

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**LANDESBANK BADEN-WÜRTTEMBERG ET AL.**  
Claimants

and

**KINGDOM OF SPAIN**  
Respondent

**ICSID Case No. ARB/15/45**

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**DECISION ON THE SECOND PROPOSAL TO DISQUALIFY  
ALL MEMBERS OF THE TRIBUNAL**

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*CHAIR OF THE ICSID ADMINISTRATIVE COUNCIL*  
Mr. David Malpass

Date: 15 December 2020

## REPRESENTATION OF THE PARTIES

### *Representing the Claimants:*

Dr. Sabine Konrad  
Dr. Maximilian Pika  
Ms. Nika Rassadina  
Mr. Pierre Trippel

Morgan, Lewis & Bockius LLP  
OpernTurm, Bockenheimer Landstr. 4  
60306 Frankfurt am Main  
Germany

### *Representing the Respondent:*

Mr. José Manuel Gutiérrez Delgado  
Ms. Gabriela Cerdeiras  
Mr. Pablo Elena Abad  
Ms. María del Socorro Garrido Moreno  
Mr. Rafael Gil Nievas  
Ms. Elena Oñoro Sainz  
Mr. Mariano Rojo Pérez  
Mr. Francisco de la Torre Díaz  
Mr. Alberto Torró Molés  
Mr. Luis Vacas Chalfoun  
Ms. Eugenia Cediél  
Mr. Javier Comerón  
Ms. Gloria María de la Guardia  
Ms. Estibaliz Hernández Marquinez  
Mr. Juan Antonio Quesada  
Ms. Ana María Rodríguez

Abogacía General del Estado  
International Arbitration Division  
c/ Marqués de la Ensenada, 14-16, 2d. Floor  
28004, Madrid

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**TABLE OF SELECTED ABBREVIATIONS**

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Arbitrators' Joint Explanations	Tribunal's Joint Explanations concerning the Respondent's Second Disqualification Proposal, dated 13 August 2020
CA-[#]	Claimants' Annex (concerning the Second Disqualification Proposal)
Cl. Response	Claimants' Response to the Respondent's Second Disqualification Proposal, dated 12 August 2020
Cl. Comments II	Claimants' Further Comments on the Respondent's Second Disqualification Proposal, dated 26 August 2020
Cl. Comments III	Claimants' Further Comments on the Respondent's Second Disqualification Proposal, dated 2 September 2020
Chair	Chairman of the ICSID Administrative Council
ECT	Energy Charter Treaty
Greenwood Explanations I	Sir Christopher Greenwood's Explanations, dated 21 August 2020
Greenwood Explanations II	Sir Christopher Greenwood's Explanations, dated 25 August 2020
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Oreamuno Explanations I	Mr. Rodrigo Oreamuno's Explanations, dated 28 August 2020
Poncet Explanations I	Dr. Charles Poncet's Explanations, dated 21 August 2020

Poncet Explanations II	Dr. Charles Poncet's Explanations, dated 25 August 2020
Poncet Explanations III	Dr. Charles Poncet's Explanations, dated 2 September 2020
RA-[#]	Respondent's Annex (concerning the Second Disqualification Proposal)
Resp. Second Proposal	Respondent's Second "Request for Disqualification of All the Tribunal," filed 12 August 2020
Resp. Comments II	Respondent's "Further Comments Regarding the Disqualification of the Tribunal," dated 20 August 2020
Resp. Comments III	Respondent's "Further Comments Regarding the Disqualification of All the Tribunal," dated 24 August 2020
Resp. Comments IV	Respondent's "Further Comments Regarding the Disqualification of All the Tribunal," dated 3 September 2020
Secretary-General	Secretary-General of ICSID
Tribunal	Arbitral Tribunal constituted on 7 June 2016

**TABLE OF CITED CASES**

<b>Short Cite</b>	<b>Decision</b>
<b><i>Abaclat 2014 Decision</i></b>	<i>Abaclat and Others v. Argentine Republic</i> , ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014
<b><i>Blue Bank 2013 Decision</i></b>	<i>Blue Bank International &amp; Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013
<b><i>Blue Bank 2018 Decision</i></b>	<i>Blue Bank International &amp; Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/12/20 – Annulment Proceeding, Decision on the Proposal to Disqualify Mr. Álvaro Castellanos Howell, 2 March 2018
<b><i>BSG</i></b>	<i>BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea</i> , ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, 28 December 2016
<b><i>Burlington</i></b>	<i>Burlington Resources, Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013
<b><i>Caratube</i></b>	<i>Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan</i> , ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014
<b><i>Conoco 2014 Decision</i></b>	<i>ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014
<b><i>Conoco 2015 Decision</i></b>	<i>ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015
<b><i>Fábrica 2015 Decision</i></b>	<i>Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify a Majority of the Tribunal, 16 June 2015

<b><i>Fábrica 2016 Decision</i></b>	<i>Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 28 March 2016
<b><i>Getma</i></b>	<i>Getma International et al. v. Republic of Guinea</i> , ICSID Case No. ARB/11/29, Decision on Proposal to Disqualify Mr. Bernardo Cremades, 28 June 2012
<b><i>Interocean</i></b>	<i>Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria</i> , ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, 3 October 2017
<b><i>Repsol</i></b>	<i>Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic</i> , ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify the Majority of the Tribunal, 13 December 2013
<b><i>Suez 2007 Decision</i></b>	<i>Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/17 and <i>Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic</i> , ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007
<b><i>Universal</i></b>	<i>Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011
<b><i>Urbaser</i></b>	<i>Urbaser S.A. and Others v. Argentine Republic</i> , ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010
<b><i>Vattenfall 2020 Decision</i></b>	<i>Vattenfall AB and Others v. Federal Republic of Germany</i> , ICSID Case No. ARB/12/12, Decision of the Chairman of the Administrative Council (8 July 2020), and Recommendation on the Respondent's Proposal to Disqualify the All Members of the Arbitral Tribunal (6 July 2020)



## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Energy Charter Treaty, which entered into force for Germany and Spain on 16 April 1998 (the “**ECT**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The Claimants are Landesbank Baden-Württemberg (“**LBBW**”), HSH Nordbank AG (“**HSH Nordbank**”), Landesbank Hessen-Thüringen Girozentrale (“**Helaba**”) and Norddeutsche Landesbank-Girozentrale (“**NORD/LB**”) (collectively, the “**Claimants**”). LBBW, Helaba, and NORD/LB assert that they are public-law institutions with legal capacity (*Anstalt des öffentlichen Rechts*), established under German law, and HSH Nordbank asserts that it is a joint stock company (*Aktiengesellschaft*) existing under German law. Each of the Claimants maintains that it operates as a commercial bank, and as a *Landesbank*.
3. The Respondent is the Kingdom of Spain (the “**Respondent**” or “**Spain**”).
4. The Claimants and the Respondent are collectively referred to as the “**Parties**,” and the term “**Party**” refers to either the Claimants or the Respondent. The Parties’ representatives and their addresses are listed above on page (i).
5. This decision concerns the Respondent’s second proposal to disqualify all members of the Tribunal in this case, received on 12 August 2020. Section II below summarizes the procedural steps pertaining to this proposal.

## **II. PROCEDURAL HISTORY**

6. On 12 August 2020, the Respondent filed its second “Request for Disqualification of All the Tribunal” with Annexes 1 to 25 (the “**Respondent’s Second Proposal**”). Spain also requested that a recommendation from the World Bank’s Integrity Vice-Presidency

(“**INT**”) be obtained prior to a decision on the Second Proposal by the Chairman of the ICSID Administrative Council (“**Chair**”).

7. On 12 August 2020, the Secretary-General transmitted the Second Proposal to the Claimants and the members of the Tribunal. Pursuant to ICSID Arbitration Rule 9(6), the Parties were informed that the proceeding would be suspended until the Second Proposal was decided. A calendar for written submissions by the Parties and explanations by the members of the Tribunal was established.
8. On 12 August 2020, the Claimants filed their response to the Second Proposal with Annexes 1 to 5 (the “**Claimants’ Response**”), copying the Respondent and the Tribunal, and proposed an amendment to the procedural calendar. The same day, the Respondent protested that the Claimants’ Response contained inaccurate representations of *inter-partes* communications, and reiterated the request for a recommendation from INT.
9. Subsequently on 12 August 2020, the Secretary-General transmitted a copy of the Claimants’ Response to Spain and the members of the Tribunal. In view of the Claimants’ early response, the Secretary-General established the dates for the next steps in the calendar of submissions on the Second Proposal.
10. By joint letter of 13 August 2020, Sir Christopher Greenwood, Dr. Charles Poncet and Mr. Rodrigo Oremano furnished their explanations pursuant to ICSID Arbitration Rule 9(3) (“**Arbitrators’ Joint Explanations**”). The same day, the Secretary-General transmitted these explanations to the Parties, and confirmed that 20 August 2020 would be the due date for the Parties’ final simultaneous submissions on the Second Proposal.
11. On 13 August 2020, the Claimants stated that they had no further comments and requested shortening the deadline for the Respondent’s final submission.
12. On 14 August 2020, the Secretary-General confirmed that 20 August 2020 would be maintained as the due date for the Respondent’s final submission, and it informed the Parties that the Respondent’s request for a recommendation from INT would be brought to the Chair’s attention once the briefing was complete.

13. On 20 August 2020, the Respondent filed its “Further Comments Regarding the Disqualification of the Tribunal” with Annexes 26 to 36 (the “**Respondent’s Comments II**”), copying the Claimants.<sup>1</sup>
14. Subsequently on 20 August 2020, the Acting Secretary-General transmitted the Respondent’s Comments II to the Claimants and the members of the Tribunal. The Acting Secretary General observed that Spain had adduced a “*further reason*” to disqualify two members of the Tribunal (Sir Christopher Greenwood and Dr. Charles Poncet), and a calendar for additional written submissions on the “*further reason*” was established.
15. On 21 August 2020, the Claimants indicated that they had no further comments; and the Respondent filed a communication reiterating the request for a recommendation from INT.
16. The same day, Sir Christopher Greenwood and Dr. Charles Poncet, separately, submitted their respective further explanations pursuant to ICSID Arbitration Rule 9(3) (“**Greenwood Explanations I**” and “**Poncet Explanations I**”). The Secretariat transmitted these explanations to the Parties and the other members of the Tribunal that day.
17. On 24 August 2020, the Secretary-General informed the Parties that the Chair, in the exercise of his discretion, had decided not to request a recommendation from INT.
18. Subsequently on 24 August 2020, the Respondent filed its “Further Comments Regarding the Disqualification of All the Tribunal” with Annexes 37 to 52 (the “**Respondent’s Comments III**”), copying the Claimants. Spain requested that a recommendation from the Permanent Court of Arbitration (“**PCA**”) be obtained prior to the Chair’s decision on the Second Proposal.
19. The same day, the Secretary-General transmitted the Respondent’s Comments III to the Claimants and the members of the Tribunal. The Secretary-General observed that Spain had requested further disclosures from Sir Christopher Greenwood and Dr. Charles Poncet,

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<sup>1</sup> Annexes 35 and 36 were received on 21 August 2020.

and a calendar for further explanations by these two members of the Tribunal and subsequent simultaneous submissions by the Parties was established.

20. On 25 August 2020, Sir Christopher Greenwood and Dr. Charles Poncet, separately, submitted their respective further explanations pursuant to ICSID Arbitration Rule 9(3) (“**Greenwood Explanations II**” and “**Poncet Explanations II**”). The Secretary-General transmitted these explanations to the Parties and the other members of the Tribunal on the same day. In his explanations, Dr. Charles Poncet offered to provide further information but observing that he would require additional days to do so.
21. By subsequent email of 25 August 2020, the Respondent requested that Dr. Poncet be afforded time to provide the “*missing information*,” and that the deadline for the Parties’ submissions on the arbitrators’ explanations be rescheduled accordingly. The same day, the Claimants opposed the Respondent’s request, and the Respondent replied.
22. By subsequent letter of 25 August 2020, the Secretary-General established a calendar for the submission of further information by Dr. Poncet, as well as for subsequent simultaneous submissions by the Parties on the arbitrators’ explanations.
23. On 26 August 2020, the Claimants filed with the Centre their further comments (the “**Claimants’ Comments II**”), with Annexes 1 to 3, without a copy to the Respondent, pursuant to the protocol for simultaneous submissions.
24. On 27 August 2020, the Claimants filed a communication arguing that the Parties’ simultaneous deadline for comments on the arbitrators’ explanations of 25 August 2020 had expired on 26 August 2020 and requested that the Claimants’ Comments II be transmitted to the members of the Tribunal and the Respondent.
25. The Secretary-General responded by subsequent letter dated 27 August 2020. She confirmed that the Centre had received the Claimants’ Comments II of 26 August 2020, but had not yet received the Respondent’s submission, and therefore the Claimants’ Comments II had not yet been circulated pursuant to the protocol for simultaneous submissions. The Secretary-General added, however, that pursuant to the established calendar the Parties had until 31 August 2020 for their observations on the arbitrators’

explanations of 25 August 2020, and on Dr. Poncet's additional information due on 28 August 2020. The Claimants were invited to confirm whether they maintained the request that the Claimants' Comments II be circulated immediately to the Respondent and the members of the Tribunal, and the Claimants so confirmed by email of 27 August 2020. The Secretariat proceeded accordingly that same day.

