; *Blue Bank*, para. 60; *BSG*, para. 58; *Caratube (R-004)* para. 54; *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 para. 28.

<sup>122</sup> *BSG*, para. 58.

<sup>123</sup> *Caratube (R-004)* para. 56;

**B. Analysis of the Proposals**

110. As indicated above, with respect to the Proposal to disqualify Prof. Douglas, the Claimants contend that: (i) Prof. Douglas is presently a co-arbitrator appointed by Kuwait in another ongoing ICSID proceeding, which the Claimants allege is similar to the present case; and (ii) Prof. Douglas has been appointed multiple times by Respondent States.
111. With respect to the Proposal to disqualify Mr. Veeder, the Claimants allege that: (i) Mr. Veeder has been appointed repeatedly by Baker & McKenzie LLP, the Respondent's counsel in this arbitration; and (ii) Mr. Veeder and Prof. Douglas have served on the same tribunal in past ICSID cases. Each of these points are dealt with below.

**(1) The Proposal to Disqualify Prof. Douglas**

**a. Prof. Douglas' Participation in the *Rizzani* Case**

112. The Claimants argue that Prof. Douglas cannot be relied upon to exercise independent judgment because he presently sits as an arbitrator in *Rizzani v Kuwait*, appointed by Kuwait.<sup>124</sup> They argue that there is significant overlap between the facts of the present case and the *Rizzani* case: both disputes arise out of the same industry, relate to projects in the same geographical area, involve the same Respondent State and concern the same type of investment.<sup>125</sup> In addition, the Claimants argue that the treaty provisions in the two cases are “almost identically worded.”<sup>126</sup>
113. The Respondent replies that Prof. Douglas has not been appointed multiple times by Kuwait (or its legal counsel). To the contrary, Prof. Douglas has been appointed once by Kuwait (*Rizzani*) and jointly by agreement of the Parties in the present arbitration.<sup>127</sup> The Respondent submits that there is no relevant factual or legal overlap between the present case and the *Rizzani* case, since the parties to the dispute are different, the treaties and

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<sup>124</sup> Proposal, para. 14.

<sup>125</sup> Proposal, paras. 14 and 22.

<sup>126</sup> Proposal, para. 23.

<sup>127</sup> Response, para. 6.5.

contracts that gave rise to the dispute are different, and the two disputes pertain to unrelated projects in different geographical areas, managed by different State entities of the Respondent.<sup>128</sup>

114. The Statement attached to Prof. Douglas' Declaration of October 3, 2019, reads as follows:

I confirm that I am currently sitting as an arbitrator in another ICSID case involving the State of Kuwait: *Rizzani de Eccher, OHL & Trevi v State of Kuwait* (ICSID Case No. ARB/17/8). This is a matter of public record. I do not consider that this is a circumstance that might cause my reliability for independent judgment to be questioned by a party but I confirm this fact nonetheless in the interests of full transparency.

115. The Chairman agrees with the Respondent's submission that Prof. Douglas has not been appointed multiple times solely by the Respondent.<sup>129</sup> As the information on the record makes clear, Prof. Douglas has been appointed once by the State of Kuwait in the *Rizzani* case and jointly by the Parties as presiding arbitrator in the present case. Therefore, the Chairman does not need to address the effect of multiple appointments by the same party.

116. In light of the arguments presented by the Claimants, the Chairman must consider whether this case and the *Rizzani* case present common facts or issues that are sufficient to give rise, objectively, to the appearance of lack of independence or impartiality of an arbitrator sitting concurrently on both cases.<sup>130</sup>

117. As a starting point, the decisions in *Tidewater* and *Raiffeisen* are instructive. In *Tidewater*, the unchallenged arbitrators stated 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."<sup>131</sup> In *Raiffeisen*, the Chairman found that "the same principle

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<sup>128</sup> Response, paras. 3.4, 6.6-6.7.

<sup>129</sup> Response, para. 6.5.

<sup>130</sup> *Universal*, para. 72; *Caratube (R-004)* para. 57.

<sup>131</sup> *Tidewater (R-002)* para. 60.

applies ... to multiple appointments by different claimants, even if they are in cases against the same respondent.”<sup>132</sup> The same principle must apply in this case as well.

118. Moreover, as noted in *Raiffeisen*, where a proposal for disqualification rests on consideration of the same issue(s) in multiple arbitrations, there must be an additional significant overlap of facts that are specific to the merits and the parties involved, as was the case in *Caratube*<sup>133</sup> – a case on which the Claimants heavily rely.
119. In *Caratube*, the unchallenged arbitrators considered whether the participation of the respondent-appointed arbitrator in an UNCITRAL arbitration (*Ruby Roz*) and appointed by the same respondent, would put into question his impartiality and independence due to the similarities between the two cases.<sup>134</sup> The unchallenged arbitrators determined that there was a “significant overlap in the underlying facts” between *Caratube* and *Ruby Roz*.<sup>135</sup> In particular: (i) there was a direct personal and commercial relationship between the claimants in the two cases; (ii) an overlap in the witnesses submitting statements in the two cases; (iii) the *Ruby Roz* tribunal had already formed an opinion as to credibility with respect to some of the witnesses giving evidence in the *Caratube* case; and (iv) in both cases the respective claimants had relied on certain identical factual allegations regarding events underlying state criminal investigations and expropriation of the related claimants and their companies.<sup>136</sup> As a result, the unchallenged arbitrators found that a reasonable and informed third party would find it highly likely that the challenged arbitrator would prejudge the legal issues in *Caratube* based on his knowledge of the facts in the *Ruby Roz* case.<sup>137</sup>
120. Applied to the present case, the Chairman notes that there are some commonalities between this arbitration and the *Rizzani* case. In both cases: (i) the responding party is Kuwait; (ii)

