

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

IN THE ARBITRATION PROCEEDING BETWEEN

MR. BOB MEIJER

CLAIMANT

and

GEORGIA

RESPONDENT

ICSID Case No. ARB/20/28

DECISION ON THE PROPOSAL TO DISQUALIFY
PROFESSOR DR. KLAUS SACHS

CHAIRMAN OF THE ADMINISTRATIVE COUNCIL
MR. DAVID MALPASS

Secretary of the Tribunal
MS. ELLA ROSENBERG

Date: July 15, 2021

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I. PROCEDURAL HISTORY

1. On July 29, 2020, Mr. Bob Meijer (“**Claimant**”) filed a Request for Arbitration at the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) against Georgia (“**Georgia**” or “**Respondent**”), under the 1998 Netherlands-Georgia BIT. The Claimant and the Respondent are collectively referred to as the “**Parties.**” The Parties’ representatives and their addresses are listed above on page (i).
2. Mr. Meijer is a shareholder in Anaklia Development Consortium LLC (“**ADC**”), a company incorporated under the law of Georgia. ADC and Georgia entered into an Investment Agreement relating to the building, operation and transfer of the Anaklia Deep Water Black Sea Port on October 3, 2016 (the “**Investment Agreement**”).
3. In July 2020, ADC (without Mr. Meijer) commenced a separate arbitration against Georgia under the ICC arbitration clause in the Investment Agreement, ICC Case 26642/HHB (the “**ICC Arbitration**”).
4. On August 11, 2020, the Secretary-General of ICSID registered the Request for Arbitration filed on July 29, 2020, in accordance with Article 36(3) of the ICSID Convention, and notified the Parties of the registration.
5. By letter dated September 10, 2020, the Respondent proposed to consolidate the present arbitration with the ICC Arbitration.
6. By letter dated October 14, 2020, the Claimant rejected the Respondent’s proposal to consolidate the ICC Arbitration and the present ICSID arbitration.
7. By letter dated October 29, 2020, the Claimant informed ICSID that it opted for the formula provided in Article 37(2)(b) of the ICSID Convention. In accordance with that provision, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party, and a presiding arbitrator appointed by agreement of the parties. The Claimant further informed the Centre that it appointed Dr. Charles Poncet, a national of Switzerland, as an arbitrator.

8. By letter dated November 20, 2020, the Respondent informed the Centre that it appointed Prof. Dr. Klaus Sachs, a national of Germany, as an arbitrator.
9. By letter dated November 25, 2020, the Claimant expressed his concern with having Prof. Dr. Sachs sit on the Tribunal in both the ICC Arbitration and in the present case and asked ICSID to communicate his letter to Prof. Dr. Sachs as he considered the appointment.
10. By letter dated November 25, 2021, ICSID informed the Parties that Prof. Dr. Sachs had reviewed Mr. Meijer's letter of the same date and had accepted his appointment. In accepting his appointment, Prof. Dr. Sachs made the following disclosure: "*For the sake of good order, I wish to disclose, although the fact is known to the parties, that the Claimant has appointed me as arbitrator in the parallel ICC proceeding (Case n° 25542/HBH) between the same parties.*"¹
11. By letter dated November 30, 2020, the Claimant commented on Prof. Dr. Sachs' disclosure of November 25, 2020 and pointed out several errors therein.
12. On December 1, 2020, Prof. Dr. Sachs corrected and clarified his disclosure submitting that:

It was not the Claimant but the Respondent that appointed me as an arbitrator in the ICC Case No. 25542/HBH.

The parties to that ICC case are Anaklia Development Consortium LLC as the claimant and the Government of Georgia as the respondent.
13. On December 2, 2020, the Claimant sent a letter to ICSID requesting that Prof. Dr. Sachs respond to several questions arising from his disclosure and his subsequent corrections/clarifications. On December 4, 2020, the Respondent commented on the Claimant's letter of December 2, 2020.
14. On December 7, 2020, Prof. Dr. Sachs responded to the Claimant's letter and made the following additional disclosure:

¹ Prof. Dr. Sachs' disclosure is dated November 23, 2020 but was, upon his instructions, communicated to the Parties on November 25, 2020 after he had an opportunity to review the Claimant's letter.

In 2016, I was appointed by the Respondent, represented by White & Case LLP, in ICC Case n° 20965/MHM. Neither Georgia nor a Georgian state-owned entity was a party to that arbitration. The case was terminated by a final award rendered in June 2020.

15. On December 21, 2020 ADC, the claimant in the ICC Arbitration, challenged Prof. Dr Klaus Sachs in the ICC Arbitration.
16. Also on December 21, 2020, Bob Meijer filed a proposal for the disqualification of Prof. Dr. Sachs on the basis that he manifestly lacks the qualities required by Article 14(1) of the ICSID Convention (“**Claimant’s Proposal to Disqualify Klaus Sachs**”). The Claimant invoked the following grounds:
 - a. Prof. Dr. Sachs accepted concurrent appointments in the present arbitration and the ICC Arbitration;²
 - b. Prof. Dr. Sachs’ was repeatedly appointed by the Respondent and/or White & Case LLP, namely in the ICC Arbitration, this arbitration and ICC Case No. 20965/MHM,³ and
 - c. The contents of Prof. Dr. Sachs’ disclosure statement contain three obvious and substantial errors which revealed that he has already prejudged the factual dispute.⁴
17. On the same date the Centre informed the Parties that:

Pursuant to Chapter V of the ICSID Convention and ICSID Arbitration Rule 9, a party may propose the disqualification of an arbitrator only after the tribunal has been constituted. In this case, the tribunal has not yet been constituted. Accordingly, the Centre may not take action on the disqualification proposal submitted, which is premature. It will be transmitted to Prof. Dr. Sachs and Dr. Charles Poncet for their information only.

