

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ABH HOLDINGS S.A.

Claimant

v.

UKRAINE

Respondent

(ICSID Case No. ARB/24/1)

**DECISION ON THE CLAIMANT'S PROPOSAL TO DISQUALIFY
PROF. SEAN MURPHY**

Chairman of the Administrative Council
Mr. Ajay Banga

Secretary of the Tribunal
Mr. Yuichiro Omori

Date: July 15, 2024

REPRESENTATION OF THE PARTIES

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TABLE OF CONTENTS

I. PROCEDURAL HISTORY..... 1

II. PARTIES’ ARGUMENTS 5

A. CLAIMANT’S POSITION 5

(1) Relevant legal standard..... 6

(2) Issues Allegedly in Dispute 6

(3) Circumstances casting into doubt Prof. Murphy’s ability to render an independent and impartial decision..... 8

i. Issue 1 – Prof. Murphy’s vote in favor of the IDI Declaration..... 8

ii. Issue 2 – Prof. Murphy’s statement during the GWU Webinar..... 10

iii. Issue 3 – Prof. Murphy’s US nationality 10

iv. Issue 4 – Prof. Murphy’s delayed disclosure and non-disclosure..... 11

B. RESPONDENT’S POSITION..... 12

(1) Relevant legal standard..... 12

(2) Issues Allegedly in Dispute 13

(3) Circumstances casting into doubt Prof. Murphy’s ability to render an independent and impartial decision..... 14

i. Issue 1 – Prof. Murphy’s vote in favor of the IDI Declaration..... 14

ii. Issue 2 – Prof. Murphy’s statement during the GWU Webinar..... 16

iii. Issue 3 – Prof. Murphy’s US nationality 17

iv. Issue 4 – Prof. Murphy’s delayed disclosure and non-disclosure..... 18

III. SUMMARY OF PROF. MURPHY’S STATEMENT 18

IV. DECISION BY THE CHAIR 20

1. Timeliness 20

2. The Applicable Legal Standard..... 21

3. Merits 22

V. DECISION..... 25

I. PROCEDURAL HISTORY

1. On December 29, 2023, ABH Holdings S.A. (“**ABH**” or “**Claimant**”) submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (“**ICSID**” or “**Centre**”) against Ukraine (“**Respondent**”).
2. On January 11, 2024, the Secretary-General of ICSID registered the Request pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”).
3. Following an exchange of correspondence between them, the Parties informed the Centre in a joint letter dated February 22, 2024, that they agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention, as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.
4. On February 26, 2024, following appointment by the Respondent, Prof. Sean Murphy, a national of the United States of America, accepted his appointment as arbitrator and submitted his *curriculum vitae*, declaration and accompanying statement, which were transmitted to the Parties.
5. On March 7, 2024, the Claimant requested that Prof. Murphy disclose the following information (“**Claimant’s Disclosure Request**”):

...any recordings, transcripts, notes, and/or materials which you have in your possession or to which you have access, which relate to the following items listed on your *curriculum vitae*:

- “Rights and Justice Today: Legacies, Challenges and Implications,” Workshop on “Placeless/Placeness: Ideas of Rights and Justice in Eastern Europe,” Center for Urban History, Lviv, Ukraine (Nov. 10, 2017);
- “The Importance of Ukraine’s Security for Europe,” George Washington University Law School, Washington, DC (Feb. 25, 2015);
- “Russia and Ukraine: What’s the Role of International Law?,” George Washington University Law School, Washington, DC (Aug. 28, 2014); and
- “International Court Jurisprudence on the Use of Force: Comparing Georgia v. Russia to the Iran-U.S. Oil Platforms Case,” American Bar Association

Section on International Law, Spring Meeting, Washington, DC (Apr. 15, 2009).

...any other speeches, lectures, roundtable discussions, publications, etc. that you have delivered, participated in, or written (as the case may be) in the past 10 years that relate to Russia, Ukraine, sanctions, and/or the use of force, that are not already listed on your *curriculum vitae* provided to ICSID...

...any and all connections you presently have with any State officials or organs of State of the United States of America, including but not limited to the United States Department of State.

6. The Claimant explained that the above disclosure was relevant to Prof. Murphy's independence and impartiality because the Claimant "anticipate[s] the Respondent to rely on arguments in relation to the current armed conflict between Russia and the Respondent, and/or the sanctions imposed by States in relation thereto", and in particular that "the Respondent may argue that its delicts against the Claimant, including the total expropriation of the Claimant's asset in the form of JSC 'Sense Bank', are somehow excused based on (i) the Respondent's position that Russia has acted wrongfully vis-à-vis the current armed conflict, and/or (ii) the sanctions imposed by third States (including the United States of America) in relation to the current armed conflict." Therefore the Claimant "consider[s] it to be critical to [his] independence and impartiality that [he] ha[s] not pre-judged any aspect of these issues that the Respondent may raise." The Claimant requested that Prof. Murphy provide the requested disclosure at his "earliest convenience."
7. On March 8, 2024, following appointment by the Claimant, Mr. Francis Xavier SC, a national of Malaysia, accepted his appointment as arbitrator and submitted his *curriculum vitae*, declaration and accompanying statement, which were transmitted to the Parties.
8. On March 11, 2024, Prof. Murphy made a number of disclosures in response to the Claimant's request of March 7, 2024 ("**1st Disclosure**"), which the Centre conveyed to the Parties.
9. On March 14, 2024, the Respondent notified ICSID that in addition to its Ministry of Justice, Quinn Emmanuel Urquhart & Sullivan UK LLP would represent it in this proceeding. It also submitted "brief comments on the attributes of the preferred presiding arbitrator."
10. On March 15, 2024, Prof. Murphy made an additional disclosure ("**2nd Disclosure**"). Prof. Murphy disclosed that he had voted in favor of an Institut de Droit International ("**IDI**").

or “**Institute**”) declaration entitled “Declaration of the Institute of International Law on Aggression in Ukraine” on March 1, 2022 (“**IDI Declaration**” or “**Declaration**”), noting however that he did not regard it as calling into question his independence or impartiality.

11. On the same date, the Centre informed the Parties that it took note of the Respondent’s “brief comments on the attributes of the preferred presiding arbitrator” provided in its communication to ICSID of March 14, 2024.
12. By letter of March 20, 2024, the Respondent provided explanations to the Claimant regarding the brief comments it submitted to ICSID on March 14, 2024, including the following remark:

...considering the very close ties of the Claimant’s shareholders to the highest levels of the Russian government, it is appropriate to exclude presiding arbitrators who are nationals of countries within the Russian sphere of influence...