26. On 27 August 2020, Mr. Rodrigo Oreamuno submitted a communication to the Centre requesting leave to file additional explanations in connection with the Respondent's Second Proposal. That same day, the Secretary-General transmitted Mr. Oreamuno's request to the Parties and the other members of the Tribunal. Mr. Oreamuno was invited to submit his further explanations no later than 28 August 2020, and the Parties' were invited to submit their comments thereto together with their final submissions due on 31 August 2020.
27. On 28 August 2020, Dr. Charles Poncet submitted a communication to the Centre requesting an extension to provide his further information. That same day, the Secretary-General transmitted Dr. Poncet's request to the Parties and the other members of the Tribunal. In light of the request, the Secretary-General amended the calendar for further explanations by Dr. Poncet, and for the Parties' subsequent simultaneous submissions on the arbitrators' explanations.
28. On 28 August 2020, Mr. Rodrigo Oreamuno submitted his further explanations pursuant to ICSID Arbitration Rule 9(3) ("**Oreamuno Explanations I**"). The Secretary-General transmitted these explanations to the Parties and the other members of the Tribunal on the same day.
29. On 2 September 2020, Dr. Charles Poncet submitted his further explanations pursuant to ICSID Arbitration Rule 9(3) ("**Poncet Explanations III**"). The Secretary-General transmitted these explanations to the Parties and the other members of the Tribunal on the same day.
30. On 2 September 2020, the Claimants filed their final comments with the Centre (the "**Claimants' Comments III**"), without providing a copy to the Respondent. On 3

September 2020, the Respondent filed its final comments with the Centre (the “**Respondent’s Comments IV**”), with Annexes 53 to 56, without providing a copy to the Claimant. Therein, the Respondent asked that the Chair reconsider his decision on the request for a recommendation from INT and reiterated the request for a recommendation from the PCA.

31. Having received both Parties’ submissions, the Secretariat circulated the Parties’ respective final submissions simultaneously to both Parties, and to the members of the Tribunal on 3 September 2020.
32. On 4 September 2020, the Respondent submitted an additional communication protesting certain assertions in the Claimants’ Comments III.

### **III. SUMMARY OF THE PARTIES’ ARGUMENTS**

#### **A. THE RESPONDENT’S ARGUMENTS**

33. The Respondent proposes the disqualification of:

- (i) The three members of the Tribunal, on the ground that the “*Tribunal not only has taken partial and unfair decisions but has trespassed all the lines when it has ‘justified’ those decisions on the basis of conscious misrepresentations and misleading statements,*” demonstrating “*lack of impartiality*” and “*lack of ‘high moral character.’*”<sup>2</sup>
- (ii) Sir Christopher Greenwood and Dr. Charles Poncet, on the additional ground that they “*accepted invitations from Claimants’ counsel to attend events with her and organized by her while the present arbitration was ongoing*” and “*deliberately and in breach of all the ethical and conflict rules did not disclose those invitations and the acceptance thereof.*”<sup>3</sup>

#### **(1) The Legal Standard**

34. Spain submits this Second Proposal pursuant to the ICSID Convention, other applicable international conventions, international custom and general principles of international law.<sup>4</sup> For the Respondent, the international law applicable to this matter is to be determined

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<sup>2</sup> Resp. Second Proposal, ¶ 3.

<sup>3</sup> Resp. Comments IV, ¶ 2. *See also*, Resp. Comments II, ¶¶ 139-140; Resp. Comments III, ¶¶ 2, 95-96.

<sup>4</sup> Resp. Second Proposal, ¶ 2.

by reference to the direct sources of public international law enumerated in Article 38 of the Statute of the International Court of Justice (international conventions, international custom, and general principles of law);<sup>5</sup> such that judicial decisions and academic teachings operate only as subsidiary means, not sources of law.<sup>6</sup> Spain argues that Article 38 undeniably applies as an essential part of the United Nations Charter; and given that this Charter prevails over any other international agreement, it is not legal to apply the ICSID Convention in “*silo*.”<sup>7</sup>

35. International Conventions. For the Respondent, the ICSID Convention is “[o]ne *applicable Convention*” to decide the present disqualification proposal, in particular Article 57 and ICSID Arbitration Rule 9.<sup>8</sup> Referring to Articles 14(1) and 57 of the ICSID Convention, the Respondent argues that arbitrators “*must be persons of high moral character who can be relied upon to exercise independent and impartial judgment.*”<sup>9</sup> While Spain recognizes that there is a difference between the English, Spanish and French texts of Article 14 of the ICSID Convention, it argues that the difference must be resolved by application of Article 33(4) of the Vienna Convention on the Law of Treaties (“**VCLT**”), with the result that “*independent judgment*” and “*impartiality*” are both required.<sup>10</sup>
36. The Respondent argues that pursuant to Article 57 of the ICSID Convention, it is enough to show “*any fact*” indicating a manifest lack of the qualities required by Article 14(1) of the ICSID Convention, that “*a simple manifestation*” is enough, and that “*an absolute demonstration*” is not required.<sup>11</sup> According to Spain, this interpretation is supported by the principles in Articles 31 and 32 of the VCLT.<sup>12</sup>
37. Spain contends that, interpreted in good faith, Article 57 of the ICSID Convention cannot impose requirements that are “*impossible to demonstrate or that substantially differ from*

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<sup>5</sup> Resp. Second Proposal, ¶¶ 23-24. *See also*, Resp. Comments III, ¶ 62.

<sup>6</sup> Resp. Second Proposal, ¶ 24.

<sup>7</sup> Resp. Second Proposal, ¶ 26. *See also*, Resp. Comments III, ¶ 63.

<sup>8</sup> Resp. Second Proposal, ¶ 27.

<sup>9</sup> Resp. Second Proposal, ¶¶ 28-30.

<sup>10</sup> Resp. Second Proposal, ¶¶ 31-34.

<sup>11</sup> Resp. Second Proposal, ¶ 36.

<sup>12</sup> Resp. Second Proposal, ¶¶ 35, 39.

*the international practice in arbitration;*<sup>13</sup> nor can it impose requirements more stringent than those applicable to the disqualification of a judge;<sup>14</sup> or against the practice of the World Bank or of civilized nations.<sup>15</sup> Moreover, Spain argues, an interpretation of Article 57 of the ICSID Convention in accordance with the VCLT requires taking into account rules of international law applicable in the relationship between Germany and Spain, namely, the European Union Charter of Fundamental Rights, the European Convention on Human Rights, and the Universal Declaration of Human Rights, which (i) require independence and impartiality, and (ii) mandate disqualification when there is “*any reasonable doubt or indication of lack of impartiality,*” which is also the standard adopted by the International Bar Association (“**IBA**”) Guidelines.<sup>16</sup> As the ICSID Convention cannot be interpreted as imposing lower standards of independence or impartiality, it follows that “*any doubt*” in this respect must lead to removal.<sup>17</sup>

38. In addition, Spain argues, a good faith interpretation of Article 14(1) of the ICSID Convention requires that the notion of “*high moral character*” be understood “*in the same way*” as the notion of “*sanctionable practices under the World Bank umbrella.*”<sup>18</sup> The ICSID Convention cannot be interpreted in a manner that allows misrepresentations and misleading statements not permitted “*in any other sector, field or activity of the World Bank or of any civilized nation (where it may qualify as a perjury felony).*”<sup>19</sup>
39. Therefore, the Respondent concludes that a proper interpretation of Articles 14 and 57 of the ICSID Convention mandates disqualification of an arbitrator “*if there is ‘any indication’ of*” lack of moral character, independence or impartiality.<sup>20</sup> This said, Spain

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<sup>13</sup> Resp. Second Proposal, ¶ 37.

<sup>14</sup> Resp. Second Proposal, ¶ 42.

<sup>15</sup> Resp. Second Proposal, ¶ 44.

<sup>16</sup> Resp. Second Proposal, ¶¶ 40-41. *See also*, Resp. Comments III, ¶ 65.

<sup>17</sup> Resp. Comments III, ¶ 68.

<sup>18</sup> Resp. Second Proposal, ¶ 38.

<sup>19</sup> Resp. Second Proposal, ¶ 43.

<sup>20</sup> Resp. Second Proposal, ¶ 45.



argues, the circumstances underlying the Second Proposal are “*beyond any reasonable doubt.*”<sup>21</sup>

40. International Custom. In Spain’s view, Articles 14 and 57 of the ICSID Convention cannot be interpreted in isolation from other international conventions or international arbitration practice;<sup>22</sup> and the word “*manifestly*” in Article 57 does not justify a departure from international custom.<sup>23</sup> Such international custom demands the disqualification of an arbitrator when there is “*any reasonable doubt*” about his/her lack of moral character, impartiality or independence.<sup>24</sup> Moreover, Spain adds, misrepresentations are absolutely prohibited in the context of international arbitration, as shown by the doctrine of “*clean hands*” which sanctions parties conduct in that regard.<sup>25</sup> It follows, the Respondent argues, that “*conscious or reckless misrepresentations and misleading statements*” must lead to removal of a tribunal from office.<sup>26</sup>
41. General Principles of Law. Finally, Spain contends that under general principles of international law “*any slight doubt*” about an adjudicator’s lack of high moral character, independence or impartiality is ground for disqualification;<sup>27</sup> bias can be inferred, and there is no need for strict evidence.<sup>28</sup> This said, Spain argues, in this case the Tribunal’s “*misrepresentations and misleading statements*” are “*blatantly evident.*”<sup>29</sup>

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<sup>21</sup> Resp. Second Proposal, ¶ 37.

<sup>22</sup> Resp. Second Proposal, ¶ 47.

<sup>23</sup> Resp. Second Proposal, ¶ 50.

<sup>24</sup> Resp. Second Proposal, ¶ 49. *See also, id.*, ¶ 53 (referring to “*justifiable and reasonable doubt*”); Resp. Comments III, ¶ 71.

<sup>25</sup> Resp. Second Proposal, ¶ 54. *See also*, Resp. Comments II, ¶ 99.

<sup>26</sup> Resp. Second Proposal, ¶ 56. *See also*, Resp. Comments II, ¶ 104.

<sup>27</sup> Resp. Second Proposal, ¶ 58.

<sup>28</sup> Resp. Second Proposal, ¶ 60.

<sup>29</sup> Resp. Second Proposal, ¶ 60.

## (2) The Grounds for Disqualification

### *a. First Ground: The Tribunal Has Made Misrepresentations and Misleading Statements Demonstrating Lack of Moral Character and Impartiality*

42. Spain submits that in this case there is “*clear and obvious evidence*” of the Tribunal’s lack of moral character and lack of impartiality, which must lead to its disqualification.<sup>30</sup> According to the Respondent, this is demonstrated by the Tribunal’s statements in Procedural Order No. 20 (“**PO No. 20**”) of 28 July 2020, the Tribunal’s response to the Respondent’s request for reconsideration of that order, and the Arbitrators’ Joint Explanations.<sup>31</sup> The Respondent has also made clear, however, that it “*does not question the integrity*” of the members of the Tribunal “*in other cases,*” and that its submission is that “[f]or this case” the members of Tribunal have demonstrated lack of “*high moral character.*”<sup>32</sup>

#### (i) The Tribunal Lacks the Required Moral Character

43. The Respondent contends that the Tribunal’s decision in PO No. 20 to hold the Hearing virtually was grounded on “*serious misrepresentations and misleading statements,*” and “*speculative [...] arguments;*”<sup>33</sup> all of which qualify as “*dishonest behavior.*”<sup>34</sup> This shows, Spain argues, that the Tribunal lacks the “*high moral character*” required by the ICSID Convention, and the World Bank’s policies and regulations.<sup>35</sup> More specifically, Spain submits that:

44. *First*, the Tribunal misrepresented that “*one of its arbitrators could not travel from Costa Rica to The Hague for a hearing at the end of the month because Costa Rica’s borders were closed,*” when in fact prior to the issuance of PO No. 20 the Government of Costa Rica had announced that “*the borders were going to open on August 1 and residents in*

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<sup>30</sup> Resp. Second Proposal, ¶ 46.

<sup>31</sup> Resp. Comments II, ¶ 10.

<sup>32</sup> Resp. Comments IV, ¶ 34.

<sup>33</sup> Resp. Second Proposal, ¶¶ 63, 65. *See also, id.*, ¶¶ 28, 66.

<sup>34</sup> Resp. Second Proposal, ¶¶ 69, 71. *See also*, Resp. Comments II, ¶ 21.

<sup>35</sup> Resp. Second Proposal, ¶ 28.