Once the tribunal has been constituted, either party may promptly propose the disqualification of any of its members, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9.

² Claimant’s Proposal to Disqualify Professor Klaus Sachs, ¶¶ 48-60.

³ Claimant’s Proposal to Disqualify Professor Klaus Sachs, ¶¶ 71-78.

⁴ *Bob Meijer v. Georgia*, ICSID Case No. ARB/20/28, Claimant’s Proposal to Disqualify Professor Klaus Sachs, 21 December 2020, ¶¶ 61-70.

18. On February 22, 2021, Prof. Bernard Hanotiau accepted his appointment, by agreement of the Parties, as president of the Tribunal. On the same date, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1), 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.
19. On March 1, 2021, the Claimant resubmitted its Proposal to Disqualify Klaus Sachs. 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).
20. On March 5, 2021, the ICC Court upheld ADC's challenge of Prof. Dr. Sachs in the ICC Arbitration (the "**ICC Court Decision**").⁵ The ICC Court decided as follows:

The Court considered that the ICC and the ICSID arbitrations appear to be based on substantially the same factual background, which is in fact not disputed by the parties. The parties also agree that there is at least a partial overlap in the legal issues to be decided in the two cases. It therefore appears probable that at least some common factual and legal issues will arise in both arbitrations.

It is unclear at this stage whether Mr. Sachs will need to decide on such issues in the ICSID Case before having to address them in the ICC proceedings because, at the moment, both arbitrations are at the same stage of constitution of the arbitral tribunal. In this regard, Claimant suggests that the ICSID Case may proceed at a faster pace than the ICC case whereas Respondent submits that this is contradicted by statistics indicating that ICSID proceedings take on average longer than ICC proceedings. Respondent therefore submits that there is no reason to assume that when Mr. Sachs will be called to decide on certain issues in the ICC case, such issues will have already been addressed in the ICSID Case.

The Court considered that it is difficult to speculate on the exact time and sequence of the decisions to be made in both arbitrations and that challenges must be decided on the basis of the facts as they stand when the Court decides. It suffices for a risk of prejudgment to exist that similar issues of fact or law exist in different proceedings that are pending at the same time involving the same arbitrators. Although the Court has no reasons to doubt that Mr.

⁵ Claimant's Supplementary Submission, ¶ 1; Respondent's Reply, ¶¶ 4, 8.

Sachs would fulfil his duties with fairness and integrity, the risk of unconscious biases resulting from the involvement in two overlapping proceedings cannot be discarded.

With respect to the asymmetry of information, although Claimant and Mr. Meijer are represented by the same legal counsel in both cases, the Court considered that Mr. Sachs may still have access to information that will not be available to his fellow arbitrators in the ICC proceedings, who will not participate to the ICSID Case, including evidence submitted in the ICSID Case that may not be produced in the ICC case, as well as internal discussions and deliberations within the ICSID arbitral tribunal. It may moreover not be excluded that legal representation in either case could change during the course of the proceedings.

Against this background, and based on the review of the relevant documents, the Court concluded that there is merit in the first ground raised by Claimant to accept the Challenge.⁶

21. On March 8, 2021, the Respondent submitted a Reply to the Claimant’s Proposal for the Disqualification of Prof. Dr. Klaus Sachs (“**Respondent’s Reply**”). The Respondent requested the dismissal of the Claimant’s Proposal given that Prof. Dr. Sachs was no longer serving as co-arbitrator in the ICC Arbitration.⁷ It further submitted that the subsidiary grounds invoked by the Claimant were groundless and should be rejected.⁸
22. On March 9, 2021, Prof. Hanotiau and Dr. Poncet (the “**Unchallenged Arbitrators**”) invited the Claimant to confirm whether, in light of the content of the Respondent’s Reply and the ICC Challenge Decision of March 5, 2021, he wished to maintain his challenge to Prof. Dr. Sachs in these proceedings.
23. On March 19, 2021, the Claimant submitted a Supplementary Submission maintaining his proposal to disqualify Prof. Dr. Klaus Sachs (“**Claimant’s Supplementary Submission**”). The following three grounds were raised by the Claimant:⁹

⁶ ICC Court Decision of March 5, 2021, ¶¶ 24 to 28.

⁷ Respondent’s Reply, ¶ 9.

⁸ Respondent’s Reply, ¶¶ 10, 18-36.

⁹ Claimant’s Supplementary Submission, ¶ 15.