In particular, the shareholders of Claimant are Russian individuals, with two out of three being subject to sanctions by EU, UK, and US authorities...
13. On March 22, 2024, the Claimant rejected both the premises and content of the Respondent’s March 20, 2024, communication.
14. On the same date, the Claimant filed a proposal for the disqualification of Prof. Murphy. Recognizing that the proposal was premature because the Tribunal had not been constituted yet, the Claimant nevertheless submitted the proposal and invited Prof. Murphy to voluntarily withdraw his appointment as arbitrator in this case. The Centre informed the Parties that the Claimant’s submission was premature and that it would transmit the submission to Prof. Murphy and the other appointed arbitrator for their information only.
15. On April 9, 2024, following appointment by agreement of the Parties, Prof. Bernard Hanotiau, a national of Belgium, accepted his appointment as presiding arbitrator. Prof. Hanotiau’s *curriculum vitae*, declaration and accompanying statement were transmitted to the Parties.
16. On the same date, the ICSID Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore constituted on that date, in accordance with Rule 21(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”). The Tribunal members are: Prof. Bernard Hanotiau, a national

of the Kingdom of Belgium, President, appointed by agreement of the Parties; Mr. Francis Xavier SC, a national of Malaysia, appointed by the Claimant; and Prof. Sean Murphy, a national of the United States of America, appointed by the Respondent. Mr. Yuichiro Omori, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

17. On April 9, 2024, the Claimant proposed the disqualification of Prof. Murphy pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 22 (“**Proposal**”).
18. On April 10, 2024, the Centre informed the Parties that, in accordance with ICSID Arbitration Rule 23(1), the Proposal would be decided by Prof. Hanotiau and Mr. Xavier. The Parties were also informed that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 22(2), subject to any contrary agreement the Parties might reach. The Centre also set forth the schedule for the Parties’ submissions on the Proposal, in accordance with ICSID Arbitration Rule 22.
19. On April 30, 2024, in compliance with that schedule, the Respondent filed its response and supporting documents (“**Respondent’s Response**”).
20. On May 3, 2024, Prof. Murphy filed a statement (“**Prof. Murphy Statement**”).
21. On May 9, 2024, the Respondent requested that ICSID (i) confirm that “final written submissions” under ICSID Arbitration Rule 22(1)(e) are limited to the Parties’ comments on Prof. Murphy’s Statement, and if that was not the case, (ii) grant the Respondent an opportunity to submit further comments on the Claimant’s final written submission.
22. On May 10, 2024, the Centre informed the Parties that the ICSID Arbitration Rules provided no limitations on the scope of these submissions, and noted that should a Party request leave to file additional submissions upon receipt and review of the final written submissions, such request would be considered in due course.
23. Also on May 10, 2024, the Parties filed their final written submissions on the Proposal simultaneously (respectively, “**Claimant’s Final Written Submission**” and “**Respondent’s Final Written Submission**”).

24. On May 14, 2024, the unchallenged arbitrators notified the Secretary-General that they were unable to decide on the Proposal. The Centre informed the Parties that the Proposal would therefore be decided by the Chair of the ICSID Administrative Council (“**Chair**”), in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 23.
25. On May 15, 2024, the Respondent sought leave to submit a response to the Claimant’s Final Written Submission, confined to the matters raised therein. On the same date, the Claimant objected to the Respondent’s request. On May 17, 2024, the Respondent responded to the Claimant’s objection.
26. By emails of May 24 and 28, 2024, the Centre invited (i) the Respondent to file any additional comments it may have arising from the Claimant’s Final Written Submission by May 30, 2024, and (ii) the Claimant to file additional comments arising from the Respondent’s additional comments, if any, by June 5, 2024.
27. On May 30, 2024, the Respondent submitted its additional comments (“**Respondent’s Additional Comments**”).
28. On June 5, 2024, the Claimant filed its additional comments (“**Claimant’s Additional Comments**”).

II. PARTIES’ ARGUMENTS

A. CLAIMANT’S POSITION

29. The Claimant identifies the following four issues which allegedly cast doubt on Prof. Murphy’s ability to render an impartial decision in this arbitration:
 - (i) Prof. Murphy’s vote in favor of the IDI Declaration (“**Issue 1**”).
 - (ii) Prof. Murphy’s statements as a speaker in a webinar organized by the George Washington University Law School around March 4, 2022, entitled “Russian Invasion of Ukraine and International Law Implications” (“GWU Webinar”) (“**Issue 2**”).
 - (iii) Prof. Murphy’s US nationality (“**Issue 3**”).
 - (iv) Prof. Murphy’s belated disclosure of Issue 1 and non-disclosure of Issue 2 (“**Issue 4**”).

30. It is the Claimant’s position that Issues 1, 2 and 4, either individually or collectively, cast a manifest doubt over Prof. Murphy’s ability to decide impartially in this proceeding, which is further compounded by Issue 3.¹

(1) Relevant legal standard

31. The Claimant agrees that Articles 14(1) and 57 of the ICSID are the provisions applicable in the present decision. The Claimant submits that arbitrators must be both “independent” and “impartial.”²

32. The Claimant acknowledges that the applicable test is an objective one based on a third party’s reasonable evaluation of the evidence, and therefore a party’s subjective belief is insufficient to justify disqualification.³ The Claimant adds that what is required to prove is appearance of dependence or bias, but not actual dependence or bias.⁴

33. On the requirement of “manifest”, the Claimant avers that this means evident or obvious.⁵

34. The Claimant accepts that the IBA Guidelines on Conflicts of Interest in International Arbitration (“**IBA Guidelines**”) provide insight on the arbitrators’ disclosure obligations,⁶ and notes that “depending on the particular facts and circumstances, the non-disclosure may itself give rise to a reasonable suspicion of bias, whether conscious or unconscious.”⁷

35. For the Claimant, challenge decisions are fact sensitive and there is no doctrine of precedent in international arbitration. Thus, the Respondent’s submitted cases are of limited assistance.⁸

(2) Issues Allegedly in Dispute

36. It is the Claimant’s case that the Respondent’s actions at issue, including the expropriation of the Claimant’s investment in Ukraine, are factually intertwined with the present armed

¹ Proposal, ¶¶ 3, 15, 92, 98.

² Proposal, ¶¶ 32-34.

³ Proposal, ¶ 35a.

⁴ Proposal, ¶¶ 35b, 36.

⁵ Proposal, ¶ 35c.

⁶ Proposal, ¶ 80; Claimant’s Final Written Submission, ¶ 43.

⁷ Proposal, ¶ 86, citing *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 L. Yves Fortier, Q.C., Arbitrator, 27 February 2012 (“*ConocoPhillips v. Venezuela*”), ¶ 60 (CL-24).