*Costa Rica can travel*” abroad.<sup>36</sup> For the Respondent, this constitutes a “*dishonest statement*,”<sup>37</sup> and an attempt to “*trick the Parties*,” in particular Spain.<sup>38</sup>

45. *Second*, the Tribunal misrepresented that “*one of the arbitrators could not travel to The Hague because ‘it is unclear whether any facilities for travel will be available,’*” when in fact at the time of PO No. 20, “*there were already dozens of travel possibilities to travel from Costa Rica to The Hague through Amsterdam or Brussels [...].*”<sup>39</sup> For Spain, this also constitutes a “*dishonest statement.*”<sup>40</sup> According to the Respondent, “*there are not and there were not at the time of the PO20 regulatory hinders to travel from Costa Rica to The Hague for a hearing starting on August 27,*” and “*traveling from and to The Hague from Costa Rica was perfectly feasible,*” and “[e]asy, in fact.”<sup>41</sup>
46. *Third*, the Tribunal based its decision on a “*misleading*” and “*speculative*” statement, in asserting that “*the reason why one of its arbitrators could not travel to The Hague*” was that after completing a 14-day quarantine required by a surgery to be performed on 4 August, “*if there is any complication, such as the discovery of a COVID case in the hospital where the surgery is performed or the need for supplementary surgery, the quarantine period would be extended.*”<sup>42</sup> The Respondent emphasizes that the President’s quarantine would conclude over one week before the date the Hearing was scheduled to begin.<sup>43</sup> For Spain, it was also “*speculative and misleading*” for the Tribunal to state that “*the medical advice which the President has been given is that it would be undesirable for him to travel for at least another two weeks after the end of the compulsory quarantine.*”<sup>44</sup> The Respondent observes that “*undesirable*” does not mean “*impossible*,”<sup>45</sup> and argues that these statements (i) “*exaggerated the possibilities of not being able to attend [] on the basis*

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<sup>36</sup> Resp. Second Proposal, ¶ 74. *See also, id.*, ¶¶ 61-64; Resp. Comments II, ¶¶ 22, 84.

<sup>37</sup> Resp. Second Proposal, ¶ 69. *See also*, Resp. Comments II, ¶¶ 70, 75.

<sup>38</sup> Resp. Comments II, ¶¶ 75-77.

<sup>39</sup> Resp. Second Proposal, ¶ 75. *See also*, Resp. Comments II, ¶ 85.

<sup>40</sup> Resp. Second Proposal, ¶ 70. *See also*, Resp. Comments II, ¶ 71.

<sup>41</sup> Resp. Comments II, ¶ 33.

<sup>42</sup> Resp. Second Proposal, ¶ 76. *See also, id.*, ¶¶ 18, 65; Resp. Comments II, ¶¶ 53, 86.

<sup>43</sup> Resp. Comments II, ¶ 35.

<sup>44</sup> Resp. Second Proposal, ¶ 65.

<sup>45</sup> Resp. Comments II, ¶ 52.

*of speculations and hypothesis;*” and (ii) demonstrate that the Tribunal “*prioritized their private interest*” at the cost of “*basic procedural rights, such as efficiency [,] [...] equal and fair treatment.*”<sup>46</sup> According to Spain, these also constituted “*dishonest statement[s].*”<sup>47</sup>

47. The Respondent argues that the situation was further aggravated by the Tribunal’s actions after PO No. 20. Spain explains that following that order it filed a request for reconsideration revealing the above “*misrepresentations*” and “*misleading and speculative statements,*” in an attempt to allow the Tribunal to correct them, but the Tribunal insisted on them.<sup>48</sup> According to Spain, its request showed: (i) that travel from Costa Rica was possible as the borders would not be closed in August; (ii) that there were available flights to The Hague; and (iii) that “*to talk about a potential and hypothetical contagion was [...] speculative and misleading [...] as every single person in the world can be exposed to whatever disgrace, contagion or hypothetical event,*” regardless of the hearing modality (in-person or online).<sup>49</sup> It follows, the Respondent argued, that the Tribunal “*consciously*” committed a “*dishonest act.*”<sup>50</sup> Moreover, the Arbitrators’ Joint Explanations constitute a further aggravating factor given that instead of retracting, the Tribunal has chosen to defend its “*misrepresentations.*”<sup>51</sup>
48. In the Respondent’s view, these actions reveal the Tribunal’s desire to retain the “*good parts of the office*” (honor, prestige and fees), while avoiding the burden of traveling for an in-person hearing when it was “*perfectly possible*” to do so, in a highly complex case, for which a virtual hearing was “*completely inappropriate.*”<sup>52</sup> According to Spain, the

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<sup>46</sup> Resp. Comments II, ¶ 23.

<sup>47</sup> Resp. Second Proposal, ¶ 71. *See also*, Resp. Comments II, ¶ 72.

<sup>48</sup> Resp. Second Proposal, ¶¶ 67-68, 74-76; Resp. Comments II, ¶¶ 24-27.

<sup>49</sup> Resp. Second Proposal, ¶ 67. *See also*, Resp. Comments II, ¶ 25.

<sup>50</sup> Resp. Second Proposal, ¶ 72. *See also*, Resp. Comments II, ¶ 48.

<sup>51</sup> Resp. Comments II, ¶ 49.

<sup>52</sup> Resp. Second Proposal, ¶¶ 77-78; Resp. Comments II, ¶ 124.

Tribunal’s decision also entailed a violation of its own Procedural Order No. 1 (“**PO No. 1**”) which required the in-person examination of experts and witnesses.<sup>53</sup>

49. Spain also argues that, leaving aside the discussion on the modality of the Hearing (in-person or virtual), the Tribunal’s “*misrepresentations and improper misleading and speculative statements*” cannot be tolerated in an international arbitration, and violate the ICSID Convention, international law and World Bank’s principles and regulations.<sup>54</sup>
50. In sum, the Respondent argues, there was an initial abuse by the Tribunal when it established the Hearing dates disregarding the 2021 dates agreed by the Parties, but “*the limits were trespassed*” in PO No. 20, where the Tribunal abused its office “*through patronage and nepotism by [...] use of misrepresentations and misleading statements*” to prioritize its own interests.<sup>55</sup>

(ii) The Tribunal Lacks Impartiality

51. The Respondent contends that in this case the Tribunal has “*systematically adopted decisions that imply an unequal treatment in favor of the Claimants and against Respondent’s interests;*”<sup>56</sup> and the “*zenith of this unequal treatment*” was reached with the imposition of a virtual hearing “*under false premises, against the Respondent’s will and when an in-person hearing can take place.*”<sup>57</sup>
52. In making this decision, Spain argues, the Tribunal accepted the Claimants’ demands;<sup>58</sup> while disregarding the Respondent’s opposition to a virtual hearing in this particular case given its “*complexity*” and “*potential expansive effects.*”<sup>59</sup> In the Respondent’s view, the

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<sup>53</sup> Resp. Second Proposal, ¶ 79 (citing **RA-0025**, PO No. 1, § 18.4: “*Witnesses and experts shall be examined in person, save in exceptional circumstances.*”)

<sup>54</sup> Resp. Second Proposal, ¶ 66.

<sup>55</sup> Resp. Comments II, ¶¶ 78-79.

<sup>56</sup> Resp. Second Proposal, ¶ 80.

<sup>57</sup> Resp. Second Proposal, ¶ 81.

<sup>58</sup> Resp. Second Proposal, ¶¶ 81, 83.

<sup>59</sup> Resp. Second Proposal, ¶¶ 82-83.

decision to hold the hearing virtually, which “*would generate economic benefits*” to the Tribunal, was reached “*paying absolute[ly] no attention*” to the Respondent’s position.<sup>60</sup>

53. According to the Respondent, the Tribunal further showed its partiality by dismissing Spain’s request for reconsideration of PO No. 20 without even inviting the Claimants to comment, demonstrating its “*rush*” to close the “*crucial issue*” of the Hearing modality.<sup>61</sup>

54. For Spain, in this case the Parties’ procedural rights are guaranteed “*only*” through “*an in-person hearing (with all the Members of the Tribunal)*,” and a virtual hearing only benefited the Tribunal, minimizing the “*inconvenience*” and “*discomfort*” of travel, while satisfying the Claimants’ wishes “*with manifest prejudice*” to the Respondent.<sup>62</sup> This shows that the Tribunal is adopting “*manifestly unfair decisions (based on false premises)*” that evidence partiality towards the Claimants.<sup>63</sup>

(iii) The Arbitrators’ Explanations Contradict PO No. 20

55. The Respondent submits that the Arbitrators’ Joint Explanations ultimately acknowledge the Tribunal’s improper behavior and contradict PO No. 20.<sup>64</sup>

56. Spain disagrees with the notion that “*many factors*” were taken into account in PO No. 20 to decide to hold a virtual hearing.<sup>65</sup> In particular, Spain emphasizes that PO No. 20 adopted a two-step reasoning, first addressing why one member of the Tribunal could not travel from Costa Rica to attend in person, and thereafter explaining why a hybrid hearing with the President alone was not possible.<sup>66</sup> In the Respondent’s view, the first step, concerning travel from Costa Rica, was based on a “*false statement and a misrepresentation*,” and the decision to avoid an in-person hearing was taken “*only on that basis*.”<sup>67</sup> Following that, the

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<sup>60</sup> Resp. Second Proposal, ¶ 83.

<sup>61</sup> Resp. Second Proposal, ¶ 85.

<sup>62</sup> Resp. Second Proposal, ¶ 87.

<sup>63</sup> Resp. Second Proposal, ¶ 88.

<sup>64</sup> Resp. Comments II, ¶ 38.

<sup>65</sup> Resp. Comments II, ¶ 57.

<sup>66</sup> Resp. Comments II, ¶¶ 39, 42-43, 57-58.

<sup>67</sup> Resp. Comments II, ¶ 43.

Tribunal analyzed the possibility of a hybrid hearing, and decided against it based on speculation and exaggeration.<sup>68</sup>

57. The Respondent submits that despite the Arbitrators' Joint Explanations observing that “[a]t the time that PO20 was adopted, the borders of Costa Rica remained closed and even though they were due to reopen, our [the Tribunal’s] assessment was that there were likely to be serious obstacles to Dr. Oreamuno travelling to Europe at the end of August,” this is not what PO No. 20 actually says.<sup>69</sup> For Spain, the basis for the decision was that “*the Costa Rica Borders were closed and that it was unclear whether any facilities for travel will be available,*” which “*was false.*”<sup>70</sup>
58. As to Mr. Oreamuno’s additional explanations, Spain submits that they confirm the misrepresentations and misleading statements, attributable to the Tribunal as a whole;<sup>71</sup> and attempt to redraft or reinterpret PO No. 20.<sup>72</sup> In particular, Spain highlights that, while Mr. Oreamuno states that by the end of July there was uncertainty about the re-opening of the borders, and that he expressed that “*he was not sure*” about his ability to travel, the problem remains that (i) PO No. 20 “*affirmed, with no hesitation, that Mr. Oreamuno could not fly to The Hague by the end of August due to the closure of Costa Rica’s borders;*”<sup>73</sup> “*as if it were a factual and undisputed evidence that the borders were going to be closed and there were no travel facilities;*”<sup>74</sup> and (ii) the Tribunal consciously insisted on this after the reconsideration request pointed out the misrepresentation.<sup>75</sup>
59. Spain further takes issue with Mr. Oreamuno’s observation that Costa Rican travelers could not enter the EU, observing that PO No. 20 did not even rely on that point, and adding that The Netherlands Government’s websites “*exclude from the self-quarantine: ‘staff and*

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<sup>68</sup> Resp. Comments II, ¶¶ 43, 58. *See also*, Resp. Comments IV, ¶ 45.

<sup>69</sup> Resp. Comments II, ¶ 44.

<sup>70</sup> Resp. Comments II, ¶ 46.

<sup>71</sup> Resp. Comments IV, ¶¶ 4, 9.

<sup>72</sup> Resp. Comments IV, ¶ 37.

<sup>73</sup> Resp. Comments IV, ¶¶ 40-41.

<sup>74</sup> Resp. Comments IV, ¶ 41.

<sup>75</sup> Resp. Comments IV, ¶¶ 40-41.

*invitees of international organisations if they are travelling for work.*<sup>76</sup> Moreover, Spain argues, whether Mr. Oreamuno would be subject to quarantine upon returning to Costa Rica was one of the burdens of the office, and he could not prioritize his personal interest to avoid such quarantine over his duties.<sup>77</sup>

(iv) The Second Proposal was Not Filed to Derail the Hearing

60. The Respondent denies that the Second Proposal was filed to avoid the Hearing, as shown by statements in July 2020 demonstrating its willingness to attend.<sup>78</sup> This said, Spain opposes the assertion that the Hearing dates were established after having tried hard to resolve the Respondent’s difficulties with those dates, arguing that the Tribunal “*did not care*” that Spain’s co-lead counsel was unavailable.<sup>79</sup> Spain acknowledges that it protested this decision in May 2020, but submits that since then it had not opposed the Hearing dates.<sup>80</sup> Spain argues that it was prepared to appear on 27 August, but it could not accept “*false, speculative and misleading statements*” from the Tribunal.<sup>81</sup>

***b. Second Ground: Sir Christopher Greenwood and Dr. Charles Poncet Have Been Involved in the Claimants’ Counsel Events after this Proceeding Began***

61. As a “*further reason*” to disqualify Sir Christopher Greenwood and Dr. Charles Poncet, the Respondent argues that after this arbitration began, they were invited to and attended events organized solely by the Claimants’ counsel, and failed to so disclose.<sup>82</sup> Spain refers to the Frankfurt Investment Arbitration Moot (“**FIAM**”) and a roundtable seminar and reception in March 2017;<sup>83</sup> and observes that in his explanations Sir Christopher admitted to participating in the 2017 FIAM, and to having been invited on other occasions.<sup>84</sup> Dr.