- a. Following the successful challenge of Prof. Dr. Sachs in the ICC Arbitration, it is now impossible for him to maintain the required appearance of impartiality towards the Claimant and his counsel;¹⁰
 - b. Prof. Dr. Sachs' refusal to engage with the concerns raised by the Claimant and his subsequent decision to accept the Respondent's appointment in the ICSID arbitration show a serious lack of judgment and create an obvious appearance of lack of impartiality;¹¹ and
 - c. The contents of Prof. Dr. Sachs' disclosure statement create an obvious appearance of lack of impartiality and the situation is exacerbated by Prof. Dr. Sachs' alleged prejudgment of the issue of the identity of the Parties, showing that he has already conflated ADC and the Claimant.¹²
24. On March 26, 2021, ICSID conveyed Prof. Dr. Sachs' comments to the Parties. Prof. Dr. Sachs stated as follows:¹³

First, I want to make it absolutely clear that I harbor no feeling of enmity towards Mr. Meijer or his counsel. Being challenged is part of life as an arbitrator and there is nothing personal about such matters.

Second, in its decision upholding the challenge in the ICC arbitration, the ICC Court took a cautious approach based on the risk that I might prejudge issues in the ICC arbitration. I believe that the merits of the ICC Court's approach could be debated, but that is of course of no relevance now. I disagree, however, with the notion that I lacked judgment in accepting the nominations in both the ICC and ICSID matters.

Third, I also disagree with the notion that I have prejudged issues in dispute. In my ICSID disclosure I referred to the two arbitrations as being "parallel" but that reflected an understanding that the two arbitrations arise out of the same events, concern the same underlying facts and involve related claimants (Mr. Meijer, as I understand it, being a minority shareholder of ADC), and are proceeding concurrently. If any part of that understanding turns out to be incorrect, however, then of course I would change my

¹⁰ Claimant's Supplementary Submission, ¶¶ 38-51.

¹¹ Claimant's Supplementary Submission, ¶¶ 52-64.

¹² Claimant's Supplementary Submission, ¶¶ 65-71. See also paragraph 60 of the present Decision.

¹³ Letter from ICSID to the Parties dated March 26, 2021.

understanding. Further, that I stated in the ICSID disclosure that the two cases were “between the same Parties” was an obvious mistake (as also found in the ICC Challenge Decision) which I corrected and for which I apologize.

Finally, I reconfirm that I have always been and intend to continue to be independent and impartial.

25. On April 7, 2021, both Parties submitted further observations in relation to the Claimant’s Proposal (“**Claimant’s Additional Comments**” and “**Respondent’s Additional Comments**,” respectively).
26. On May 25, 2021, the Parties were notified that the Unchallenged Arbitrators were equally divided and that the Proposal would be decided by the Chairman of the Administrative Council (“**Chairman**”), in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

II. POSITIONS OF THE PARTIES

A. LEGAL STANDARD

(1) The Claimant’s Position

27. The Claimant submits that Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal in the following terms:

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.

28. The Claimant argues that the standard for disqualification under Article 57 is an objective standard, based on how a reasonable third party would evaluate established facts.¹⁴ He

¹⁴ Claimant’s Supplementary Submission, ¶ 23.

argues that as noted in *Ayat Nizar Sumrain*,¹⁵ *Blue Bank*,¹⁶ *BSG Resources*,¹⁷ *Burlington*¹⁸ and *Caratube*¹⁹ “the word ‘manifest’ in [Article 57] means ‘evident’ or ‘obvious’ and that it relates to the ease with which the alleged lack of the required qualities can be perceived and not to the seriousness of the alleged lack of required qualities.”²⁰

29. According to the Claimant, the ICSID Convention does not require proof of actual dependence or bias. Instead, it is sufficient to establish the appearance of dependence or bias. Accordingly, in order to meet the standard of “*manifest lack*” as to an arbitrator’s independence or impartiality, it is sufficient for the party proposing the disqualification to show that there is an evident or obvious appearance of lack or impartiality or independence, based on a reasonable evaluation of the relevant facts by a hypothetical third party.²¹
30. In addition, the Claimant contends that “as a matter of policy, the ‘manifest lack’ standard under Article 14(1) of the ICSID Convention should not be interpreted as providing for a substantially lower level of protection to parties than afforded by other leading arbitral institutions.”²²
31. The Claimant further adds that while the English version of the ICSID Convention makes reference only to the ability to “*exercise independent judgment*,” it is understood by

¹⁵ *Ayat Nizar Raja Sumrain and others v. State of Kuwait* (ICSID Case No. ARB/19/20), Decision on the Claimants Proposal to Disqualify Prof. Zachary Douglas and Mr. V. V. Veeder dated 2 January 2020 (“*Ayat Nizar Sumrain*”), ¶ 100, Exhibit CD-12.

¹⁶ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Proposal for Disqualification of a Majority of the Tribunal dated 12 November 2013 (“*Blue Bank*”), ¶ 61, Exhibit CD-6.

¹⁷ *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 dated 28 December 2016 (“*BSG Resources*”), ¶ 54, Exhibit CD-10.

¹⁸ *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña dated 13 December 2013 (“*Burlington*”), ¶ 68, Exhibit CD-7.

¹⁹ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Decision on the Proposal for Disqualification of Bruno Boesch, March 20, 2014, ¶ 55 (“*Caratube*”), Exhibit CD-8.

²⁰ Claimant’s Proposal to Disqualify Klaus Sachs, ¶ 30; Claimant’s Supplementary Submission, paras 18-20.

²¹ Claimant’s Proposal to Disqualify Klaus Sachs, ¶ 33.

²² Claimant’s Supplementary Submission, ¶ 24.

reference to the French and Spanish language versions of the ICSID Convention that pursuant to Article 14(1), arbitrators must be both independent and impartial.