⁸ Claimant’s Final Written Submission, ¶¶ 7-10.

conflict between Russia and Ukraine and the consequence thereof, and, in particular in relation to the Respondent's stance that Russia has committed an "armed aggression against Ukraine." The Claimant asserts that the imposition of sanctions by Ukraine and third States in relation to such armed conflict is also intertwined with the same question.⁹

37. Specifically, the Claimant avers that, based on Ukraine's communications of August 25, 2023, and March 20, 2024, the Respondent will likely raise defenses on the following matters: (i) "the correctness of Ukraine's stance that Russia has committed an 'armed aggression against Ukraine,' and whether that can excuse Ukraine's wrongs against Claimant"; and (ii) "the lawfulness of the sanctions imposed by third States in relation to that purported 'armed aggression,' and whether that can excuse Ukraine's wrongs against Claimant."¹⁰
38. The Claimant rejects the Respondent's suggestion that the Request does not touch upon the above-mentioned matters and that the present armed conflict between Ukraine and Russia is irrelevant to this arbitration proceeding.¹¹ The Claimant explains that (i) the Request refers to the Respondent's domestic law relevant to the expropriation of the Claimant's assets which makes numerous references to the "state (states) that has (have) committed or is (are) committing an armed aggression against Ukraine" and provides that any person who suffers loss or damage as a result of the nationalization of a bank pursuant to the law will not have access to the usual civil remedies under Ukrainian law, but can only be compensated "with the funds of the state (states) that has (have) committed or is (are) committing an armed aggression against Ukraine"; and (ii) the present arbitration has already been labelled by pro-Ukrainian commentators as "countermeasures by Ukraine" *vis-à-vis* the acts of Russia in the present armed conflict. The Claimant further dismisses the Respondent's assertion that the Claimant must state unequivocally that it supports the lawfulness of the Russian invasion for these defenses to become a dispute. For the Claimant, the content of the Ukrainian national law alone is sufficient in showing the existence of a dispute, and it is the Respondent which bears the burden of proving that the expropriation of the Claimant's investment is justified.¹²

⁹ Proposal, ¶¶ 10-12.

¹⁰ Proposal, ¶¶ 13-14.

¹¹ Claimant's Final Written Submission, ¶ 12.

¹² Claimant's Final Written Submission, ¶¶ 13-14; Claimant's Additional Comments, ¶ 4.

(3) Circumstances casting into doubt Prof. Murphy’s ability to render an independent and impartial decision

i. Issue 1 – Prof. Murphy’s vote in favor of the IDI Declaration

39. The Claimant submits that Prof. Murphy’s vote in favor of the IDI Declaration gives rise to manifest doubts as to his ability to exercise impartial judgement, considering the issues already raised by Ukraine and likely to be raised further in the course of the proceeding.¹³
40. First, the Claimant asserts that the language and content of the IDI Declaration are aggressive (more than declarations published by IDI in response to other armed conflicts), inflammatory, and political.¹⁴ According to the Claimant, this is evidenced by the use of terms like “aggression”, “massive military intervention” and “firmly denounce.” In particular, the use of the word “aggression” in the title of the IDI Declaration (rather than the terms “[use of] force”) shows that the Declaration aims at advancing political objects (given that the United Nations Security Council - and not the IDI - can determine the existence of an “aggression”). The Claimant adds that some IDI members commented on the IDI Declaration as “political” which would “prejudice [the IDI’s] standing” and that it appeared to “assign blame” by “find[ing] [Russia] guilty.”¹⁵
41. The Claimant adds that the IDI Declaration also lays out its voters’ explicit view that Ukraine has rights of self-defense to take measures against the Russian acts, which Ukraine is likely to invoke in this arbitration.¹⁶
42. Second, the Claimant highlights that Prof. Murphy voted in favor of the IDI Declaration without providing any comments on it, in contrast to some other IDI members.¹⁷
43. Third, the Claimant relies on a decision rendered on March 6, 2024, by a majority of the tribunal in the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*

¹³ Proposal, ¶ 39.

¹⁴ Proposal, ¶ 40; Claimant’s Final Written Submission, ¶¶ 16-21. *See also* Annex A to the Claimant’s Final Written Submission and Claimant’s Final Written Submission, ¶ 25 noting, *inter alia*, that the IDI Declaration is not a mere academic statement and even if so, a statement made from an academic perspective does not preclude the possibility of it giving rise to an appearance of bias.

¹⁵ Proposal, ¶¶ 40-41; Claimant’s Final Written Submission, ¶¶ 16-17. *See also* Proposal, ¶¶ 16-20; Claimant’s Additional Comments, ¶ 5.

¹⁶ Proposal, ¶¶ 42, 46. *See also* Proposal, ¶ 18; Claimant’s Final Written Submission, ¶ 24.

¹⁷ Proposal, ¶¶ 43-45. *See also* Proposal, ¶¶ 19-21.

(Ukraine v. the Russian Federation) (“**Ukrainian Vessels**”) upholding Russia’s challenge against two arbitrators, Judge Wolfrum and Prof. McRae, based on their votes in favor of the IDI Declaration (“**Ukrainian Vessels Challenge Decision**”). The Claimant advances that while that case involved Russia directly, its holding remains applicable in this case.¹⁸

44. The Claimant states that an ICISD arbitrator can be disqualified for his or her prejudgment of the issues,¹⁹ and that the relevant facts and circumstances in the present proceeding are straightforward as follows: (i) the language of the IDI Declaration is excessively aggressive; (ii) the IDI Declaration has publicly declared Russia’s “international responsibility” and confirmed its exposure to “appropriate measures in accordance with international law and without prejudice to Ukraine’s right of self-defence”; (iii) Ukraine is a party to this case and appointed Prof. Murphy; and (iv) Ukraine will likely argue, in this arbitration, Russia’s “international responsibility” and its exposure to “appropriate measures in accordance with international law and without prejudice to Ukraine’s right of self-defence.” Thus, for the Claimant, there is a complete alignment between the positions that Ukraine is likely to take in this proceeding and the position taken by Prof. Murphy.²⁰ The Claimant avers that the facts that Prof. Murphy was a new member of the IDI at the time he signed the IDI Declaration and he was not involved in drafting its text are irrelevant.²¹
45. The Claimant distinguishes the present case from other investor-State arbitrations in which the challenged arbitrators’ votes in favor of the IDI Declaration were deemed insufficient to sustain the challenges because there was no nexus between the IDI Declaration and the subject-matter of these cases, which pre-date February 24, 2022.²²
46. Fourth, the Claimant rejects a reference by the Respondent in its Response to an article authored by Mr. Xavier because in the Claimant’s view, contrary to the Respondent’s contention, Mr. Xavier expresses no views on the lawfulness of Russia’s acts under

¹⁸ Proposal, ¶ 46. See also Proposal, ¶¶ 22-24; Claimant’s Final Written Submission, ¶ 26.