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<sup>76</sup> Resp. Comments IV, ¶¶ 42-43.

<sup>77</sup> Resp. Comments IV, ¶ 44.

<sup>78</sup> Resp. Comments II, ¶ 2.

<sup>79</sup> Resp. Comments II, ¶ 13.

<sup>80</sup> Resp. Comments II, ¶ 56.

<sup>81</sup> Resp. Comments II, ¶ 31. *See also*, Resp. Comments II, ¶ 16.

<sup>82</sup> Resp. Comments IV, ¶ 2; Resp. Comments III, ¶ 2; Resp. Comments II, ¶¶ 139-141.

<sup>83</sup> Resp. Comments II, ¶ 139; Resp. Comments III, ¶ 96.

<sup>84</sup> Resp. Comments III, ¶ 27; Resp. Comments IV, ¶ 20.



Poncet admitted attending in 2017 to 2019,<sup>85</sup> and participating in other ancillary and social events organized by the Claimants' counsel.<sup>86</sup> The Respondent emphasizes that although other organizations might have supported the FIAM, undoubtedly it is an event fully organized by the Claimants' counsel.<sup>87</sup>

62. In Spain's view, the two arbitrators were required but failed to disclose the invitations received after the start of this arbitration and their attendance with Ms. Konrad as the sole partner from her firm present.<sup>88</sup> The impropriety is compounded, Spain argues, as the event led to the gathering of the Claimants' appointed arbitrator with the President of the Tribunal "probably" without informing the third arbitrator.<sup>89</sup>
63. For the Respondent: (i) the attendance to the events in question "put at serious risk" the arbitrators' impartiality and independence; and (ii) their concealment of the information demonstrates lack of high moral character, independence, and impartiality.<sup>90</sup>
64. The Respondent submits that there is an "aggravating factor" in the present case as there was an "easy" opportunity to make the disclosures.<sup>91</sup> Spain highlights that in February 2017 the Claimants' counsel requested the extension of the deadline to file its Memorial, arguing among other factors that they were the "sole organizers" of the 2017 FIAM,<sup>92</sup> yet no reference was made to the fact that Sir Christopher and Dr. Poncet had been invited to that moot, or to the reception and roundtable hosted by the then Claimants' firm.<sup>93</sup>

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<sup>85</sup> Resp. Comments IV, ¶¶ 27-29. Dr. Poncet has confirmed attending the moot in 2010 to 2013. Spain does not take issue with the events prior to the arbitrators' appointment in this case. *See* Resp. Comments III, ¶ 55.

<sup>86</sup> Resp. Comments III, ¶ 24.

<sup>87</sup> Resp. Comments IV, ¶ 15.

<sup>88</sup> Resp. Comments III, ¶¶ 2, 95-96, 99. *See also*, Resp. Comments II, ¶ 140; Resp. Comments IV, ¶ 2.

<sup>89</sup> Resp. Comments III, ¶ 20.

<sup>90</sup> Resp. Comments III, ¶ 94.

<sup>91</sup> Resp. Comments IV, ¶¶ 22-23.

<sup>92</sup> Resp. Comments II, ¶ 142. *See also*, Resp. Comments IV, ¶ 23.

<sup>93</sup> Resp. Comments II, ¶¶ 143-144. *See also*, Resp. Comments IV, ¶ 23.

65. According to Spain, it became aware of these facts “*just*” prior to its 20 August 2020 submission, when it “*did a deep internet search of the relationships of Ms. Konrad with the members of the [...] Tribunal.*”<sup>94</sup>
66. But even if the invitations and their acceptances had been disclosed, the Respondent argues, the matter “*must be revisited in light of the present situation,*”<sup>95</sup> as the facts have “*a new perspective*” given “*the accumulation of circumstances*” in this case which have increased the Respondent’s concerns over the Tribunal’s independence and impartiality.<sup>96</sup> According to the Respondent, the circumstances underlying this ground explain “*why the Tribunal has always tried to satisfy Claimants counsel’s wishes [...];*”<sup>97</sup> and confirm the existence of a “*close relationship*” between Ms. Konrad, Sir Christopher and Dr. Poncet, evidenced in actions taken throughout the arbitration.<sup>98</sup>

(i) Sir Christopher’s and Dr. Poncet’s Conduct Violates Ethical, Disclosure and Conflict of Interest Rules

67. Spain contends that the conduct of Sir Christopher and Dr. Poncet violates “*ethical, disclosure and conflict of interest rules;*”<sup>99</sup> in particular, the ICSID Convention and Arbitration Rules, the World Bank’s Code of Conduct, ICSID’s and UNCITRAL’s Draft Code of Conduct for Adjudicators, the IBA Guidelines, and “*rules applicable in any civilized nation.*”<sup>100</sup>
68. The ICSID Convention and ICSID Arbitration Rules. According to Spain, Sir Christopher and Dr. Poncet failed to fulfill their ICSID Arbitration Rule 6 declarations.<sup>101</sup> In particular, Spain submits: *first*, that Sir Christopher acted “*incoherent[ly]*” when disclosing at the time of his appointment in June 2016 that he knew Ms. Konrad from international conferences,

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<sup>94</sup> Resp. Comments II, ¶ 143; Resp. Comments III, ¶ 80 (arguing that Spain became aware “*three days*” before its 24 August 2020 submission).

<sup>95</sup> Resp. Comments II, ¶ 145. *See also*, Resp. Comments II, ¶ 140.

<sup>96</sup> Resp. Comments II, ¶ 146. *See also*, Resp. Comments III, ¶ 97.

<sup>97</sup> Resp. Comments III, ¶ 81. *See also*, Resp. Comments III, ¶ 58.

<sup>98</sup> Resp. Comments IV, ¶¶ 7-8.

<sup>99</sup> Resp. Comments III, ¶ 34.

<sup>100</sup> Resp. Comments III, ¶¶ 35-61, 99; Resp. Comments IV, ¶¶ 21, 50.

<sup>101</sup> Resp. Comments III, ¶ 49.

while failing to disclose his attendance to an event organized by her the following year, in violation of his continuous obligation of prompt disclosure.<sup>102</sup> Even admitting (*quod non*) that participation in this type of event was a normal part of public service of judges or arbitrators, the concealment shows bias, lack of impartiality and of moral character.<sup>103</sup> *Second*, that the same conclusion applies to Dr. Poncet, compounded by the fact that his ICSID Arbitration Rule 6 declaration of January 2016 does not mention any “*professional relationship*” with Ms. Konrad, when he has now confirmed participating in the FIAM several times.<sup>104</sup> Further, the lack of precision in Dr. Poncet’s explanations of 21 August 2020 reveals lack of moral character, independence and impartiality.<sup>105</sup>

69. The World Bank’s Code of Conduct. Spain submits that the Code applies to ICSID arbitrators as it covers “*not only to current career staff but also to consultants and temporary staff [...]*”;<sup>106</sup> and in any event, as ICSID staff is subject to it, ICSID “*cannot tolerate for arbitrators what would not be tolerated for them without breaching the Code [...]*.”<sup>107</sup> The Respondent observes that this Code: (i) requires assessment of a situation from the perspective of a third party; (ii) reflects an obligation of prompt disclosure, which was breached here; and (iii) contains principles that when applied to this case support the conclusion that a conflict of interest exists.<sup>108</sup> Spain emphasizes that even if no economic payment was proffered, the arbitrators’ participation “*in the most prestigious investment arbitration moot court*” was “*tremendously beneficial*” in terms of “*extraordinary visibility, honors, and prestige*” and potential “*future appointments*.”<sup>109</sup>
70. Draft Code of Conduct for Adjudicators. According to Spain, the conduct of Sir Christopher and Dr. Poncet also fails to meet the standards of the draft Code of Conduct for Adjudicators jointly prepared by ICSID and UNCITRAL,<sup>110</sup> in particular, Article 4(e)

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<sup>102</sup> Resp. Comments III, ¶¶ 50-51.

<sup>103</sup> Resp. Comments III, ¶ 52.

<sup>104</sup> Resp. Comments III, ¶ 53.

<sup>105</sup> Resp. Comments III, ¶ 53.

<sup>106</sup> Resp. Comments III, ¶¶ 35, 38.

<sup>107</sup> Resp. Comments III, ¶ 39.

<sup>108</sup> Resp. Comments III, ¶ 41-43, 46.

<sup>109</sup> Resp. Comments III, ¶ 44.

<sup>110</sup> Resp. Comments III, ¶ 54.

and the disclosure obligations in Article 5.<sup>111</sup> The Respondent observes that under this code, arbitrators should err on the side of disclosure and argues that the invitations at issue here were “*not trivial*.”<sup>112</sup>

71. IBA Guidelines. Finally, Spain submits that the duty to disclose the circumstances at issue is also compelled by Rule 3 of the IBA Guidelines, which requires disclosure when “*facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence [...]*” and provides that any doubt is to be resolved in favor of disclosure.<sup>113</sup>

(ii) All Sources of International Law Support the Disqualification<sup>114</sup>

72. According to Spain, Sir Christopher and Dr. Poncet must be disqualified for their violation of: (i) applicable international conventions; (ii) their commitments when accepting their appointments; (iii) international custom; and (iv) general principles of law in civilized nations.<sup>115</sup>
73. International Conventions. Recalling that the ICSID Convention cannot be interpreted as imposing lower standards of independence and impartiality than other international conventions,<sup>116</sup> Spain argues that an arbitrator that “*receive[s] credit and benefits ff[r]om the Claimants’ counsel*” and fails to disclose them cannot be considered independent or impartial.<sup>117</sup> Even if the ICSID Convention and the ICSID Arbitration Rules were applied in “*silo*,” the disqualification would be warranted, as the circumstances leave “*no doubt*.”<sup>118</sup>

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<sup>111</sup> Resp. Comments III, ¶¶ 55-56 (referring to Article 4(e): “[...] *adjudicators shall not: (e) [d]irectly or indirectly, incur an obligation or accept a benefit that would interfere, or appear to interfere, with the performance of their duties;*” and Article 5, which refers to disclosure of “[a]ny professional, business and other significant relationships, within the past [five] years with: [...] (ii) *The parties’ counsel.*”)

<sup>112</sup> Resp. Comments III, ¶¶ 57-59.

<sup>113</sup> Resp. Comments III, ¶ 61.

<sup>114</sup> Resp. Comments III, § IV.

<sup>115</sup> Resp. Comments III, ¶¶ 62, 85.

<sup>116</sup> Resp. Comments III, ¶¶ 64-68.

<sup>117</sup> Resp. Comments III, ¶ 65.

<sup>118</sup> Resp. Comments III, ¶¶ 69-70.

74. International Custom. Spain submits that the disclosure obligations under the various conventions, codes and rules on which it relies, constitute international custom,<sup>119</sup> which in turn constitutes applicable international law and supports the disqualification.<sup>120</sup>
75. General Principles of Law. The Respondent further submits that under the relevant principles of independence and impartiality in “*all civilized nations*,” adjudicators “(1) [...] cannot accept any economic or non-economic benefit from any of the parties; and (2) [...] have the obligation to disclose any relationship professional or personal with the parties, specially of those [...] after the case has started;”<sup>121</sup> obligations that were breached in this case.<sup>122</sup> Spain argues that no civilized nation would condone “*that an adjudicator is invited to academic and social events from which he gets credit by an attorney on a pending case [...];*” which in “*most*” nations would constitute a “*gross wrongdoing*” leading to removal.<sup>123</sup> According to Spain, the arbitrators’ conduct here contravenes judicial practice in their own countries (UK and Switzerland) or the place the event took place (Germany).<sup>124</sup>
76. ICSID Prior Decisions. Finally, Spain argues that prior decisions on proposals for disqualification on grounds of lack of disclosure reveal that the standard is applied with extreme rigor.<sup>125</sup> The Respondent relies particularly on *Burlington*,<sup>126</sup> *Caratube*,<sup>127</sup> and the annulment decision in *Eiser*,<sup>128</sup> emphasizing that *Eiser* demonstrates the “*instrumental role*

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<sup>119</sup> Resp. Comments III, ¶ 74.

<sup>120</sup> Resp. Comments III, ¶ 72.

<sup>121</sup> Resp. Comments III, ¶ 84. *See also*, Resp. Comments III, ¶¶ 77-78.

<sup>122</sup> Resp. Comments III, ¶ 85.

<sup>123</sup> Resp. Comments III, ¶ 25. *See also, id.*, ¶ 32.

<sup>124</sup> Resp. Comments III, ¶¶ 26, 33, 83.