32. Finally, the Claimant argues that ICSID disqualification decisions often refer to the IBA Guidelines, with the qualification that these are not binding but can be “*useful references*.”²³ It relies on several provisions of the Orange list, described below, as relevant to the present proposal.

(2) The Respondent’s Position

33. The Respondent submits that the Parties “*are largely in agreement on the applicable standard for disqualification*.”²⁴
34. The Parties disagree, however, regarding the interpretation to be given to the words “*manifest lack*” in Article 57 of the ICSID Convention.²⁵
35. The Respondent submits that the standard for establishing a manifest lack of the qualities required to exercise independent judgement is high. A mere doubt, it submits, will not suffice, even if that doubt is a reasonable or justifiable one. The Respondent adds that “[*m]ere speculation and inference likewise will not suffice*.”²⁶
36. For the Respondent, a successful challenge must be based on “*established facts which place in clear doubt the appearance of impartiality. It is equally well established that the standard for disqualification under Article 57 of the ICSID Convention is an objective standard, based on how a reasonable third party would evaluate established facts. The subjective belief of the party requesting the disqualification of a tribunal member is thus not enough to meet the high standard*.”²⁷

²³ Claimant’s Proposal to Disqualify Klaus Sachs, ¶ 34.

²⁴ Respondent’s Reply, ¶ 13.

²⁵ Claimant’s Supplementary Submission, ¶ 18.

²⁶ Respondent’s Reply, ¶ 14.

²⁷ Respondent’s Reply, ¶¶ 14-15.

37. For the reasons set out below, the Respondent concludes that the Claimant’s Proposal to Disqualify Prof. Dr. Sachs does not meet the threshold required under Article 57 of the ICSID Convention.²⁸

B. FIRST GROUND: FOLLOWING HIS REMOVAL FROM THE ICC TRIBUNAL, IT IS IMPOSSIBLE FOR PROF. DR. SACHS TO MAINTAIN THE REQUIRED APPEARANCE OF IMPARTIALITY TOWARDS THE CLAIMANT AND HIS COUNSEL

(1) The Claimant’s Position

38. The Claimant submits that as a result of the ICC Court Decision dated March 5, 2021 accepting the challenge to Prof. Dr. Sachs, a reasonable third party would conclude that Prof. Dr. Sachs objectively lacks the appearance of impartiality required by Article 14(1) of the ICSID Convention.

39. The Claimant submits that “[a] reasonable third party would not accept that Professor Sachs maintains the required appearance of impartiality towards Mr Meijer and his legal counsel, in circumstances where ADC (which Professor Sachs has previously conflated with Mr Meijer) led to his disqualification from the tribunal in what he called the ‘parallel’ ICC Arbitration, acting on the advice of the same counsel.”²⁹

40. The Claimant relies on *Burlington v. Ecuador* and submits that it “is good authority for two key legal principles relevant to the analysis of the present case”:

(a) prior conduct of an arbitrator in connection with a challenge and feelings of enmity of that arbitrator towards one of the parties and its counsel are capable of forming the basis of a successful disqualification proposal in the ICSID context; and

*(b) such circumstances are to be assessed by the Unchallenged Arbitrators from an objective standpoint, considering whether the relevant facts “evidenc[e] an appearance of lack of impartiality with respect to” the challenging party or its counsel.*³⁰

²⁸ Respondent’s Additional Comments, ¶ 13.

²⁹ Claimant’s Supplementary Submission, ¶ 5.

³⁰ Claimant’s Supplementary Submission, ¶ 32.

41. Applying the reasoning of the *Burlington v. Ecuador* decision, the Claimant submits that the following circumstances demonstrate an appearance of lack of impartiality towards Mr. Meijer and his counsel:

(a) the adverse ICC Challenge Decision;

(b) the fact that this decision was reached by the ICC Court in plenary session;

(c) the publication of the fact of the adverse ICC Challenge decision (as well as the reasons for it) by GAR;

(d) the possible reputational harm arising therefrom;

(e) that in Professor Sachs' mind, ADC and Mr Meijer are closely related claimants in "parallel" proceedings; and

(f) that ADC and Mr Meijer are represented by the same legal counsel team, evidence an obvious appearance of Professor Sachs' lack of impartiality towards Mr Meijer and/or his legal team based on a reasonable evaluation of these facts by an informed third party.³¹

42. The Claimant argues that from an objective point of view, and in light of the circumstances listed above, it is impossible to see how Prof. Dr. Sachs could fully extract himself or clear his mind from potential feelings of enmity towards the Claimant and his counsel.³²

43. The Claimant further submits that this is a situation – referred to in paragraphs 3.3.7 and 3.4.4 of the Orange List of the IBA Guidelines on Conflicts³³ – that may, in the eyes of a third party, give rise to doubts as to an arbitrator's independence and impartiality.

44. The Claimant adds that a successful challenge is, in and of itself, a situation that would be perceived by an informed third party as sufficient to establish that Prof. Dr. Sachs lacks the qualities required under Article 14(1) of the ICSID Convention.

³¹ Claimant's Supplementary Submission, ¶ 47.

³² Claimant's Supplementary Submission, ¶ 48.