¹⁹ Proposal, ¶¶ 48-49, citing *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, 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 v. Argentina*”), ¶¶ 44-45 (CL-8).

²⁰ Proposal, ¶¶ 50-51.

²¹ Claimant’s Final Written Submission, ¶ 28.

²² Proposal, ¶ 51; Claimant’s Final Written Submission, ¶ 27.

international law, the consequence thereof under international law, or the lawfulness of Ukraine's acts taken in response thereto under international law.²³

ii. Issue 2 – Prof. Murphy's statement during the GWU Webinar

47. The Claimant submits that Prof. Murphy's remarks at the GWU Webinar also give rise to an appearance of bias and prejudgment of the issues arising in this arbitration.²⁴
48. In particular, the Claimant argues that Prof. Murphy's statement that "sanctions against assets of Russian officials and business leaders, sometimes referred to as oligarchs" by "other States" were an example of "acts of retorsion and countermeasures" shows that Prof. Murphy has prejudged two matters which are likely to be key in this case, namely (i) the sanctions against Messrs. Aven and Fridman imposed by third States, and (ii) the effects under international law (if any) of the armed conflict between Russia and Ukraine.²⁵ For the Claimant, whether or not the GWU Webinar was of purely academic nature is irrelevant.²⁶
49. The Claimant accepts the Respondent's contention that Prof. Murphy used the word "might" prior to speaking about "countermeasures" and "retortions", and that most of Prof. Murphy's remarks during the GWU Webinar do not express his personal views. However, it argues that Prof. Murphy's remarks about "countermeasures" and "retortions" are his personal opinions²⁷ and that the meaning of the word "might" is context dependent.²⁸

iii. Issue 3 – Prof. Murphy's US nationality

50. The Claimant submits that Prof. Murphy's United States nationality, in conjunction with the other circumstances invoked, reinforces the appearance of bias and his partiality.²⁹
51. The Claimant notes that the United States have firmly supported Ukraine and opposed Russia in the current conflict, including by imposing sanctions on Russian nationals like Messrs. Aven and Fridman. This manifests the position of the United States that its interests

²³ Claimant's Final Written Submission, ¶ 48.

²⁴ Proposal, ¶ 53.

²⁵ Proposal, ¶¶ 54-60. *See also* Proposal, ¶¶ 25-27.

²⁶ Claimant's Final Written Submission, ¶ 30. *See also* Claimant's Additional Comments, ¶ 6.

²⁷ Claimant's Final Written Submission, ¶¶ 31-32.

²⁸ Claimant's Final Written Submission, ¶¶ 33-40.

²⁹ Proposal, ¶ 61.

and Ukraine's interests are the same.³⁰ According to the Claimant, the lawfulness of the sanctions imposed by third States (including the US) is a key issue likely to arise in this arbitration, and Prof. Murphy is not in a position to fairly assess it because, due to his nationality, he must abide by US sanctions.³¹

52. The Claimant further notes that Article 39 of the ICSID Convention and ICSID Arbitration Rule 13(2)-(3) confirm that arbitrators may be seen as siding with countries of their nationality or their co-nationals.³² It also states that the Respondent admits in its letter of March 20, 2024 that US nationality is a relevant factor for arbitrators' (non-)qualifications in this case, because using the Respondent's own words, Ukraine must be within the United States' "sphere of influence".³³

iv. Issue 4 – Prof. Murphy's delayed disclosure and non-disclosure

53. The Claimant takes issue with Prof. Murphy's initial non-disclosure of his voting in favor of the IDI Declaration and claims that such a delayed disclosure gives rise to a manifest (or at the minimum, reasonable) appearance or suspicion of bias.³⁴ The Claimant avers that the IDI Declaration was not a general legal opinion but rather contains an opinion which is directly applicable to a specific factual situation in this arbitration.³⁵
54. The Claimant also criticizes Prof. Murphy's failure to disclose his speech at the GWU Webinar, which allegedly contains Prof. Murphy's opinion directly applicable to a specific factual situation in this arbitration.³⁶

³⁰ Proposal, ¶¶ 65-66. *See also* Proposal, ¶¶ 28-30.

³¹ Proposal, ¶¶ 74-76.

³² Proposal, ¶¶ 63-64.

³³ Proposal, ¶¶ 67-73.

³⁴ Proposal, ¶¶ 77, 82-92, 98.

³⁵ Claimant's Final Written Submission, ¶¶ 42-44. *See also* Claimant's Final Written Submission, ¶¶ 45-47; Claimant's Additional Comments, ¶ 7.

³⁶ Proposal, ¶¶ 27, 93-97, 98. *See also* Proposal, ¶ 27; Claimant's Final Written Submission, ¶¶ 44-47; Claimant's Additional Comments, ¶ 7.

B. RESPONDENT'S POSITION

(1) Relevant legal standard

55. The Respondent agrees that the applicable rules are Articles 14(1) and 57 of the ICSID Convention and that “manifest” means “evident” or “obvious.”³⁷
56. The Respondent underscores that the applicable threshold of “manifest lack” under the ICSID Convention is different from the one under the UNCITRAL Arbitration Rules (“**UNCITRAL Rules**”) and the IBA Guidelines, which adopt a lower standard of “justifiable doubts.” The Respondent stresses that “manifest” lack must be shown by facts and not mere inference. According to the Respondent, only six (6) out of 111 challenges against ICISD arbitrators were upheld between 1982 and 2023, none of which were based solely on the challenged arbitrators’ previous expressed opinion on legal issues.³⁸ An arbitrator’s public statements which do not refer to the approach of the respondent State, the specific conduct at stake in that arbitration, or the treatment of foreign investors are insufficient to uphold the disqualification proposal.³⁹
57. Focusing on the questions of issue conflict and prejudgment, the Respondent argues that the applicable standard for disqualifying an arbitrator on such a basis is high. According to the IBA Guidelines, an arbitrator’s legal opinion which is not “focused on the case” is a Green List item, whereas a scenario in which “[t]he arbitrator has publicly advocated a position on

³⁷ Respondent’s Response, ¶ 15.

³⁸ Respondent’s Response, ¶¶ 16- 19, referring to the following cases: *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 (“*2013 Blue Bank v. Venezuela*”), ¶¶ 66-69 (CL-3); *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v. The Republic of Kazakhstan*, ICSID Case No ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, March 20, 2014, ¶¶ 78-91 (RLA-7); *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 v. Ecuador*”), ¶¶ 79-80 (CL-4); *Optima Ventures LLC, Optima 7171 LLC and Optima 55 Public Square LLC v. United States of America*, ICSID Case No. ARB/21/11, Decision on the Claimant’s Proposal to Disqualify Mr. M. as Arbitrator, December 20, 2022 (“*Optima v. USA*”), ¶ 85 (RLA-8); *Imeks Insaat Makina Elektrik Konstrüksiyon Sanayi Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/21/23, Decision on the Claimant’s Proposal for the Disqualification of Prof. Dr. Rolf Knieper, October 31, 2023, ¶ 78 (CL-10); *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision of the Chairman of the ICSID Administrative Council on the Disqualification of Prof. Lalive and Judge Bedjaoui, February 21, 2006 (RLA-9).