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<sup>132</sup> *Raiffeisen (R-009)* para. 88.

<sup>133</sup> *Raiffeisen (R-009)* para. 91.

<sup>134</sup> *Caratube (R-004)* paras. 71 *et seq.*

<sup>135</sup> *Caratube (R-004)* paras. 88-90.

<sup>136</sup> See Response, para. 5.25; *Caratube (R-004)* paras. 78 *et seq.*

<sup>137</sup> *Caratube (R-004)* para. 90.

the investors allege that the dispute arose out of a measure by Kuwait; (iii) the projects arose out of the construction sector;<sup>138</sup> and (iv) there are some similarities between the treaties pursuant to which the respective claims have been brought. However, that is where the few commonalities end.

121. The overlap of the periods during which the conduct complained of in each case took place, absent more, is of little relevance. Likewise, the fact that the two projects are located in Kuwait City is not relevant. The claimant investors in the two cases are distinct, and there is no evidence that there is any relationship between them. The projects themselves and the contracts governing them are entirely distinct. Although the Claimants suggested that there are “the same potential witness[es]” in the two cases,<sup>139</sup> they failed to identify any specific individuals who would be potential witnesses. In short, there is no significant overlap in this case such as was found to exist in the *Caratube* case.
122. In sum, the Claimants failed to identify an overlap between the *Rizzani* case and the present arbitration that would be relevant to the consideration of the legal issues in the present dispute. Accordingly, a third party undertaking a reasonable evaluation of the facts alleged and the arguments submitted would not conclude that there is a manifest lack of the qualities required by Art. 14(1) of the ICSID Convention.

### **b. Multiple Arbitrator Appointments by States**

123. The Claimants further argue that Prof. Douglas has been appointed repeatedly by Respondent States and therefore he manifestly lacks the independence and impartiality required of an arbitrator by Art. 14(1). The Claimants characterize Prof. Douglas as a “pro-State arbitrator,” and state that he has been appointed by Respondent States in 44 ICSID cases.<sup>140</sup>

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<sup>138</sup> See case details on the ICSID website: <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/19/20> and <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/8>

<sup>139</sup> Observations, para. 19.

<sup>140</sup> See above at paragraphs 43-45.

124. The Respondent's position is that the mere fact of multiple arbitrator appointments by State parties is insufficient, in and of itself, to demonstrate a manifest lack of the qualities in Art. 14(1) of the ICSID Convention. They also argue that no other objective circumstance in this case would support the conclusion that these appointments by State parties undermined Prof. Douglas' ability to exercise independent judgment in the present case.<sup>141</sup>
125. The Chairman notes that the Parties do not disagree that Prof. Douglas has been appointed repeatedly by States. However, the mere fact that Prof. Douglas has been appointed repeatedly by States is insufficient by itself to establish a manifest lack of independence and impartiality. Rather, there must also be objective circumstances demonstrating that these prior appointments manifestly influence the arbitrator's ability to exercise independent judgment in the arbitration in question. Moreover, a finding that a lack of impartiality or independence is manifest "must exclude reliance on speculative assumptions or arguments" and "the circumstances actually established ... must negate or place in clear doubt the appearance of impartiality."<sup>142</sup>
126. The Claimants' suggestion that Prof. Douglas will favor Kuwait in this arbitration because he has more frequently been appointed by States is speculation. No evidence has been submitted demonstrating that an informed third-party observer would conclude that Prof. Douglas would favor the Respondent in this arbitration. To the contrary, the fact that the Claimants proposed Prof. Douglas as the presiding arbitrator in the first place, and then re-confirmed their agreement to appoint Prof. Douglas before subsequently calling his appointment into question, significantly undermines the Claimants' arguments.
127. In light of the above, the Chairman rejects the Claimants' proposal to disqualify Prof. Douglas on this ground.

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<sup>141</sup> See above at paragraphs 81-84.

<sup>142</sup> *Raiffeisen (R-009)* para. 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, para. 25).

**(2) Conclusion**

128. On the facts established in this case, whether considered separately or cumulatively, the factors alleged by the Claimants do not satisfy the test required under Art. 57 in relation to repeat appointments by States. Consequently, in the Chairman's view, the combination of the factors alleged by the Claimants do not impugn the independent judgment to be exercised by Prof. Douglas.
129. The Chairman finds that the Claimants have not demonstrated that an informed third party would conclude that Prof. Douglas manifestly lacks the qualities required of an arbitrator by Art. 14(1) of the ICSID Convention. Accordingly, the proposal to disqualify Prof. Douglas is rejected.