³³ 3.3.7 Enmity exists between an arbitrator and counsel appearing in the arbitration; 3.4.4 Enmity exists between an arbitrator and a manager or director or a member of the supervisory board of: a party; an entity that has a direct economic interest in the award; or any person having a controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert. (IBA Guidelines, pp. 24-25, Exhibit CD-9).

(2) The Respondent's Position

45. The Respondent's position is that the Claimant's Proposal should fail because the ICC Court accepted the challenge of Prof. Dr. Sachs on grounds of the concurrent tribunal memberships and rejected the other grounds contained in challenge raised by ADC.³⁴
46. The Respondent argues that the Claimant's challenge on this ground should be rejected because any concerns that Prof. Dr. Sachs may have "*potential feelings of enmity*" against him and his counsel are purely speculative.³⁵
47. The Respondent submits that "*there is no reasonable basis to assume that a highly professional and experienced arbitrator such as Prof. Dr. Sachs would develop feelings of enmity, or would otherwise bear a grudge, against a party or its counsel following a successful challenge. Prof. Dr. Sachs has in fact expressly confirmed that he harbors 'no feelings of enmity towards Mr. Meijer or his counsel.'* As Prof. Dr. Sachs explained '*[b]eing challenged is part of life as an arbitrator and there is nothing personal about such matters.*'"³⁶
48. The Respondent rejects the Claimant's reliance on the *Burlington* decision and submits that in this case, "*Prof. Dr. Sachs has not made any statements that evidence or otherwise reflect tension or ill feeling towards Mr. Meijer or his counsel. In fact, his comments as filed on 26 March 2021 indicate the exact opposite.*"³⁷
49. In addition, the Respondent rejects Mr. Meijer's reliance on the IBA Guidelines on Conflict of Interest and argues that it is "*equally unavailing.*" The Respondent submits that there is nothing in the IBA Guidelines to suggest that the successful challenge of an arbitrator would, in and of itself, give rise to doubts as to that arbitrator's independence and impartiality towards the party who challenged him, affiliates of that party, or the party's counsel.³⁸

³⁴ Respondent's Reply, ¶ 10.

³⁵ Respondent's Additional Comments, ¶ 15.

³⁶ Respondent's Additional Comments, ¶ 16.

³⁷ Respondent's Additional Comments, ¶¶ 18-19.

³⁸ Respondent's Additional Comments, ¶ 21.

50. Finally, the Respondent argues that the Claimant’s reliance on the GAR publication as something that “*exacerbates the already existing appearance of bias against Mr Meijer*” is “*inappropriate and perverse.*”³⁹ According to the Respondent, the leaking of information to GAR was intended to cause Prof. Dr. Sachs the “*reputational harm*” that the Claimant now invokes to support his challenge.⁴⁰

C. SECOND GROUND: PROF. DR. SACHS’ REFUSAL TO ENGAGE WITH THE CONCERNS RAISED BY THE CLAIMANT AND SUBSEQUENT DECISION TO ACCEPT THE RESPONDENT’S APPOINTMENT OF HIM IN THIS ARBITRATION SHOWS A SERIOUS LACK OF JUDGMENT AND CREATED AN OBVIOUS APPEARANCE OF LACK OF IMPARTIALITY

(1) The Claimant’s Position

51. The Claimant submits that the manner in which Prof. Dr. Sachs accepted his appointment in the present arbitration and refused to address Claimant’s and ADC’s concerns throughout the ICC challenge process would inevitably lead a reasonable third party to conclude that there is an obvious appearance of lack of impartiality.

52. The Claimant submits that “*the ICC Challenge Decision now confirms beyond a shadow of a doubt that Professor Sachs should not have accepted his ICSID appointment.*”⁴¹ The Claimant emphasizes that the ICC Court upheld the challenge on grounds of “*(i) potential issue conflict in overlapping proceedings and (ii) asymmetry of information between Professor Sachs and other members of the ICC Tribunal*” which, are the exact concerns that he flagged in his letter to ICSID dated November 25, 2020.⁴²

53. The Claimant adds that Prof. Dr. Sachs did not give any consideration to the concerns of the Claimant and ADC about the concurrent appointments as he allegedly declined seven invitations to comment on these issues whether offered by the Claimant, ADC or the ICC Court.⁴³

³⁹ Respondent’s Additional Comments, ¶ 21.

⁴⁰ Respondent’s Additional Comments, ¶¶ 24-28.

⁴¹ Claimant’s Supplementary Submission, ¶ 56.

⁴² Claimant’s Supplementary Submission, ¶¶ 54 and 59.

⁴³ Claimant’s Supplementary Submission, ¶ 60.

54. The Claimant adds that in light of the challenge, Prof. Dr. Sachs should also have adopted a “*sensitive approach*” in his conflicts review and should have disclosed his appointment by White & Case in ICC Case No. 20965/MHM, a case that concluded five months before his appointment in this case.⁴⁴ Prof. Dr. Sachs only made that disclosure on December 1, 2021.

(2) The Respondent’s Position

55. The Respondent argues that there is no basis to suggest that Prof. Dr. Sachs did not give due consideration to the concerns raised by ADC and Mr. Meijer about his concurrent appointment in the ICC and ICSID arbitrations.⁴⁵ Prof. Dr. Sachs accepted his appointment in the ICSID arbitration after having “*received and reviewed*” the Claimant’s letter of November 25, 2020 urging him not to do so.