³⁹ Respondent’s Response, ¶ 20, citing *Imeks Insaat Makina Elektrik Konstrüksiyon Sanayi Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/21/23, Decision on the Claimant’s Proposal for the Disqualification of Prof. Dr. Rolf Knieper, October 31, 2023, ¶ 93 (CL-10).

the case” triggers the arbitrator’s disclosure obligations.⁴⁰ The Respondent avers that a number of ICSID arbitration cases support this position⁴¹ and further cites decisions rendered by international courts and tribunals, as well as by arbitral tribunals under other rules and national courts which dismissed challenges brought against member(s) of their decision-making body on the basis of their prior statements or similar reasons.⁴²

58. As to arbitrators’ disclosure obligations, the Respondent states that non-disclosure would indicate a manifest lack of independence or impartiality “only if the facts or circumstances surrounding such non-disclosure are of such gravity....as to call into question the ability of the arbitrator to exercise independent and impartial judgment.”⁴³

(2) Issues Allegedly in Dispute

59. The Respondent emphasizes that the Claimant’s arguments are speculative, as they rely on issues that will “likely be” in dispute but these assumptions find no support in the Parties’ statements to date. The Respondent also notes that the Claimant has not stated that it intends

⁴⁰ Respondent’s Response, ¶¶ 21-24.

⁴¹ Respondent’s Response, ¶¶ 26-36, referring to the following cases: *Urbaser v. Argentina*, ¶¶ 20-24, 40, 44; *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser, December 13, 2013 (“*Repsol v. Argentina*”), ¶¶ 25-34, 77, 81 (RLA-16); *Blue Bank International & Trust Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Motion to Disqualify Alvaro Castellanos Howell, March 2, 2018 (“*2018 Blue Bank v. Venezuela*”), ¶¶ 31-32, 87-89 (RLA-17); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007 (“*Suez v. Argentina*”), ¶¶ 12, 36-37 (RLA-2); *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify Ibrahim Fadlallah, November 12, 2009, ¶¶ 15, 31-35 (RLA-19); *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Decision on Claimant’s Proposal to Disqualify Professor Philippe Sands, July 11, 2014, ¶¶ 65, 119-120 (RLA-20); *Optima v. USA*, ¶¶ 16, 33-34, 100.

⁴² Respondent’s Response, ¶¶ 37-46, citing ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of January 30, 2004, ¶ 8 (RLA-21); *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the Defence Request for the Disqualification of a Judge, June 5, 2012, ¶¶ 2, 5, 13-14, 17-20 (RLA-22); citing *Prosecutor v. Dyllo*, Case No. ICC-01/04-01/06, Decision on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song, June 11, 2013, ¶¶ 13-15, 39 (RLA-23); *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, Judgment on Appeal, November 28, 2007, ¶¶ 76-77, 79 (RLA-24); SCC Arbitration 2011/094 (RLA-25); and *ST-AD v. Bulgaria ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Decision of the Thuringian Higher Regional Court in Jena, November 20, 2013, ¶ 31 (RLA-26).

⁴³ Respondent’s Response, ¶¶ 118-119, citing *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, December 23, 2010, ¶ 40 (RLA-36).

to argue that Russia's invasion of Ukraine was lawful under international law, which is a necessary presupposition for a legal dispute in this case on that point to exist.⁴⁴

(3) Circumstances casting into doubt Prof. Murphy's ability to render an independent and impartial decision

i. Issue 1 – Prof. Murphy's vote in favor of the IDI Declaration

60. The Respondent objects to the Claimant's position that the IDI Declaration and Prof. Murphy's vote in favor of it *per se* gives rise to manifest doubt as to his impartiality.
61. First, the Respondent argues that the subject matter of the IDI Declaration is dissimilar to the subject matter of this arbitration. According to the Respondent, the subject matter of the present dispute is the legitimacy of the measures taken by Ukraine and its alleged breach of the BIT *vis-à-vis* the Claimant's investment in the Ukrainian territory. Indeed, the Request does not touch upon the questions of the legality of Russia's invasion of Ukraine or any other issues contemplated in the IDI Declaration, but rather it distances itself from those questions. Conversely, the IDI Declaration addresses principles of international law, the prohibition of the use of force, the equal rights of peoples and international humanitarian law, and does not refer to international investment law, international arbitration, concepts of sanctions or legitimacy of specific measures taken by Ukraine from the perspective of international investment law.⁴⁵ When Prof. Murphy voted for the IDI Declaration, the present arbitration had not commenced and he voted as an effort to "apply certain aspects of international law to the facts as then understood, amidst fast-changing circumstances, including a call for a peaceful resolution of the situation".⁴⁶ It is therefore irreconcilable for the Claimant to argue that the IDI Declaration concerns the very same specific subject matter as in this arbitration.⁴⁷
62. Second, it is the Respondent's position that the IDI Declaration and Prof. Murphy's affirmative vote do not show his prejudgment on the permissibility or legality of

⁴⁴ Respondent's Response, ¶¶ 9-10, 59; Respondent's Additional Comments, ¶ 9. *See also* Respondent's Additional Comments, ¶ 8, dismissing the Claimant's Final Written Submission, ¶ 13 in which the Claimant effectively argued that the content of the Ukrainian national law alone, referred to in the Request, is sufficient in showing the existence of a dispute and that pro-Ukrainian commentators had labelled the present arbitration in the context of countermeasures by Ukraine.

⁴⁵ Respondent's Response, ¶¶ 52-54. *See also* Respondent's Additional Comments, ¶¶ 14-15.

⁴⁶ Respondent's Additional Comments, ¶¶ 7, 14.