<sup>125</sup> Resp. Comments III, ¶ 86.

<sup>126</sup> Resp. Comments III, ¶¶ 87-89, referring to **RA-0051**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013 (“*Burlington*”).

<sup>127</sup> Resp. Comments III, ¶ 90, referring to **RA-0050**, *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014 (“*Caratube*”).

<sup>128</sup> Resp. Comments III, ¶¶ 91-94, referring to **RA-0052**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Application for Annulment, 11 June 2020 (“*Eiser Annulment*”).

*played by any kind of professional relationship*” vis-à-vis the standards of independence and impartiality.<sup>129</sup>

(iii) The Arbitrators’ Explanations and the Claimants’ Comments Confirm the Need to Disqualify

77. Spain highlights that the Claimants’ counsel: (i) did not attempt to explain her improper invitations to two members of the Tribunal;<sup>130</sup> and (ii) while being aware that Dr. Poncet attended the FIAM from 2017-2019, chose to stay silent on this during the disqualification briefing.<sup>131</sup> The Respondent further observes that the Claimants’ allegations emphasizing the global relevance of the FIAM confirm that an invitation to this event amounts to a “*gift*” with “*material and non-material value*” for the arbitrators.<sup>132</sup>
78. With regard to Sir Christopher, the Respondent finds it “*really serious*” that he regards his participation in the 2017 FIAM and the invitations on other occasions as “*normal*.”<sup>133</sup> For Spain, his explanations are misleading as they (i) fail to recognize that the event is “*fully created and organized by*” the Claimants’ counsel;<sup>134</sup> and (ii) describe it as a “*student event*” forming “*normal part of the public service*” of judges and arbitrators, when in fact, the event was a source of “*credit*” for him.<sup>135</sup>
79. With respect to Dr. Poncet, Spain submits that he “*implicitly acknowledge[s]*” his violations of ethical and conflict rules.<sup>136</sup> Although in Spain’s view a single instance suffices to disqualify an arbitrator, it highlights that Dr. Poncet admitted being invited “*several times*;<sup>137</sup> and despite his attempts to elude giving specifics, in the end acknowledged participating in the FIAM in 2017, 2018 and 2019.<sup>138</sup> For Spain, Dr.

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<sup>129</sup> Resp. Comments III, ¶¶ 91-93.

<sup>130</sup> Resp. Comments III, ¶¶ 5-6. *See also*, Resp. Comments IV, ¶¶ 16-17.

<sup>131</sup> Resp. Comments IV, ¶ 17.

<sup>132</sup> Resp. Comments IV, ¶ 19.

<sup>133</sup> Resp. Comments III, ¶ 27.

<sup>134</sup> Resp. Comments III, ¶¶ 28-29.

<sup>135</sup> Resp. Comments III, ¶¶ 30-31.

<sup>136</sup> Resp. Comments III, ¶ 12; Resp. Comments IV, ¶ 25.

<sup>137</sup> Resp. Comments III, ¶¶ 13-14; Resp. Comments IV, ¶ 26.

<sup>138</sup> Resp. Comments IV, ¶¶ 27-29.

Poncet's explanations are misleading when he indicates (i) that the FIAM is held at a university and the roundtable at the Frankfurt Chamber of Commerce, and (ii) that the event is sponsored by various organizations, given that these events are organized by the Claimants' counsel.<sup>139</sup> The Respondent also disagrees with Dr. Poncet's characterization of the FIAM as a "*pro-bono*" event, because "*academia events*" entail a clear benefit for the participants.<sup>140</sup>

80. The Respondent further submits that Dr. Poncet's attempt to excuse his lack of disclosure on the ground that the facts were "*publicly available information*" is improper, as the burden of disclosure falls on the arbitrator, and an internet search does not "*easily*" reveal the moot court members or the roundtable participants.<sup>141</sup> Moreover, Spain observes that Dr. Poncet has admitted that he attended ancillary and social events organized by the Claimants' counsel, adding to the impropriety.<sup>142</sup> Finally, the Respondent remarks that Dr. Poncet's promise "*to remain totally independent*" has no value given his breach of his disclosure obligations, and in fact demonstrates that he cannot commit to being impartial, particularly as he is so "*offended*" by the present Proposal.<sup>143</sup>

### *c. Conclusion*

81. According to the Respondent, an arbitrator should be removed when "*there are doubts about the integrity of the tribunal as an impartial body.*"<sup>144</sup> In this case, a disqualification is warranted in accordance with all the sources of public international law, and "*even in the stricter application of the disqualification standards.*"<sup>145</sup>
82. The Respondent lastly remarks that Dr. Poncet's and Mr. Oreamuno's assertions that they are "*offended*" by the Second Proposal constitute an "*abuse of [d]rama*" to divert

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<sup>139</sup> Resp. Comments III, ¶¶ 15-20.

<sup>140</sup> Resp. Comments IV, ¶ 30.

<sup>141</sup> Resp. Comments III, ¶ 21.

<sup>142</sup> Resp. Comments III, ¶¶ 22-24.

<sup>143</sup> Resp. Comments IV, ¶ 32.

<sup>144</sup> Resp. Second Proposal, ¶ 98.

<sup>145</sup> Resp. Second Proposal, ¶ 100.

attention;<sup>146</sup> as it is Spain who has been “*offended*” here.<sup>147</sup> Spain urges that such “*drama or the long relationship of the arbitrators with the [ICSID] Secretariat [...] should not make [...] ICSID [...] turn a blind eye on the improper behavior*” of the Tribunal.<sup>148</sup> For Spain, the disqualification here is not only “*legally imperative*” but also “*necessary to maintain the credibility of the Centre as a neutral institution [...]*.”<sup>149</sup>

### **(3) The Timeliness of the Second Proposal and Request for a Reasoned Decision**

83. Relying on *Burlington*, the Respondent submits that the timeliness of a proposal must be determined on a case by case basis; and argues that the Second Proposal was timely because it “*was presented as soon as [...] Spain was aware of the lack of high moral character as well as the lack of impartiality and independence of*” the Tribunal, and it was *not* filed to avoid the Hearing.<sup>150</sup>
84. Spain also opposed the Claimants’ request that the decision by the Chair be rendered without reasoning and asked that the necessary time be taken to issue a thorough decision with full guarantees.<sup>151</sup>

## **B. THE CLAIMANTS’ ARGUMENTS**

85. The Claimants submit that the Second Proposal is “*frivolous*,” and constituted a “*bad faith*” attempt to derail the Hearing scheduled for 27 August to 5 September 2020,<sup>152</sup> and an abuse of the disqualification procedure.<sup>153</sup>
86. In their initial Response of 12 August 2020, the Claimants requested that given the planned dates for Hearing, the Chair “*should render his decision by 26 August 2020 without written reasons*,” with the reasoning to follow later.<sup>154</sup> According to the Claimants, this would not

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<sup>146</sup> Resp. Comments IV, ¶ 47.

<sup>147</sup> Resp. Comments IV, ¶ 48.

<sup>148</sup> Resp. Comments IV, ¶ 51.

<sup>149</sup> Resp. Comments IV, ¶ 51.

<sup>150</sup> Resp. Comments III, ¶ 89.

<sup>151</sup> Resp. Comments II, ¶¶ 60-65; Resp. Comments III, ¶ 11.

<sup>152</sup> Cl. Response, pp. 1-2.

<sup>153</sup> Cl. Comments II, p. 1.

<sup>154</sup> Cl. Response, p. 3.



impair Spain's rights because there was no appeal against the Chair's decision, and ICSID Arbitration Rule 9(5) does not require a reasoned decision.<sup>155</sup>

**(1) On the First Ground**

87. First, the Claimants observe that the Chair has already dismissed a proposal to disqualify a tribunal on the ground that such tribunal ordered a video-hearing against a party's objection, and the same reasoning should be followed in the present case.<sup>156</sup>
88. Second, the Claimants argued that "*the regulatory and practical constraints*" on Mr. Oreamuno's travel to The Hague from Costa Rica were "*real*" and that it was "*undisputed that Professor Greenwood [...] had a major surgery in early August and [was] undergoing quarantine.*"<sup>157</sup> In the Claimants' view, conducting the Hearing virtually was the "*only alternative*" to a third re-scheduling, and the Tribunal "*exercised its procedural discretion necessary to avoid another delay [...]*."<sup>158</sup>
89. Third, the Claimants argue that Articles 57 and 14(1) of the ICSID Convention require an "*objective appearance of bias,*" which is not demonstrated by a decision to hold a hearing virtually, given that "*the impediments of video pleadings (if any) are born by both Parties equally.*"<sup>159</sup>
90. Finally, referring to the Respondent's allegation that PO No. 20 contained no valid ground to justify modifying the Hearing format from in-person to virtual, the Claimants observed that Spain's COVID-19 infection rates were almost ten times as high as those in Germany, The Netherlands or the U.K.<sup>160</sup> They added that, in May 2020 when an in-person Hearing was still under consideration, the Claimants made a comprehensive health proposal to minimize risk for the participants, and Spain took the view that "*subject to the compulsory*

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<sup>155</sup> Cl. Response, p. 3.

<sup>156</sup> Cl. Response, p. 2 (citing **CA-001** and **CA-002**, *Vattenfall AB and Others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision of the Chairman of the Administrative Council (8 July 2020) and Recommendation on the Respondent's Proposal to Disqualify the All Members of the Arbitral Tribunal 2020 (6 July 2020) ("**Vattenfall 2020 Decision**").

<sup>157</sup> Cl. Response, p. 2.

<sup>158</sup> Cl. Response, p. 2.

<sup>159</sup> Cl. Response, p. 3.

<sup>160</sup> Cl. Comments III, p. 1.

*rules in force in the Netherlands and of those mandatory rules applicable in the venue, the wearing of masks will be up to the will of each attendant.”*<sup>161</sup>

## **(2) On the Second Ground**

91. The Claimants observe that the FIAM is an event organized under the auspices of the Max Planck Institute, and previously under the auspices of the Goethe University Frankfurt; it has been a “*leading educational project*” for over a decade, recognized by UNCITRAL;<sup>162</sup> and its objective is to promote education in less developed countries.<sup>163</sup> It involves over 300 persons and dozens of arbitrators every year; and the arbitrators for the final round include at least three of the most respected arbitrators in the community.<sup>164</sup>
92. According to the Claimants, the FIAM is a pro-bono project, “*it is not ‘branded’ by any particular law firm;*”<sup>165</sup> and “[i]t does not cover travel expenses or other costs of any of the arbitrators.”<sup>166</sup>
93. Lastly, the Claimants observe that “[a]ll information about the Moot is easily available on the internet, in particular on the Moot’s own website [...],” and, Spain has admitted that it was aware of the Claimants’ counsel involvement in the FIAM since at least February 2017.<sup>167</sup> In the Claimants’ view, Spain has not raised the participation of Sir Christopher and Dr. Poncet in the FIAM as an “*actual disqualification ground,*” nor could it;<sup>168</sup> and in any event, any proposal would be belated given the Respondent’s admission that it “*has been aware of the Moot since 2017.*”<sup>169</sup>

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<sup>161</sup> Cl. Comments III, p. 2.

<sup>162</sup> Cl. Comments II, p. 1.

<sup>163</sup> Cl. Comments II, p. 2.

<sup>164</sup> Cl. Comments II, p. 2.

<sup>165</sup> Cl. Comments II, p. 2.

<sup>166</sup> Cl. Comments II, p. 2.

<sup>167</sup> Cl. Comments II, p. 3.

<sup>168</sup> Cl. Comments III, p. 2.

<sup>169</sup> Cl. Comments III, p. 2.

## C. THE ARBITRATORS' EXPLANATIONS

### (1) Joint Explanations

94. The members of the Tribunal observe that in addressing the dates for the Hearing and the format of the Hearing, they were “*guided by the need to respond to the unprecedented challenges posed by the COVID pandemic in a way which both ensures due process to the Parties and recognizes the need to conduct the proceedings as expeditiously as possible,*” bearing in mind that “*the achievement of those twin goals justifies - and indeed requires - a measure of sacrifice on the part of all concerned.*”<sup>170</sup>
95. The Tribunal observes that its “*letter of 22 May 2020 made clear that, although the Tribunal hoped to hold the hearing in person, it was ‘minded to hold the hearings by video conference if it concludes that it is impossible - for example because of restrictions at the venue or limitations placed by the countries in which counsel, witnesses, experts or Tribunal Members reside - to proceed with an in person hearing for all or any of the sessions contemplated.’*”<sup>171</sup> The Tribunal further explains that, given that a video-hearing necessarily involved a different schedule and different planning from the Parties, the Tribunal found it important not to leave the decision about the format of the Hearing until shortly before the scheduled start date.<sup>172</sup>
96. The Tribunal notes that, after listening and considering carefully both Parties’ views, it concluded “*that the risk of an in person hearing being rendered impossible was too great and that the hearing should proceed by video conference.*”<sup>173</sup> According to the Tribunal, its decision in that regard (embodied in PO No. 20) took account of: (i) “*likely difficulties which Dr Oreamuno would face in travel from Costa Rica (PO 20, paras. 13-14);*” (ii) “*the risk that the President would be unable to travel given that he was to have surgery at the*

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<sup>170</sup> Arbitrators’ Joint Explanations, ¶ 4.