56. Notwithstanding the ICC Court Decision, the Respondent argues that it was “*reasonable for Prof. Dr. Sachs to take the view that his concurrent appointment in the parallel ICSID and ICC arbitrations would not be perceived by a reasonable third party as impairing his ability to exercise independent judgment, and to accept his nomination on this basis. The mere fact that Prof. Dr. Sachs accepted his nomination in the ICSID arbitration thus would not cause an objective third party to doubt his ability to exercise independent judgment.*”⁴⁶

57. The Respondent adds that the ICC Court was not convinced that the fact that Prof. Dr. Sachs accepted his appointment in the present arbitration without addressing Mr. Meijer’s stated concerns about his concurrent appointment in the ICC Arbitration creates an appearance of bias.⁴⁷

58. Finally, the Respondent submits that “*there are no links between Prof. Dr. Sachs and Georgia or White & Case that could possibly call into question his independence and impartiality.*”⁴⁸ The Respondent argues that Prof. Dr. Sachs’s appointment in ICC Case

⁴⁴ Claimant’s Supplementary Submission, ¶ 63.

⁴⁵ Respondent’s Reply, ¶ 24.

⁴⁶ Respondent’s Reply, ¶ 26.

⁴⁷ Respondent’s Reply, ¶ 27.

⁴⁸ Respondent’s Reply, ¶ 34.

No. 20965/MHM, which, according to the Respondent was his only appointment by White & Case beyond his appointment in the ICC Arbitration and the present arbitration, was made in 2016 in an entirely unrelated case that concluded in June 2020, several months before Prof. Dr. Sachs's appointments in the ICC Arbitration and this proceeding. It was therefore reasonable for Prof. Dr. Sachs to determine that this appointment was not of such a nature as to call into question his ability to exercise independent judgement, and there was therefore no need for him to disclose this prior appointment to the Claimant.⁴⁹

59. Finally, the Respondent highlights that the ICC Court confirmed that Prof. Dr. Sachs's "nominations by Respondent's counsel in two other cases, i.e. the ICSID Case and the unrelated ICC case 20965/MHM, do not give rise to reasonable doubts as to his impartiality."⁵⁰

D. THIRD GROUND: PROF. DR. SACHS PREJUDGED A DISPUTED ISSUE BETWEEN THE PARTIES AND ALIGNED HIMSELF WITH THE RESPONDENT'S VIEW (THAT ADC AND THE CLAIMANT ARE THE SAME PARTIES) IN HIS DISCLOSURE STATEMENT

(1) The Claimant's Position

60. The Claimant points to three errors in Prof. Dr. Sachs' disclosure to support the position that Prof. Dr. Sachs' disclosure shows that he prejudged one of the issues between the Parties:

(a) First, the Disclosure Statement averred that "the Claimant" appointed Professor Sachs in the ICC Arbitration. The Claimant in these ICSID proceedings, being Mr Meijer, had of course not appointed Professor Sachs as arbitrator in the ICC Arbitration to which he is not a party. As noted above, the claimant in the ICC Arbitration is ADC. In any event, it is the Respondent who appointed Professor Sachs in that arbitration.

(b) Second, the Disclosure Statement noted that Professor Sachs had been appointed in the "parallel" ICC case. However, that statement is also not correct. The arbitration would be "parallel" if (at a minimum) the identity of all of the parties were the same. However,

⁴⁹ Respondent's Reply, ¶ 29.

⁵⁰ Respondent's Reply, ¶ 36.

that is not the case given that Mr Meijer is not the (or a) party to the ICC Arbitration.

(c) Third, and importantly, the Disclosure Statement avers that the ICSID Arbitration and the ICC Arbitration are "between the same parties". This is not only wrong but, indeed, shows bias towards the case that has been advanced (quite forcefully) by the Respondent to date. This situation is of particular concern given that we are at a stage before the proceedings have fully commenced.⁵¹

61. The Claimant emphasizes that Prof. Dr. Sachs issued his disclosure immediately after confirming that he had reviewed the Claimant's letter dated November 25, 2020 in which he objected to the same characterization made by the Respondent in previous correspondence. According to the Claimant, in doing so Prof. Dr. Sachs revealed (intentionally or not) apparent prejudgment of an essential issue in dispute.⁵²

(2) The Respondent's Position

62. The Respondent argues that the misstatements in Prof. Dr. Sachs's original disclosure are "*simple errors which have no bearing whatsoever on Prof. Dr. Sachs's ability to exercise independent judgment in considering Mr. Meijer's claims.*"⁵³
63. The Respondent further submits that the ICC Arbitration and the present arbitration are indeed "parallel" proceedings because they were "*brought (i) concurrently, (ii) respectively by a local project company and by one of its shareholders, (iii) on the basis of the same underlying facts, and (iv) for the same economic harm.*"⁵⁴
64. Finally, the Respondent argues that the ICC Court was not persuaded that Prof. Dr. Sachs's disclosure in this arbitration creates the appearance of partiality. The ICC Court concluded that: "*Mr. Sachs' errors in his ICSID disclosure, which were obvious ones and swiftly corrected, do not evidence that he prejudged disputed issues between the parties.*"⁵⁵

⁵¹ Claimant's Proposal to Disqualify Klaus Sachs, ¶ 23.

⁵² Claimant's Supplementary Submission, ¶¶ 68-69.