⁴⁷ Respondent's Additional Comments, ¶ 6, citing the Claimant's Final Written Submission, ¶¶ 9, 12.

countermeasures in the context of investor-State arbitration because, *inter alia*, the IDI Declaration does not indicate what sort of measures those would be or whether such defense would be permissible in such context.⁴⁸ Prof. Murphy confirmed in his Statement that he had no involvement in drafting the IDI Declaration and he had no intention of addressing or resolving any legal issue, including those at stake in this arbitration.⁴⁹

63. Third, the Respondent asserts that the language and tone of the IDI Declaration shows no bias against Russia or Russian nationals as the IDI Declaration makes no general condemnations of Russia or its nationals, but rather it simply assesses, from an academic perspective, Russia's responsibility in relation to the "ongoing Russian military operations in Ukraine" at the relevant time, without expressing specific support for Ukraine. For the Respondent, the IDI Declaration is not dissimilar to views made by other individuals and organizations⁵⁰ or to the IDI's other declarations in response to other armed conflicts.⁵¹
64. The Respondent rejects the Claimant's contention that the use of the word "aggression" indicates the political nature of the Declaration.⁵² The Respondent adds that the Claimant places disproportionate weight on the comments made by some IDI members which, when examined closely, offer no real support that the IDI Declaration was "aggressively worded" so as to indicate bias against Russia or its citizens.⁵³
65. Fourth, the Respondent highlights that the IDI Declaration was neither specific nor clear.⁵⁴ For the Respondent, Prof. Murphy's vote, which was adopted in the academic context and pre-dates the measures relied on in the Request, does not indicate that he will not approach the issues in this proceeding with an open, impartial mind.⁵⁵
66. Fifth, the Respondent dismisses the Claimant's reliance on the Ukrainian Vessels Challenge Decision because: (i) the applicable standard in that case was lower; (ii) that decision was rendered in the context of an inter-State dispute; (iii) this case involves a commercial entity

⁴⁸ Respondent's Response, ¶¶ 55-58.

⁴⁹ Respondent's Final Written Submission, ¶ 4.

⁵⁰ Respondent's Response, ¶¶ 60-61.

⁵¹ Respondent's Additional Comments, ¶¶ 10-12.

⁵² Respondent's Response, ¶¶ 63-64.

⁵³ Respondent's Response, ¶¶ 65-68. *See also* Respondent's Additional Comments, ¶ 13.

⁵⁴ Respondent's Response, ¶¶ 69-75, citing *Urbaser v. Argentina*, ¶¶ 45, 51-52, 54.

⁵⁵ Respondent's Additional Comments, ¶¶ 15-16.

and Ukraine as a host state for foreign direct investment; (iv) the nature and subject matter of the two disputes are fundamentally different; and (v) the Decision does not assess whether the IDI Declaration shows a negative predisposition against Russia or its nationals.⁵⁶

67. The Respondent relies on decisions rejecting challenges brought by Russia in three investor-State arbitrations and asserts that “there is established jurisprudence to the effect that the IDI Declaration solely comprises of a high-level academic legal assessment, does not discuss Russia’s responsibility in the investor-State arbitration context, and has no bearing on the conduct or impartiality of arbitrators”.⁵⁷
68. Lastly, the Respondent adds that Mr. Francis Xavier publicly wrote about the Ukraine-Russia war in an undisclosed article and condemns the Claimant’s “cherry-pick[ing]” tactics.⁵⁸

ii. Issue 2 – Prof. Murphy’s statement during the GWU Webinar

69. The Respondent rejects the Claimant’s contention that Prof. Murphy’s remarks during the GWU Webinar cast doubt on his impartiality in this proceeding.
70. First, the Respondent avers that the circumstances and context surrounding the GWU Webinar clearly showcase its purely academic nature as it was organized by a university with the subject of the “international law implications of Russia’s invasion of Ukraine”.⁵⁹
71. Second, in the Respondent’s view, Prof. Murphy’s statements during the GWU Webinar are balanced and impartial, and do not contain any personal criticism towards the actions of Russia, the Claimant and its shareholders, or any specific individuals, nor do they suggest any prejudgment of the matters at issue in this arbitration. During the GWU Webinar, Prof. Murphy (i) made it clear that these statements were not his personal opinion; (ii) explained Russia’s positions on that topic; and (iii) focused on factual recounting of recent events.⁶⁰

⁵⁶ Respondent’s Response, ¶¶ 76-85.

⁵⁷ Respondent’s Response, ¶¶ 86-90, referring to *Akhmetov v. Russia*; *JSC Privatbank v. Russia*; *Aeroporto Belbek and Mr. Kolomoisky v. Russia*. See also Respondent’s Additional Comments, ¶ 5.

⁵⁸ Respondent’s Response, ¶¶ 91-94. See also Respondent’s Additional Comments, ¶¶ 24-25.

⁵⁹ Respondent’s Response, ¶¶ 96-97. See also Respondent’s Additional Comments, ¶ 15.

⁶⁰ Respondent’s Response, ¶¶ 98-99; Respondent’s Final Written Submission, ¶ 4.

72. Third, the Respondent stresses that what Prof. Murphy said at the GWU Webinar was that States’ conduct “might [be] characterize[d]...as either retorsion...or...countermeasures” which merely indicates a possibility or likelihood among several alternative possibilities. Prof. Murphy also merely laid out the relevant legal principle concerning countermeasures, without opining on its specific application and leaving that decision to be assessed on a case-by-case basis. The Respondent notes that Prof. Murphy did not mention the sanctions imposed on the Claimant’s shareholders during the GWU Webinar,⁶¹ and that when Prof. Murphy made his statements at the GWU Webinar, the present arbitration had not commenced.⁶²

iii. Issue 3 – Prof. Murphy’s US nationality

73. The Respondent challenges the Claimant’s assertion that Prof. Murphy’s US nationality reinforces his alleged appearance of bias.

74. First, the Respondent avers that Prof. Murphy’s US nationality bears no relevance in this case because Article 39 of the ICSID Convention and Arbitration Rule 13(2)-(3) do not limit US citizens from being an arbitrator in this proceeding. Additionally, the Respondent’s March 20, 2024, letter does not discuss disqualification issues.⁶³

75. Second, the Respondent reiterates that the United States’ stance on Russia is not at issue in this arbitration. There is no support in the Claimant’s contention that “the United States considers Ukraine’s interests and its own one the same.”⁶⁴

76. Third, the Respondent claims that individuals have the right to hold divergent and independent views from those expressed by the government of the United States. Prof. Murphy’s ability to hear witnesses or consider issues of international law impartially is, the Respondent’s states, unaffected.⁶⁵

⁶¹ Respondent’s Response, ¶¶ 100-104. *See also* Respondent’s Additional Comments, ¶¶ 17-20.

⁶² Respondent’s Additional Comments, ¶¶ 6-7.

⁶³ Respondent’s Response, ¶¶ 107-109. *See also* Respondent’s Additional Comments, ¶ 26.

⁶⁴ Respondent’s Response, ¶ 110.

⁶⁵ Respondent’s Response, ¶¶ 111-112. *See also* Respondent’s Final Written Submission, ¶ 4.