**(3) The Proposal to Disqualify Mr. Veeder**

**a. Multiple Arbitrator Appointments by the Same Counsel and Other Alleged Relationships with Counsel**

130. The Claimants propose to disqualify Mr. Veeder due to alleged prior appointments by the Respondent's counsel, Baker & McKenzie LLP, in two ICSID cases concluded in 2010. The Claimants criticize Mr. Veeder for not disclosing these appointments upon acceptance of his appointment, arguing that he was required to do so under the IBA Guidelines. The Respondent argues that no disclosure was required under the IBA Guidelines and that these prior appointments have no impact on Mr. Veeder's independence or impartiality.
131. As noted above, the Chairman is bound by Art. 57 of the ICSID Convention and considers any reference to the IBA Guidelines as merely illustrative. With respect to Mr. Veeder's alleged multiple arbitrator appointments by Baker & McKenzie LLP, the Chairman notes that Mr. Veeder was appointed 15 years ago in the consolidated *Gemplus* and *Talsud* cases. The appointments in *Gemplus* and *Talsud* were made by agreement of the parties, only one of which was represented by Baker & McKenzie LLP. An appointment by agreement of the disputing parties which involved Baker & McKenzie LLP as one of the multiple representatives is not an appointment that can be said to have been made by Baker & McKenzie LLP only.

132. The fact that Mr. Veeder did not disclose the *Gemplus* and *Talsud* appointments made by party agreement is not inconsistent with the IBA Guidelines. The provision of the IBA Guidelines on which the Claimants rely requires disclosure of appointments by the same law firm “on more than three occasions” within the past three years. Here, there are only two relevant appointments, and they were not made by the same law firm. Notably, the Claimants did not challenge these facts in their submissions.
133. Although the Claimants allege that Mr. Veeder ought to also have disclosed certain other “relations with the respondents’ legal counsels” and other professional or educational interactions with Prof. Douglas,<sup>143</sup> they provide no evidence or detail concerning the “relations” or interactions they allege, and make no argument as to how they may impact Mr. Veeder’s independence and impartiality. At least some of the allegations appear to be misleading, when considered in light of the information on the record. For example, the Claimants allege that one of the Respondent’s counsel is “in Essex Court Chambers,” but she is in fact a member of the law firm Baker & McKenzie LLP. In any event, the alleged “relations” and interactions of Mr. Veeder with members of Respondent’s counsel team and Prof. Douglas do not establish a lack of independence and impartiality.
134. The Chairman agrees with Mr. Veeder’s assessment that the mere participation of a legal representative or arbitrator in one or more earlier arbitrations where he was also an arbitrator was not a factor affecting his independence, impartiality or suitability as an arbitrator in a later arbitration.<sup>144</sup>
135. In conclusion, the Chairman finds that an informed third party would not conclude that Mr. Veeder manifestly lacks independence and impartiality based on this ground.

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<sup>143</sup> See above at paragraph 49.

<sup>144</sup> Mr. Veeder’s Explanations dated November 3, 2019, p.2.

**b. Service as Co-Arbitrators on Same Tribunal in Prior ICSID Cases**

136. The Claimants further propose to disqualify Mr. Veeder because he served with Prof. Douglas on the same tribunal in prior ICSID cases.<sup>145</sup> The Respondent opposes this and argues that the Claimants have not established that the arbitrators' past service on the same tribunal would objectively give rise to an appearance of lack of independence and impartiality in the present case.<sup>146</sup>
137. The Chairman notes that the mere fact that Prof. Douglas and Mr. Veeder sat together on the same tribunal does not indicate that there is a lack of independence or impartiality to decide the issues in the present case. In fact, the information on record demonstrates that Prof. Douglas and Mr. Veeder have reached different conclusions when sitting together in the *Koch* case. An informed third party undertaking a reasonable evaluation of these facts would not conclude that Mr. Veeder manifestly lacks the qualities required by Art. 14(1) of the ICSID Convention because he served with Prof. Douglas in prior ICSID cases.

**(4) Conclusion**

138. Having considered the Parties' arguments, the Chairman concludes that an informed third party undertaking a reasonable evaluation of the facts alleged would not find a manifest lack of the qualities required by Art. 14(1) of the ICSID Convention on the part of Mr. Veeder. Accordingly, the Claimants' Proposal to disqualify Mr. Veeder is rejected.

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<sup>145</sup> See above at paragraphs 32-42.

<sup>146</sup> See above paragraph 88.

**V. DECISION**

139. Having previously stated the conclusions in paragraphs 129 and 138 above, the Claimants' Proposal to disqualify Prof. Douglas and Mr. Veeder is dismissed.
140. The allocation of costs incurred in connection with this decision is a matter for determination by the Tribunal in the course of the arbitration, in accordance with ICSID Arbitration Rule 28(1), and the Chairman makes no decision in this regard.

[signed]

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Mr. David Malpass  
Chairman of the ICSID Administrative Council  
Date: January 2, 2020