⁵³ Respondent's Reply, ¶ 19.

⁵⁴ Respondent's Reply, ¶ 20.

⁵⁵ Respondent's Reply, ¶ 22

III. ANALYSIS OF THE CHAIR OF THE ADMINISTRATIVE COUNCIL

A. APPLICABLE RULES AND LEGAL STANDARDS FOR DISQUALIFICATION UNDER THE ICSID CONVENTION

65. The Chair has considered all of the Parties' submissions but will refer to them only inasmuch as they are relevant for the present Decision.
66. The Chair observes that the Claimant's Proposal to Disqualify Prof. Dr. Klaus Sachs was promptly submitted after the constitution of the Tribunal and neither party has contested its timeliness.
67. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal 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. 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.

68. In this case, the Parties disagree on the meaning of "manifest."
69. A number of decisions have concluded that the word "manifest" in Article 57 of the ICSID Convention means "evident" or "obvious,"⁵⁶ and that it relates to the ease with which the alleged lack of the required qualities can be perceived.⁵⁷
70. The disqualification proposal alleges that Prof. Dr. Klaus Sachs manifestly lacks the qualities required by Article 14(1) and in particular, impartiality.

⁵⁶ *Burlington*, ¶ 68, footnote 83; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), ¶ 61, footnote 43 ("Blue Bank"); *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser (December 13, 2013), ¶ 73, footnote 58 ("Repsol"); *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on the Proposal to Disqualify a Majority of the Tribunal (May 5, 2014), ¶ 39 ("Conoco").

⁵⁷ C. Schreuer, *The ICSID Convention*, Second Edition (2009), p. 1202, ¶¶ 134-154.

71. Article 14(1) of the ICSID Convention provides:

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

72. 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.

73. Impartiality refers to the absence of bias or predisposition towards a party.

74. 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.⁵⁸

75. The Parties 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*.” As a consequence, the subjective belief of the party proposing the disqualification is not enough to satisfy the requirements of the ICSID Convention.⁵⁹

76. The Claimant has referred to the IBA Guidelines on Conflicts of Interest in International Arbitration in his arguments. While these rules or guidelines may serve as useful references, the Chair is bound by the standard set forth in the ICSID Convention. Accordingly, this Decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

⁵⁸ *Burlington*, ¶ 66, *Blue Bank*, ¶ 59, *Repsol*, ¶ 71, *Conoco*, ¶ 52.

⁵⁹ *Burlington*, ¶ 67, *Blue Bank*, ¶ 60, *Repsol*, ¶ 72, *Conoco*, ¶ 53.

B. FIRST GROUND

77. The Claimant argues that, as a result of the ICC Court Decision dated March 5, 2021 accepting the challenge to Prof. Dr. Sachs and the publication of the Decision in GAR, a reasonable third party would conclude that Prof. Dr. Sachs objectively lacks the appearance of impartiality required by Article 14(1) of the ICSID Convention.
78. Prior conduct of an arbitrator in connection with a challenge and feelings of enmity of the challenged arbitrator towards one of the parties and/or their counsel may, in some circumstances, form the basis of a successful challenge proposal. For example, this was the case in *Burlington v. Ecuador*. However, the facts in this case are very different and do not evidence an appearance of lack of impartiality with respect to the Claimant and or his counsel.
79. In his Supplementary Submission, the Claimant points to several circumstances which allegedly create an appearance of impartiality with respect to the Claimant and its counsel. However, the Chair is not persuaded that the same reasoning could be applied to the facts at hand.
80. In *Burlington v. Ecuador* the challenged arbitrator, Prof. Orrego Vicuña, made allegations about the ethics of Ecuador’s counsel and it was Prof. Orrego Vicuña’s own statements that were found to manifestly evidence an appearance of lack of impartiality towards Ecuador and its counsel.⁶⁰
81. In contrast with Prof. Orrego Vicuña’s explanations in the *Burlington v. Ecuador* case, Prof. Dr. Sachs’ explanations in the present arbitration expressly state that he “*harbor[s] no feeling of enmity towards Mr. Meijer or his counsel. Being challenged is part of life as an arbitrator and there is nothing personal about such matters.*” The Chair does not believe that Prof. Dr. Sachs’ statement creates an appearance of lack of impartiality nor does it suggest an absence of impartiality. Equally, the surrounding circumstances do not create an appearance of lack of impartiality nor do they suggest an absence of impartiality

⁶⁰ *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, ¶¶ 72-75.

on the part of Prof. Dr. Sachs. To the contrary, Prof. Dr. Sachs' statement evidences a professional and impartial approach.

82. Finally, the Chair is also not persuaded by the Claimant's argument that publication of the ICC decision by GAR would cause reputational harm to Prof. Dr. Sachs, that it would cause enmity on the part of an arbitrator such as Prof. Dr. Sachs (as evidenced by his explanations of March 26, 2021) or that it would lead to an appearance of partiality on the part of Prof. Dr. Sachs. As correctly pointed out by Prof. Dr. Sachs, being challenged is part of being an arbitrator and is not personal.
83. In the Chair's view, a third party undertaking a reasonable evaluation of the circumstances described above would not conclude that they evidence a manifest appearance of lack of independence and impartiality, as required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected on this ground.