77. Fourth, the Respondent points out the inconsistency in the Claimant’s position when it refers to alleged bias against Russia as a basis of the Proposal, but at the same time it distances itself from Russia by insisting that it is a Luxemburg national having an international character.⁶⁶

iv. Issue 4 – Prof. Murphy’s delayed disclosure and non-disclosure

78. The Respondent first asserts that the fact that Prof. Murphy did not initially disclose his vote for the IDI Declaration is insufficient to justify his disqualification. For the Respondent, Prof. Murphy had no obligation to disclose his vote because it did not relate to the same facts or parties in this arbitration. The Respondent also underscores that Prof. Murphy promptly disclosed the information to the Claimant in the 2nd Disclosure.⁶⁷

79. Second, the Respondent contends that Prof. Murphy could have reasonably believed that his disclosure was not required considering the legal and factual circumstances of the present dispute as well as the content and nature of the statement Prof. Murphy made in the GWU Webinar. The Respondent adds that even if that assessment is not proven correct, there are no circumstances surrounding his non-disclosure that would warrant his disqualification.⁶⁸

III. SUMMARY OF PROF. MURPHY’S STATEMENT

80. In his Statement on May 3, 2024, Prof. Murphy addresses the four grounds raised by the Claimant in the Proposal.

81. Concerning his vote in favor of the IDI Declaration, Prof. Murphy does not consider it to call into question his impartiality. Prof. Murphy states (i) that the Declaration was adopted five days after February 24, 2022, when he was still a relatively new IDI member (elected in August 2021), (ii) that he was not involved in the drafting of the text of the IDI Declaration, and (iii) that it was his first time voting on such type of resolutions. In this regard, Prof. Murphy ultimately considered it unobjectionable for the IDI, an academic institution devoted to international law, to express its position by applying certain aspects of international law to the facts as then understood, amidst fast-changing circumstances. He points out that

⁶⁶ Respondent’s Response, ¶¶ 113-116.

⁶⁷ Respondent’s Response, ¶¶ 122-128. *See also* Respondent’s Additional Comments, ¶¶ 21-23.

⁶⁸ Respondent’s Response, ¶¶ 129-131. *See also* Respondent’s Additional Comments, ¶¶ 21-23.

the IDI Declaration was adopted several months before Ukraine took measures discussed in this arbitration, and it does not seek to address or resolve the types of issues that might arise in the course of this arbitration.⁶⁹

82. As for his remarks at the GWU Webinar, Prof. Murphy does not believe that it affects his impartiality in this arbitration. He avers that the Webinar took place on March 4, 2022, shortly after February 24, 2022 and just after the adoption of the IDI Declaration. It was one of the seminars that the George Washington University Law School holds periodically where law professors speak to students about current events. Prof. Murphy explains that he did not take any position on whether Russia had violated rules regarding use of force by States or whether Russia had committed an aggression. He rather referred to views of other States, international organizations or scholars on the use of force by Russia, and presented to the audience Russia's position on the same topic. When referring to States' actions in support of Ukraine, Prof. Murphy stated that "you might characterize what other States are doing" as either "retorsion" or as "countermeasures", which must fulfill certain requirements for being lawful. Prof. Murphy thus concludes that he was presenting and locating for the students the facts and legal issues in play at the time with respect to the use of force and non-forcible actions, while avoiding any legal characterization of his own.⁷⁰
83. In relation to his United States nationality, Prof. Murphy considers that he is fully capable of acting independently and impartially in this arbitration. While he did serve in the US government early in his career, he has been a full-time law professor for more than 25 years and at times he criticizes the US government in his academic writings. Prof. Murphy adds that the US Constitution protects the freedom of expression and that the US sanctions laws and regulations do not seek to control the views of US nationals.⁷¹
84. With regard to his alleged late and/or non-disclosure of his vote on the IDI Declaration and his participation in the GWU Webinar, Prof. Murphy states that neither circumstance calls his impartiality into question. Regarding the IDI Declaration, Prof. Murphy explains that he decided to disclose it in the 2nd Disclosure because he saw in the press a report that the

⁶⁹ Prof. Murphy Statement, pp. 1-2.

⁷⁰ Prof. Murphy Statement, pp. 2-3.

⁷¹ Prof. Murphy Statement, pp. 3-4.

IDI Declaration had been raised in challenges in different investor-State cases. Prof. Murphy further explains that he omitted to disclose the GWU Webinar because he did not remember it (being one of the many seminars that the University organizes for its students and being similar to his teaching classes).⁷²

85. Prof. Murphy concludes that he remains open-minded about any facts or arguments that might be placed by the Parties before this Tribunal, and that he is committed to act entirely impartially and independently in this arbitration, and to take full and fair account of all facts and legal arguments brought forward by the Parties.⁷³

IV. DECISION BY THE CHAIR

86. The Chair has considered all of the Parties' submissions and Prof. Murphy's statement, and will refer to them to the extent that they are relevant for the present Decision.

1. Timeliness

87. ICSID Arbitration Rule 22(1)(a) reads as follows:

(1) A party may file a proposal to disqualify one or more arbitrators ('proposal') in accordance with the following procedure:

(a) the proposal shall be filed after the constitution of the Tribunal and within 21 days after the later of:

(i) the constitution of the Tribunal; or

(ii) the date on which the party proposing the disqualification first knew or first should have known of the facts on which the proposal is based.

88. Here, the Tribunal was constituted on April 9, 2024, and the Proposal was filed on the same date. Therefore, the Proposal is timely.

⁷² Prof. Murphy Statement, pp. 1-2.

⁷³ Prof. Murphy Statement, pp. 2-4.

2. The Applicable Legal Standard

89. Article 58 of the ICSID Convention provides that a challenge to an arbitrator, where the unchallenged arbitrators are equally divided, will be decided by the Chair of the Administrative Council:

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

90. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads 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.

91. The disqualification proposed in this case alleges that Prof. Murphy manifestly lacks the qualities required by Article 14(1) of the ICSID Convention, which provides:

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

92. 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.⁷⁴

⁷⁴ 2013 *Blue Bank v. Venezuela*, ¶58; *Burlington v. Ecuador*, ¶ 65; *Repsol v. Argentina*, ¶ 70; *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 v. Guinea*”), ¶ 56 (CL-9).

93. 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.⁷⁵
94. 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.⁷⁶ Such appearance of dependence or bias has to be “manifest”, or in other words “evident” or “obvious” according to prior decisions, which relates to the ease with which the alleged lack of the required qualities can be perceived.⁷⁷
95. 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.⁷⁸ In other words, a finding of apprehension of bias must be based on facts and cannot be based on speculation, presumption, or the subjective belief of the requesting party.⁷⁹
96. The Parties have referred to other sets of standards and guidelines in their arguments, including the IBA Guidelines. Regardless of the actual relevance and/or weight assigned to these standards and guidelines, 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.

3. Merits

97. The Claimant does not question Prof. Murphy’s high moral character or that he has competence in the fields of law, commerce, industry, or finance, as required by Article 14(1)

⁷⁵ *BSG v. Guinea*, ¶ 57, citing, *inter alia*, *Suez v. Argentina*, ¶29; *Burlington v. Ecuador*, ¶ 66; *2013 Blue Bank v. Venezuela*, ¶59.