<sup>171</sup> Arbitrators’ Joint Explanations, ¶ 6, referring to **RA-0018**.

<sup>172</sup> Arbitrators’ Joint Explanations, ¶ 7.

<sup>173</sup> Arbitrators’ Joint Explanations, ¶ 8.

*start of August (PO 20, para. 18);” and (iii) “the risk that further travel restrictions (such as those imposed by the United Kingdom on travellers from Spain) would be imposed.”*<sup>174</sup>

97. The Tribunal rejects the contention that its decision amounted to “*pure speculation,*” observing that “[a]ny assessment of risk necessarily entails weighing different possibilities about the future.”<sup>175</sup> The Tribunal explains that “*the issue was one of assessing risk*” and thus “*it necessarily entailed examining what **might** happen.*”<sup>176</sup> According to the Tribunal, in making that assessment they considered: (i) “*the apparent spread of the virus in North America [...] in assessing the possibility of Dr Oreamuno and the experts travelling to Europe for the hearing (and being able to return without quarantine to their home countries);*”<sup>177</sup> and (ii) “*the risk of the President being required to remain in the United Kingdom in the event of any complication concerning his surgery (as well as the fact that he had been advised not to travel as early as 27 August 2020; see PO 20, para. 18) [...].*”<sup>178</sup>
98. Nor does the Tribunal agree that it made any misrepresentation or misstatement.<sup>179</sup> In that regard, the Tribunal submits: “*At the time that PO 20 was adopted, the borders of Costa Rica remained closed and even though they were due to reopen, our assessment was that there were likely to be serious obstacles to Dr Oreamuno travelling to Europe at the end of August.*”<sup>180</sup> In addition, the Tribunal notes, this was “*only one*” of the factors that led to the decision to hold the Hearing by video-conference.<sup>181</sup>
99. The Tribunal further explains that it “*considered carefully whether the decision to hold the hearings by video conference would bear more heavily on one Party than on the other,*” and concluded that it would not, given that both Parties counsel were in the same time zone and their experts would testify under the same conditions.<sup>182</sup>

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<sup>174</sup> Arbitrators’ Joint Explanations, ¶ 9.

<sup>175</sup> Arbitrators’ Joint Explanations, ¶ 10.

<sup>176</sup> Arbitrators’ Joint Explanations, ¶ 10 (emphasis original).

<sup>177</sup> Arbitrators’ Joint Explanations, ¶ 10

<sup>178</sup> Arbitrators’ Joint Explanations, ¶ 10.

<sup>179</sup> Arbitrators’ Joint Explanations, ¶ 11.

<sup>180</sup> Arbitrators’ Joint Explanations, ¶ 11.

<sup>181</sup> Arbitrators’ Joint Explanations, ¶ 11.

<sup>182</sup> Arbitrators’ Joint Explanations, ¶ 12.

100. While recognizing that this case is a substantial one that raises complex issues, the Tribunal considers that these can properly be addressed by a video hearing, and observes that “[s]ubject to the outcome of the present challenge [the Tribunal is] determined to ensure that the arbitration is conducted in a manner which is both fair and efficient and properly meets the challenges posed by the COVID pandemic.”<sup>183</sup>

**(2) Sir Christopher Greenwood’s Additional Explanations**

101. Sir Christopher confirms that he participated as a judge in the finals of the FIAM on 10 March 2017, describing it as “an annual event held by the Frankfurt Chamber of Commerce and Industry.”<sup>184</sup> He clarifies that he took no part in the roundtable or reception, adding that he may have been invited but would have declined given other engagements and his travel schedule.<sup>185</sup>

102. Sir Christopher notes that “[t]he law firm of which the Claimants’ counsel, Dr Sabine Konrad, was then a partner, was a sponsor and provided much of the organization for the moot;” but explains that he “received no remuneration,” he paid for his own travel and hotel expenses, and received no hospitality apart from a light lunch.<sup>186</sup> He “regard[s] taking part in such student events as a normal part of the public service which judges and arbitrators are encouraged to provide,” and considers that participation in the event has no bearing on his independence or impartiality.<sup>187</sup>

103. Finally, Sir Christopher confirmed that, apart from the 2017 FIAM, he has not taken part in the FIAM or roundtable or “any other event organized by the Claimants or their counsel” since becoming an arbitrator in this case.<sup>188</sup> He has no recollection of having been invited to any such event, but notes that as he does not keep correspondence related to declined

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<sup>183</sup> Arbitrators’ Joint Explanations, ¶ 13.

<sup>184</sup> Greenwood Explanations I, ¶ 2.

<sup>185</sup> Greenwood Explanations I, ¶ 4.

<sup>186</sup> Greenwood Explanations I, ¶ 2.

<sup>187</sup> Greenwood Explanations I, ¶ 3.

<sup>188</sup> Greenwood Explanations II, ¶ 2.

invitations, he cannot be sure. He affirms, however, that if he received such an invitation, it was declined.<sup>189</sup>

### (3) Dr. Charles Poncet's Additional Explanations

104. Dr. Poncet confirmed that he has attended the FIAM several times as an arbitrator.<sup>190</sup> Initially, he did not remember whether he attended in 2017 although he observed he “*might very well have.*”<sup>191</sup> He later explained that, due to the pro-bono nature of the event, he had no time records but offered to check his financial records to determine when he had attended.<sup>192</sup> Thereafter, Dr. Poncet specified that such financial records showed that he had attended the FIAM from 2010 to 2013, and 2017 to 2019.<sup>193</sup>
105. Dr. Poncet explains that he “*never received any contribution*” for his attendance to the FIAM, and that he has always paid for his own travel and accommodation,<sup>194</sup> specifically his former law firm paid up to 2013 and Poncet SARL paid from 2017 to 2019.<sup>195</sup> He adds that this is a pro-bono event in which arbitrator practitioners help students develop case presentation and forensic skills, and he regards it as a “*service*” to the future arbitration community.<sup>196</sup> He further explained that the FIAM is held at a university and is sponsored by a number of organizations, remarking that this is public information.<sup>197</sup>
106. Dr. Poncet further notes that “[t]o the best of [his] recollection, [he] did attend some of the ancillary events in connection with the Moot, including drinks at Dr. Konrad's law firm.”<sup>198</sup> He observed that the FIAM generally includes a party on campus at Goethe University for

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<sup>189</sup> Greenwood Explanations II, ¶ 3.

<sup>190</sup> Poncet Explanations I; Poncet Explanations II, p. 1.

<sup>191</sup> Poncet Explanations I.

<sup>192</sup> Poncet Explanations II, p. 1.

<sup>193</sup> Poncet Explanations III.

<sup>194</sup> Poncet Explanations I.

<sup>195</sup> Poncet Explanations III.

<sup>196</sup> Poncet Explanations II.

<sup>197</sup> Poncet Explanations I.

<sup>198</sup> Poncet Explanations I. *See also*, Poncet Explanations II, p. 2.

all participants, and that he attended some of those events.<sup>199</sup> He also attended discussions on investor-State international law at the Frankfurt Chamber of Commerce.<sup>200</sup>

107. In Dr. Poncet’s view, none of the foregoing has any impact on his independence and impartiality, and he affirms that he is and intends to remain “*fully independent and impartial.*”<sup>201</sup> He rejects the allegation that by attending these events and their social surroundings he has become beholden to one of the organizers, which he considers “*baseless and almost offensive.*”<sup>202</sup>

#### **(4) Mr. Rodrigo Oreamuno’s Additional Explanations**

108. In his 28 August 2020 submission, Mr. Oreamuno explained that due to the COVID-19 pandemic “*several months ago*” Costa Rica “*decided to close its borders to travelers entering Costa Rica by air or other means of transportation, and to prohibit Costa Rica nationals to travel abroad.*”<sup>203</sup> He adds that the pandemic “*forced the government to postpone the July opening until 1st August*” but “*by the end of July nobody was really sure if that opening would, in fact, take place on such date.*”<sup>204</sup> He observes that when in late July the Parties and the Tribunal analyzed the possibility of holding the Hearing in-person, he “*expressed [his] concern that [he] was not sure if [he] would be allowed to travel on 1 August;*”<sup>205</sup> and that “[t]here was another problem for [his] travelling: in those dates (and even today), Costa Rican citizens are not admitted to any of the EU nations.”<sup>206</sup> He adds that although on 22 July 2020 the Respondent submitted a communication observing that members of international organizations could travel without restriction to the EU and that “[a]rbitrators have the same privileges and immunities of the members of the Centre [...],” he “*did not know if, in fact, a Costa Rican ICSID arbitrator could travel to the EU under*

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<sup>199</sup> Poncet Explanations II, p. 2.

<sup>200</sup> Poncet Explanations II, p. 2.

<sup>201</sup> Poncet Explanations I. *See also*, Poncet Explanations II, p. 2; Poncet Explanations III.

<sup>202</sup> Poncet Explanations II, p. 2. *See also*, Poncet Explanations III.

<sup>203</sup> Oreamuno Explanations I, ¶ 2(c).

<sup>204</sup> Oreamuno Explanations I, ¶ 2 (e).

<sup>205</sup> Oreamuno Explanations I, ¶ 2 (g).

<sup>206</sup> Oreamuno Explanations I, ¶ 2 (h).

*the existing sanitary limitations.*”<sup>207</sup> He explains that the information he “*did receive was that, even if a Costa Rican ICSID arbitrator would be admitted to a EU nation, upon arrival he would be subject to quarantine for 15 days;*” and he would be quarantined again upon return to Costa Rica.<sup>208</sup> Lastly, Mr. Oreamuno notes that even if he had been able to travel, there were additional difficulties related to the President of the Tribunal’s surgery “*that would make it impossible to make sure that an in person hearing would take place.*”<sup>209</sup>

109. Mr. Oreamuno rejects the allegation that he made “*misrepresentations and misleading statements*” or acted with “*bias and partiality;*” or incurred in any “*unethical behavior;*” and denies having benefited in any way from the decision to hold the Hearing virtually.<sup>210</sup>

#### **IV. ANALYSIS**

##### **A. REQUESTS FOR A RECOMMENDATION**

110. In the Second Proposal, Spain requested that the Tribunal’s conduct underlying the first ground be referred to the World Bank Group’s INT for a recommendation prior to the Chair’s decision on the proposal.<sup>211</sup> Spain argued that this recommendation was “*absolutely necessary,*”<sup>212</sup> to “*clarify*” if the Tribunal’s conduct would be “*subject to sanction if [...] committed in a project financed by the World Bank.*”<sup>213</sup> Observing that the World Bank is a single international organization, the Respondent argued that “*the concept of [...] certain wrongs*” could not differ throughout its various institutions.<sup>214</sup> Thus, for Spain, if the Tribunal’s acts qualify for the purpose of World Bank sanctions as “*unacceptable practice*” (and Spain argues they do), ICSID as part of the World Bank Group must also conclude that they are “*dishonest acts*” that lead to disqualification.<sup>215</sup> In

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<sup>207</sup> Oreamuno Explanations I, ¶ 2 (i).

<sup>208</sup> Oreamuno Explanations I, ¶ 2 (j-k).

<sup>209</sup> Oreamuno Explanations I, ¶ 2 (l).

<sup>210</sup> Oreamuno Explanations I, ¶ 2 (o).

<sup>211</sup> Resp. Second Proposal, ¶ 101(c). *See also*, Resp. Second Proposal, ¶¶ 91, 97; Resp. Comments II, ¶¶ 87, 130, 147(c).

<sup>212</sup> Resp. Second Proposal, ¶¶ 89, 97; Resp. Comments II, ¶ 6.

<sup>213</sup> Resp. Second Proposal, ¶ 93.

<sup>214</sup> Resp. Second Proposal, ¶ 95. *See also*, Resp. Comments II, ¶¶ 133, 135-136.

<sup>215</sup> Resp. Comments II, ¶¶ 121-122. *See also, id.*, ¶¶ 125, 129, 131.



the Respondent's view, the Second Proposal should be assessed under the standard of evidence in World Bank sanction procedures of “*more likely than not*,”<sup>216</sup> and applying a regime of “*absolute liability*,” which demonstrates a “*wrongdoing*” in this case.<sup>217</sup>

111. By letter of 24 August 2020 the Centre notified the Parties of the Chair's decision to dismiss the request for a recommendation from INT. On 3 September 2020, Spain requested a reconsideration of this matter.<sup>218</sup> The Respondent emphasizes that INT's role would not be to interpret the ICSID Convention, but to analyze whether the Tribunal's conduct falls under the World Bank's notion of a *sanctionable practice*.<sup>219</sup> Should the answer be affirmative, Spain submits, ICSID would decide whether those practices reflect the “*high moral character*” required by the ICSID Convention.<sup>220</sup> Spain adds that INT's recommendation has become “*essential*” given the discovery of the events underlying the second ground for disqualification.<sup>221</sup>
112. In addition, Spain asked that the Second Proposal be referred to the PCA for a recommendation.<sup>222</sup> The Respondent justifies this by: (i) the “*new and specific circumstances*” underlying the second ground for disqualification;<sup>223</sup> (ii) the fact that “*a request for disqualification has already been resolved by ICSID*” and the “*number of cumulative circumstances regarding the conduct of the [...] Tribunal raised by the Respondent*,”<sup>224</sup> and (iii) because it is “*convenient*” to interpret the ICSID Convention in light of PCA practice, to benefit the ICSID system and arbitral practice in general.<sup>225</sup>

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<sup>216</sup> Resp. Comments II, ¶¶ 118-120.