C. SECOND GROUND

84. The Claimant argues that Prof. Dr. Sachs lacked judgement as illustrated by his acceptance of the appointment in the present arbitration and his alleged refusal to address the Claimant's and ADC's concerns throughout the ICC challenge process. He adds that Prof. Dr. Sachs should have disclosed a previous appointment by Respondent's counsel.
85. The Claimant argues that these circumstances would inevitably lead a reasonable third party to conclude that there is an obvious appearance of lack of impartiality.
86. The Chair does not agree with this argument. First, and as a preliminary matter, Prof. Dr. Sachs is no longer acting on concurrent cases. Following the ICC Court Decision, Prof. Dr. Sachs sits as an arbitrator only in the present arbitration. In addition, both arbitrations were in the very early stages of formation, and submissions on the merits had not been filed when the challenges of Prof. Dr. Sachs were lodged. The issue of concurrent appointments and any potential asymmetry of information arising therefrom is moot.
87. In addition, when he accepted his appointment as arbitrator in the ICSID arbitration, Prof. Dr. Sachs expressly acknowledged that he had read and reviewed the Claimant's

letter of November 25, 2020 expressing concerns about his concurrent appointments in the ICC Arbitration and the present arbitration. Having reviewed the Parties' pleadings and the evidence on this issue, the Chair considers that Prof. Dr. Sachs acceptance of his appointment in the present arbitration does not lead to a manifest appearance of partiality.

88. Second, with respect to the allegation that Prof. Dr. Sachs did not give sufficient consideration to the Claimant's and/or ADC's invitations to comment on the issue of concurrent appointments in the ICC Arbitration, the Chair notes that Prof. Dr. Sachs engaged with the Parties every time he was invited to do so in the present arbitration.
89. Prof. Dr. Sachs made an initial disclosure together with his acceptance of his appointment on November 25, 2020. He submitted further comments on December 7, 2020, in response to the Claimant's questions dated December 4, 2020, regarding his disclosure of November 25, 2020, and corrections thereto dated December 1, 2020. Prof. Dr. Sachs also furnished explanations in response to the Parties' submissions, on March 26, 2021. The Chairman therefore considers that Prof. Dr. Sachs has provided ample answers to the Parties in the present arbitration.
90. Finally, the Claimant alleges that Prof. Dr. Sachs' failure to disclose his 2016 appointment by White & Case in ICC Case No. 20965/MHM,⁶¹ which concluded in June 2020, further illustrates his lack of judgement and partiality.
91. The Chair notes that the appointment in question happened over four years ago, by different parties, and that the case was concluded before the Request for Arbitration was filed. The Chair shares the ICC Court's view that Prof. Dr. Sachs' "*nominations by Respondent's counsel in [...], the ICSID Case, and the unrelated ICC case 20965/MHM, do not give rise to reasonable doubts as to his impartiality.*"
92. In light of the above, the Chair considers that a third party undertaking a reasonable evaluation of whether the circumstances create an appearance of lack of impartiality would

⁶¹ Claimant's Supplementary Submission, ¶ 63.

not conclude that they evidence a manifest lack of the independence and impartiality. Accordingly, the disqualification proposal must be rejected on this ground.

D. THIRD GROUND

93. The Claimant argues that the three alleged errors in Prof. Dr. Sachs' disclosure statement illustrate that he has prejudged key issues in dispute in this arbitration.

94. In response to such allegations, Prof. Dr. Sachs explained as follows:

I also disagree with the notion that I have prejudged issues in dispute. In my ICSID disclosure, I referred to the two arbitrations as being "parallel" but that reflected an understanding that the two arbitrations arise out of the same events, concern the same underlying facts and involve related Claimants (Mr. Meijer, as I understand it, being a minority shareholder of ABC), and are proceeding concurrently. If any part of that understanding turns out to be incorrect, however, then of course I would change my understanding. Further, that I stated in the ICSID disclosure that the two cases were "between the same Parties" was an obvious mistake (as also found in the ICC Challenge Decision) which I corrected and for which I apologize.

Finally, I reconfirm that I have always been and intend to continue to be independent and impartial.

95. Prof. Dr. Sachs has explained why he referred to the two proceedings as "parallel" and has explained that he made "an obvious mistake" in referring to the ICC Arbitration and the present arbitration as "between the same Parties." The Chair has no reason to believe that Prof. Dr. Sachs' explanations are disingenuous nor is he persuaded by the Claimant's argument that the errors made in Prof. Dr. Sachs' disclosure create an obvious appearance of lack of impartiality.

96. In addition, the Chair notes that in its Decision, the ICC Court notably concluded that "Mr. Sachs' errors in his ICSID Disclosure, which were obvious ones and swiftly corrected, do not evidence that he prejudged disputed issues between the same parties."⁶²

⁶² ICC Court Decision, ¶ 29.

97. The Chair shares those views. The errors made by Prof. Dr. Sachs in his disclosure were promptly corrected and would not lead a third party undertaking a reasonable evaluation of the facts to conclude that they evidence a manifest appearance of lack of the independence and impartiality required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected on this ground.

IV. DECISION

98. Having considered all the facts alleged and the arguments submitted by the Parties, and for the reasons stated above, the Chair rejects the Claimant's Proposal to Disqualify Prof. Dr. Klaus Sachs.

[Signed]

Chair of the ICSID Administrative Council

Mr. David Malpass