⁷⁶ *Optima v. USA*, ¶ 66, citing, *inter alia*, *Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine*, ICSID Case No. ARB/21/15, Decision on the Respondent’s Proposal to Disqualify Dr. Stanimir A. Alexandrov of April 15, 2022 (“*Misen v. Ukraine*”), ¶105 (RLA-35). *See also* *BSG v. Guinea*, ¶ 57.

⁷⁷ *Optima v. USA*, ¶ 65, citing, *inter alia*, *2013 Blue Bank v. Venezuela*, ¶61; *Misen v. Ukraine*, ¶101.

⁷⁸ *BSG v. Guinea*, ¶ 58; *Misen v. Ukraine*, ¶ 106, citing, *inter alia*, *2018 Blue Bank v. Venezuela*, ¶79; *2013 Blue Bank v. Venezuela*, ¶ 60.

⁷⁹ *Misen v. Ukraine*, ¶ 105, citing, *inter alia*, *2018 Blue Bank v. Venezuela*, ¶79; *BSG v. Guinea*, ¶ 58.

of the ICSID Convention. It rather challenges Prof. Murphy's reliability to exercise independent and impartial judgement in the present proceeding.⁸⁰

98. The Claimant's case rests on the allegation that Prof. Murphy, through his past actions or inaction, or by virtue of his nationality, cannot be relied on to exercise impartial and independent judgement on key issues that the Tribunal will be asked to rule on.⁸¹

99. The Claimant summarizes these key issues as follows: "(i) the correctness of Ukraine's stance that Russia has committed an 'armed aggression against Ukraine,' and whether that can excuse Ukraine's wrongs against Claimant; and (ii) the lawfulness of the sanctions imposed by third States in relation to that purported 'armed aggression,' and whether that can excuse Ukraine's wrongs against Claimant."⁸²

100. The Claimant contends that it is clear from the following circumstances that these key issues are in dispute in this arbitration: (i) the Respondent's prior statements, (ii) the Respondent's alleged expropriation of the Claimant's investment under Ukrainian law, (iii) comments made by pro-Ukraine commentators regarding the present arbitration, and (iv) the Respondent's letter of March 20, 2024.⁸³

101. The Respondent noted in its Response that "[t]he Claimant's assertions in relation to arguments that the Respondent 'is likely to raise' during the course of this arbitration are speculative," and that "[t]hese assumptions find no support in the parties' statements to date."⁸⁴

⁸⁰ See Proposal, ¶¶ 4, 38, 52; Claimant's Final Written Submission, ¶ 51.

⁸¹ See Proposal, ¶¶ 3-4, 15, 38, 39, 47, 51-53, 55, 58, 60, 66, 74-76; Claimant's Final Written Submission, ¶ 27.b, 37, 40, 44.

⁸² Proposal, ¶ 13, under Section II.B entitled "The Key Issues Likely in Dispute Relevant for this Proposal". See also Proposal, ¶¶ 5, 12, 46, 50-51, 55, 58, 60, 70, 74; Claimant's Final Written Submission, ¶ 14, 37; as well as Claimant's Disclosure Request, ¶¶ 7-8, in which the Claimant noted that "consider[s] it to be critical to [Prof. Murphy's] independence and impartiality that [he] ha[s] not pre-judged any aspect of these issues that the Respondent may raise" and that "[it] anticipate[s] the Respondent to rely on arguments in relation to the current armed conflict between Russia and the Respondent, and/or the sanctions imposed by States in relation thereto. In particular, but without limitation, [the Claimant] anticipate[s] the Respondent may argue that its delicts against the Claimant, including the total excused based on (i) the Respondent's position that Russia has acted wrongfully *vis-à-vis* the current armed conflict, and/or (ii) the sanctions imposed by third States (including the United States of America) in relation to the current armed conflict".

⁸³ Proposal, ¶ 14; Claimant's Final Written Submission, ¶¶ 12-13, 15.

⁸⁴ Respondent's Response, ¶ 9.

102. The Chair notes that, at the time of this Decision, the Request is the only written pleading submitted by the Parties on the substance of the dispute. The Respondent has neither raised nor indicated its intention to raise, as defenses, any of the issues invoked or relied upon by the Claimant in the Proposal. Neither Party has yet put forward in full its position on the substance of the dispute in this arbitration.

103. Based on the record available at the time of this Decision, with only the Request on the record and no other pleading, the Chair is not in position to assess whether the “key issues” invoked by the Claimant in the Proposal will or will not have to be decided by the Tribunal in the course of the proceeding. The Claimant submits repeatedly throughout its Proposal that it is “likely” that these issues will be in dispute or will be raised by the Respondent.⁸⁵ But at this stage, the Claimant’s reliance on these issues is hypothetical or speculative in nature.

104. The Chair notes that, in its subsequent observations filed after its Proposal, the Claimant does not characterize anymore these issues as “likely” to be in dispute or “likely” to be raised by Respondent, but consider them to be “issues in dispute” based on the circumstances listed in paragraph 100 above.⁸⁶

105. The Chair is not convinced, at this stage of the proceeding, that these circumstances demonstrate that the issues relied upon by the Claimant for purposes of its Proposal are in dispute in this arbitration. First, Ukraine’s statements referred to by the Claimant were made before the commencement of this arbitration and the appointment of its counsel. Second, it is unknown at this stage what position, if any, Ukraine would take with respect to the relevance of its national law in this arbitration. Third, comments made by third parties, who do not represent Ukraine, about the present arbitration, have no relevance to or bearing on the determination of the disputed issues in this proceeding. Fourth, the Respondent’s comment in its letter of March 20, 2024 were made in the context of assessing the attributes of candidates for the role of President of the Tribunal, not as a defense on the substance of the dispute.

⁸⁵ See Proposal, ¶¶ 13, 39, 46, 50d, 51, 66c.

⁸⁶ See Claimant’s Final Written Submission, ¶¶ 3, 9, 14, 49a. See also Claimant’s Additional Comments, ¶ 4.

106. In these circumstances, it is not established whether and the extent to which there are similarities in law or in fact between Prof. Murphy's alleged positions and the issues that the Tribunal will need to decide.

107. As a consequence, the Chair is not persuaded that a third party undertaking a reasonable evaluation would conclude that Prof. Murphy manifestly cannot be relied upon to exercise independent and impartial judgement in the present proceeding and therefore lacks the qualities required under Article 14(1) of the ICSID Convention.

108. Accordingly, the Proposal must be rejected.

V. DECISION

109. 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. Sean Murphy.

[signature]

Mr. Ajay Banga
Chair of the ICSID Administrative Council