<sup>217</sup> Resp. Comments II, ¶¶ 87-91. *See also, id.*, ¶¶ 107-117.

<sup>218</sup> Resp. Comments IV, ¶¶ 54, 56(c).

<sup>219</sup> Resp. Comments IV, ¶ 53.

<sup>220</sup> Resp. Comments IV, ¶ 53.

<sup>221</sup> Resp. Comments IV, ¶ 54.

<sup>222</sup> Resp. Comments III, ¶¶ 106, 107(d); Resp. Comments IV, ¶¶ 55, 56(c).

<sup>223</sup> Resp. Comments III, ¶ 103.

<sup>224</sup> Resp. Comments III, ¶ 104.

<sup>225</sup> Resp. Comments III, ¶ 105.

113. It is undisputed that pursuant to Article 58 of the ICSID Convention, the decision on any proposal to disqualify all the members of a tribunal shall be taken by the Chair.<sup>226</sup> The Chair has requested external recommendations on rare occasions, on the basis of the specific circumstances of the case, but in every case the final decision on the proposal has been taken by the Chair, as required by Article 58 of the ICSID Convention.
114. The circumstances in the present case do not justify requesting an external recommendation. The Chair is bound to evaluate the Tribunal's conduct in light of the standard of the ICSID Convention. There is no basis for the contention that such standard must be determined by reference to (i) the World Bank Group's guidelines for different regulatory regimes or (ii) the manner in which INT applies those guidelines to the sanctions context. In addition, Spain has not explained the alleged "*cumulative circumstances*" that prevent the Chair from resolving the present proposal under the usual process, and nothing in the ICSID Convention limits the Chair's mandate to resolve proposals for disqualification to one per case.
115. The Chair will therefore proceed to decide the Second Proposal on the basis of the Parties' submissions and the arbitrators' explanations, in accordance with Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9.

**B. TIMELINESS**

116. ICSID Arbitration Rule 9(1) provides:

*"A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor."*

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<sup>226</sup> See Resp. Comments II, ¶ 5 (stating that "[t]his is a crucial Disqualification Proposal that has to be decided by the Chairperson of the Administrative Council of the ICSID [...].")

117. Neither the ICSID Convention nor the ICSID Arbitration Rules specify a number of days within which a disqualification proposal must be filed. Accordingly, the timeliness of a disqualification proposal must be determined on a case-by-case basis.<sup>227</sup>
118. For example, in *BSG*, a disqualification proposal filed 7 days after the tribunal’s ruling giving rise to the proposal was considered timely.<sup>228</sup> In *Fábrica*, a challenge filed 45 days after the latest fact on which it was based was considered untimely.<sup>229</sup> In *Burlington*, two grounds were dismissed because they related to facts which had been public for more than 4 months prior to filing the challenge.<sup>230</sup> In *Interocean*, a number of grounds were found untimely, including two invoked 377 days and 305 days respectively after the date on which the challenging party became aware of the factual basis of the proposal.<sup>231</sup>
119. In this case, the Respondent filed the Second Proposal on 12 August 2020. The first ground arises from a procedural decision rendered by the Tribunal on 28 July 2020 (PO No. 20) and the ruling on the request for reconsideration of that order of 30 July 2020. The Chair concludes that the time period between the facts relied upon for this ground and the filing of the Second Proposal falls within a range that can be considered timely.
120. The second ground was raised in the Respondent’s submission of 20 August 2020. It arises from events that took place in March 2017 with respect to both Sir Christopher and Dr. Poncet, and from additional events in March 2018 and 2019 with respect to Dr. Poncet

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<sup>227</sup> See, e.g., *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, 3 October 2017 (“*Interocean*”), ¶ 71; *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, 28 December 2016 (“*BSG*”), ¶ 60; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify a Majority of the Tribunal, 16 June 2015 (“*Fábrica 2015 Decision*”), ¶ 40; *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, 5 May 2014 (“*Conoco 2014 Decision*”), ¶ 39; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014 (“*Abaclat 2014 Decision*”), ¶ 68; **RA-0051**, *Burlington*, ¶ 73.

<sup>228</sup> *BSG*, ¶ 62.

<sup>229</sup> *Fábrica 2015 Decision*, ¶¶ 44-46.

<sup>230</sup> **RA-0051**, *Burlington*, ¶¶ 71-75.

<sup>231</sup> *Interocean*, ¶¶ 78, 83.

only. In the Chair’s view, the second ground does not fall within a range that can be considered timely.

121. Spain argues that the Second Proposal was timely because it was filed “*as soon as [...] Spain was aware*” of the basis for it.<sup>232</sup> As to Sir Christopher’s and Dr. Poncet’s participation in the 2017 FIAM, Spain has argued that this was “*just*” found by the Respondent on or around 20 August 2020 in an internet search.<sup>233</sup> The fact remains, however, that the moot in question took place in March 2017, and it is undisputed that information about Sir Christopher’s and Dr. Poncet’s participation was publicly available online.<sup>234</sup> Spain has provided no explanation as to why it needed over 3 years to identify the concern. Nor can the Chair see any reason that could justify such a delay.
122. As to Dr. Poncet, Spain relies also on his participation in the 2018 and 2019 FIAM,<sup>235</sup> and his attendance to ancillary and social events surrounding the FIAM, including a 2017 roundtable and social reception at the Claimants’ counsel’s firm.<sup>236</sup> Yet, on the basis of the record put forward by the Parties, the Chair observes that the same sources relied upon by the Respondent indicate that Dr. Poncet’s participation in the 2017 roundtable, and in the 2018 FIAM was publicly available information.<sup>237</sup> So was Dr. Poncet’s participation in the 2019 FIAM, which was listed on the moot’s website.<sup>238</sup> Moreover, attending the surrounding social events is a common feature of academic events and would therefore be unsurprising to any reasonable third party.

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<sup>232</sup> Resp. Comments III, ¶ 89.

<sup>233</sup> Resp. Comments II, ¶ 143; Resp. Comments III, ¶ 80.

<sup>234</sup> See, Resp. Comments II, ¶ 143 and n. 53.

<sup>235</sup> See, Resp. Comments IV, ¶ 29. Spain takes no issue with events prior to his appointment in this case. See Resp. Comments III, ¶ 55.

<sup>236</sup> See, Resp. Comments II, ¶ 144; Resp. Comments III, ¶¶ 22-24; Resp. Comments IV, ¶ 31. Sir Christopher has indicated that, apart from the 2017 FIAM finals, he did not attend any other event organized by the Claimants or their counsel. Greenwood Explanations II, ¶ 2.

<sup>237</sup> See, Resp. Comments II, ¶ 144, n. 54 (referring to <https://www.mwe.com/events/frankfurt-roundtable-seminar> on the 10 March 2017 roundtable); and Resp. Comments IV, n. 7 (referring to **RA-0054**, *NUS - Faculty of Law: Asia's Global Law School. NUS Law wins 11th Frankfurt Investment Arbitration Moot*, on the 2018 FIAM).

<sup>238</sup> Cl. Comments II, p. 3 (referring to [www.investmentmoot.org](http://www.investmentmoot.org))

123. Finally, although the Respondent argues that the circumstances underlying the second ground took on a “*new perspective*” given the “*accumulation of circumstances*,”<sup>239</sup> this does not explain why the concern could not have been raised earlier.
124. On the basis of the foregoing, the Chair concludes that: (i) the first ground was filed promptly, and will be analyzed in Section IV.C below; and (ii) the second ground was not filed promptly. This said, the Chair will also analyze the second ground in Section IV.C below to show that this ground must, in any event, be dismissed in its entirety.

## **C. THE GROUNDS FOR DISQUALIFICATION**

### **(1) The Legal Standard**

125. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It provides that:

*“A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. 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.”*

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<sup>239</sup> Resp. Comments II, ¶ 146.

126. A number of decisions have concluded that the word “*manifest*” in Article 57 of the Convention means “*evident*” or “*obvious*,”<sup>240</sup> and that it relates to the ease with which the alleged lack of the required qualities can be perceived.<sup>241</sup>
127. The required qualities are stated in 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.”*
128. While the English version of Article 14 refers to “*independent judgment*,” and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*” (guaranteed independence in exercising their functions), the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, it is understood that pursuant to Article 14(1) arbitrators must be both impartial and independent.<sup>242</sup>
129. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both

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<sup>240</sup> See, e.g., *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20 – Annulment Proceeding, Decision on the Proposal to Disqualify Mr. Álvaro Castellanos Howell, 2 March 2018 (“**Blue Bank 2018 Decision**”), ¶ 78; *BSG*, ¶ 54; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 28 March 2016 (“**Fábrica 2016 Decision**”) ¶ 33; *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, 1 July 2015 (“**Conoco 2015 Decision**”), ¶ 82; *Conoco 2014 Decision*, ¶ 47; **RA-0050**, *Caratube*, ¶ 55; *Abaclat 2014 Decision*, ¶ 71; **RA-0051**, *Burlington*, ¶ 68; *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify the Majority of the Tribunal, 13 December 2013 (“**Repsol**”), ¶ 73; *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, 12 November 2013 (“**Blue Bank 2013 Decision**”), ¶ 61.

<sup>241</sup> See, e.g., *Blue Bank 2018 Decision*, ¶ 78; *BSG*, ¶ 54; *Fábrica 2016 Decision*, ¶ 33; *Conoco 2014 Decision*, ¶ 47; *Abaclat 2014 Decision*, ¶ 71.

<sup>242</sup> See, e.g., *Blue Bank 2018 Decision*, ¶ 77; *BSG*, ¶ 56; *Fábrica 2016 Decision*, ¶ 28; *Conoco 2015 Decision*, ¶ 80; *Conoco 2014 Decision*, ¶ 50; *Abaclat 2014 Decision*, ¶ 74; **RA-0051**, *Burlington*, ¶ 65; *Repsol*, ¶ 70; *Blue Bank 2013 Decision*, ¶ 58.

“protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”<sup>243</sup>

130. Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias.<sup>244</sup>
131. The legal standard applied to a proposal to disqualify an arbitrator is an “*objective standard based on a reasonable evaluation of the evidence by a third party.*”<sup>245</sup> Therefore, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.<sup>246</sup>
132. The Chair notes that the Respondent has referred to other sets of standards and guidelines in its arguments. While some of 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.

**(2) First Ground: The Allegation of Misrepresentations and Misleading Statements**

***a. Allegation of Lack of High Moral Character***

133. The allegation that the Tribunal lacks the “*high moral character*” required by Article 14(1) of the ICSID Convention stems from the following portions of PO No. 20:

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<sup>243</sup> See, e.g., *Blue Bank 2018 Decision*, ¶ 77; *BSG*, ¶ 57; *Fábrica 2016 Decision*, ¶ 29; *Conoco 2015 Decision*, ¶ 81; *Conoco 2014 Decision*, ¶ 51; **RA-0050**, *Caratube*, ¶ 53; *Blue Bank 2013 Decision*, ¶ 59; *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011 (“*Universal*”), ¶ 70; *Urbaser S.A. and Others v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010 (“*Urbaser*”), ¶ 43.

<sup>244</sup> See, e.g., *Interocean*, ¶ 68; *BSG*, ¶ 57; *Conoco 2015 Decision*, ¶ 83; *Conoco 2014 Decision*, ¶ 52; **RA-0050**, *Caratube Decision*, ¶ 57; *Abaclat 2014 Decision*, ¶ 76; **RA-0051**, *Burlington*, ¶ 66; *Repsol*, ¶ 71; *Blue Bank 2013 Decision*, ¶ 59.

<sup>245</sup> See, e.g., *Blue Bank 2018 Decision*, ¶ 79; *Interocean*, ¶ 69; *BSG*, ¶ 58; *Fábrica 2016 Decision*, ¶¶ 30-32; *Conoco 2015 Decision*, ¶ 84; *Conoco 2014 Decision*, ¶ 53; **RA-0050**, *Caratube*, ¶ 54; *Blue Bank 2013 Decision*, ¶ 60; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007 (“*Suez 2007 Decision*”), ¶ 39.

<sup>246</sup> See, e.g., *Blue Bank 2018 Decision*, ¶ 79; *Interocean*, ¶ 69; *BSG*, ¶ 58; *Conoco 2015 Decision*, ¶ 84; *Conoco 2014 Decision*, ¶ 53.

“13. The Tribunal notes the observation of the Respondent that Dr Oreamuno’s status as an arbitrator in an ICSID case might allow him to benefit from an exception in the restrictions currently in force in Europe on entry from the Western Hemisphere. However, even if that is the case, it does not solve the practical problems of arranging travel given that Costa Rica has closed its borders and it is unclear whether any facilities for travel will be available.”<sup>247</sup>

[...]

“18. Moreover, there remains a serious risk that the President might not be able to attend an in-person hearing. As explained in the conference, the President is due to undergo surgery in early August. This surgery is followed by a compulsory period of quarantine following discharge from hospital. While that period of quarantine would end approximately one week before the hearing is scheduled to begin, the medical advice which the President has been given is that it would be undesirable for him to travel for at least another two weeks after the end of the compulsory quarantine. In addition, if there is any complication, such as the discovery of a COVID case in the hospital where the surgery is performed or the need for supplementary surgery, the quarantine period would be extended. Consequently, there is a risk that arrangements for any hybrid hearing would have to be cancelled at a late stage.”<sup>248</sup>

134. The Chair understands that PO No. 20 was issued in the context of the global health crisis arising from the COVID-19 pandemic, which required the Tribunal to consider whether the Hearing scheduled for 27 August to 5 September 2020 could be held in person at The Hague on those dates. The Respondent argues that a Hearing in person was “*perfectly possible*,”<sup>249</sup> and strongly criticizes the reasoning at paragraphs 13 and 18 of PO No. 20 that led the Tribunal to a different conclusion, characterizing it as “*conscious misrepresentations*,” “*misleading*” and “*speculative*” statements.<sup>250</sup>
135. Spain’s complaint with respect to paragraph 13 of PO No. 20 is premised on the allegations that: (i) the Tribunal “*said that one of its arbitrators could not travel from Costa Rica to The Hague for a hearing at the end of the month because Costa Rica’s borders were closed*,”<sup>251</sup> and (ii) the Tribunal “*said that one of the arbitrators could not travel*” because

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<sup>247</sup> RA-010, PO No. 20, ¶ 13.

<sup>248</sup> RA-010, PO No. 20, ¶ 18.

<sup>249</sup> See, e.g., Resp. Comments II, ¶¶ 41, 88, 124; Resp. Comments III, ¶ 98.

<sup>250</sup> See, e.g., Resp. Second Proposal, ¶¶ 3, 66.

<sup>251</sup> Resp. Second Proposal, ¶ 74; Resp. Comments II, ¶ 84.



“it is unclear whether any facilities for travel will be available.”<sup>252</sup> Yet, this characterization fails to recognize that paragraph 14 of PO No. 20 makes clear that the analysis on these points was one of risk and probability, not a definitive assertion of impossibility. At paragraph 14 the Tribunal stated that it was “*proceed[ing] on the basis that there is a very high **probability** that one Member of the Tribunal would be unable to attend a hearing in Europe on the dates already determined.*”<sup>253</sup> Spain’s further allegation that the reasoning in paragraph 18 of PO No. 20 was “*speculative*”<sup>254</sup> merely reflects a disagreement with the Tribunal’s risk assessment.

136. The Tribunal has commented that it viewed its decision in PO No. 20 as one of assessing the risk of an in-person Hearing being rendered impossible.<sup>255</sup> That this was the task the Tribunal undertook is further confirmed by the observation in PO No. 20 that there was an “*additional risk that other travel restrictions may be introduced at short notice which might affect the ability of counsel, experts, witnesses or a Member of the Tribunal to attend the hearing.*”<sup>256</sup>
137. The Chair further notes that the challenged arbitrators have also observed that they have strived to conduct the proceeding “*in a way which both ensures due process to the Parties and recognizes the need to conduct the proceedings as expeditiously as possible.*”<sup>257</sup> In the Chair’s view, as a general rule, the Tribunal itself is best placed to assess and balance these risks and considerations. Given the extraordinary circumstances and the multiple uncertainties created by the COVID-19 pandemic, the Tribunal’s decision to conduct a risk assessment certainly does not show a lack of high moral character. Rather, in the eyes of an objective third party, it would appear to be the Tribunal’s duty to do so. A party’s disagreement with the Tribunal’s risk assessment is no basis to conclude that there is “a

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<sup>252</sup> Resp. Second Proposal, ¶ 75; Resp. Comments II, ¶ 85.

<sup>253</sup> **RA-010**, PO No. 20, ¶ 14 (emphasis added).

<sup>254</sup> Resp. Second Proposal, ¶ 76; Resp. Comments II, ¶ 86.

<sup>255</sup> Arbitrators’ Joint Explanations, ¶ 8.

<sup>256</sup> **RA-010**, PO No. 20, ¶ 19.

<sup>257</sup> Arbitrators’ Joint Explanations, ¶ 4.

*manifest lack of the qualities required by paragraph (1) of Article 14*” to disqualify the Tribunal.<sup>258</sup>

***b. Allegation of Lack of Impartiality***

138. As to Spain’s allegations of lack of impartiality, the Chair finds that a third party undertaking a reasonable evaluation of the circumstances underlying the first ground would *not* conclude that the Tribunal manifestly lacks impartiality.
139. *First*, the Respondent asserts that the decision to modify the modality of the Hearing from in-person to virtual was made to satisfy the Claimants’ desire to avoid the postponement of the Hearing, and in absolute disregard of the Respondent’s position.<sup>259</sup> The Respondent does not deny that it was given an opportunity to present its views on the matter. Rather, the allegation is that Spain’s concerns about the change of the Hearing modality were dismissed “*without [...] serious consideration,*”<sup>260</sup> and that the Tribunal gave priority to the Claimants’ position and to its own desire to minimize the Tribunal’s “*inconvenience*” and “*discomfort*” in traveling, while prejudicing the Respondent.<sup>261</sup>
140. While it is not unusual for a party to be dissatisfied with adverse procedural rulings made by a tribunal, the mere existence of such an adverse ruling is insufficient to conclude that the Tribunal manifestly lacks impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention. Otherwise, proceedings could continuously be interrupted by the unsuccessful party, unduly prolonging and disrupting the arbitral process.<sup>262</sup>
141. *Second*, although the Respondent generally asserts that the decision to change the modality of the Hearing constituted “*unequal treatment,*”<sup>263</sup> and was taken to satisfy the Claimants “*with manifest prejudice*” to the Respondent’s position;<sup>264</sup> Spain has failed to explain the additional burden and/or prejudice that the modality of the hearing would impose solely on

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<sup>258</sup> ICSID Convention, Art. 57.

<sup>259</sup> See, e.g., Resp. Second Proposal, ¶¶ 81-83.

<sup>260</sup> Resp. Second Proposal, ¶ 85.

<sup>261</sup> Resp. Second Proposal, ¶ 87.

<sup>262</sup> See, e.g., BSG, ¶ 68; *Abaclat 2014 Decision*, ¶ 80.

<sup>263</sup> Resp. Second Proposal, ¶ 81.

<sup>264</sup> Resp. Second Proposal, ¶ 87.

the Respondent and not on the Claimants. The Chair does not see that “*a procedural disagreement—or the fact that the Tribunal’s decision was supported by the Claimants and opposed by the Respondent—reasonably provides a basis for an inference of bias.*”<sup>265</sup>

142. *Third*, the Chair notes Spain’s view that “*only an in-person hearing (with all the Members of the Tribunal) is able to guarantee the procedural rights of the Parties*” in this particular case.<sup>266</sup> However, as the Chair has observed on a prior occasion, “*any arbitral tribunal is called on to balance considerations of efficiency and avoiding delay with ensuring that the parties are properly heard,*” and “[t]he Tribunal itself is best placed to balance these considerations [...]”<sup>267</sup>

143. Neither the ICSID Convention, nor the ICSID Arbitration Rules contemplate a disqualification proceeding as a mechanism to overturn procedural decisions that dissatisfy one of the Parties. Nor is a Party’s dissatisfaction with a procedural ruling the threshold to measure whether there is a manifest lack of impartiality or independence on the Tribunal.

144. The Chair notes the Respondent’s contention that Articles 57 and 14(1) of the ICSID Convention do not require an “*absolute demonstration*” of lack of impartiality, and that “*a simple manifestation*” or “*any indication*” is sufficient.<sup>268</sup> However, this distinction does not assist Spain in the present case. The procedural decision over the modality of the Hearing in this case does not establish even an indication of bias.

### ***c. Conclusion***

145. Upon careful review of the Parties’ submissions and the arbitrators’ explanations, the Chair finds that a third party undertaking a reasonable evaluation of the facts underlying the first ground for disqualification would *not* conclude that the Tribunal manifestly lacks the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the first ground must be rejected.

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<sup>265</sup> CA-002, *Vattenfall 2020 Decision*, ¶ 139.

<sup>266</sup> Resp. Second Proposal, ¶ 87. *See also, id.*, ¶ 82.

<sup>267</sup> CA-002, *Vattenfall 2020 Decision*, ¶ 139.

<sup>268</sup> *See, e.g.*, Resp. Second Proposal, ¶¶ 36, 45.

**(3) Second Ground: Participation of Sir Christopher Greenwood and Dr. Charles Poncet in Events Organized by Counsel for the Claimants**

146. The Respondent seeks the disqualification of Sir Christopher and Dr. Poncet on the additional ground that (i) both were invited to and participated in the 2017 FIAM and failed to disclose such information;<sup>269</sup> and (ii) Dr. Poncet also participated in the 2018 and 2019 FIAM, and attended certain ancillary and social events, including at counsel for the Claimants’ firm, and failed to disclose this information.<sup>270</sup> The gravamen of Spain’s complaint is that these events were organized by and attended by the Claimants’ counsel;<sup>271</sup> and resulted in “*credit and benefits*” flowing from counsel to the arbitrators.<sup>272</sup> Spain does not take issue with events prior to the arbitrators’ appointments in this case.<sup>273</sup>
147. Spain’s submission appears to be three-fold: *first*, that the arbitrators’ acceptance of the invitations to these events was itself improper and should lead to their disqualification;<sup>274</sup> *second*, that the invitations and the attendance at the events should have been disclosed and the absence of disclosure itself leads to disqualification;<sup>275</sup> and *third*, that even if a disclosure had been made, the “*accumulation of circumstances*” in this case casts these events in a different light,<sup>276</sup> as they “*confirm the close relationship*” among these two arbitrators and the Claimants’ counsel,<sup>277</sup> and explain the Tribunal’s alleged partiality in favor of the Claimants.<sup>278</sup>

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<sup>269</sup> *Supra*, ¶¶ 61-65.

<sup>270</sup> *Supra*, ¶¶ 61-65. Sir Christopher has explained that he did not attend the 2017 roundtable or the reception, and that apart from the 2017 FIAM he has “*not taken part in the [FIAM] or round table or any other event organized by the Claimants or their counsel*” since his appointment in this case. Greenwood Explanations I, ¶ 4; Greenwood Explanations II, ¶ 2.

<sup>271</sup> *See, e.g.*, Resp. Comments IV, ¶ 2; *supra*, ¶¶ 61-62.

<sup>272</sup> *See, e.g.*, Resp. Comments III, ¶ 65; Resp. Comments IV, ¶ 19.

<sup>273</sup> *See* Resp. Comments III, ¶ 55 (stating “*being appointed by Ms. Konrad as an arbitrator at the FIAMC generates no problem if that appointment is made and the attendance is done before that same arbitrator has been appointed to decide in a case where Ms. Konrad is representing any of the Parties.*”) Dr. Poncet accepted his appointment in this case on 15 January 2016 and Sir Christopher on 7 June 2016.

<sup>274</sup> *See, e.g.*, Resp. Comments IV, ¶ 2; Resp. Comments III, ¶¶ 2, 94.

<sup>275</sup> *See, e.g.*, Resp. Comments IV, ¶ 2; Resp. Comments III, ¶¶ 2, 94, 99.

<sup>276</sup> *See* Resp. Comments II, ¶¶ 145-146.

<sup>277</sup> *See* Resp. Comments IV, ¶¶ 7-8.

<sup>278</sup> *See* Resp. Comments III, ¶ 81.

*a. The Invitations and Attendance to the Events*

148. The Chair finds that the participation of Sir Christopher and Dr. Poncet in the events in question would *not* lead a third party undertaking a reasonable evaluation of the facts to conclude that these two arbitrators manifestly lack the qualities required by Article 14(1) of the ICSID Convention.
149. The 2017, 2018 and 2019 FIAM at issue were academic events, as was the roundtable attended by Dr. Poncet. Both Sir Christopher and Dr. Poncet have confirmed that they received no remuneration or contribution in exchange for their participation.<sup>279</sup> Spain repeatedly asserts that despite the academic nature of the events, benefits were received by the arbitrators in the form of “*extraordinary visibility, honors, and prestige*” and potential “*future appointments*,”<sup>280</sup> such that the events amount to an improper “*gift*” from counsel to two arbitrators.<sup>281</sup> However, speculation about the possible impact of these academic events is no basis to sustain a disqualification proposal. As to the social events attended by Dr. Poncet, the Chair observes that it is not uncommon for academic events to be surrounded by social events open to the various participants, and in this context, a third party undertaking a reasonable evaluation would *not* conclude that Dr. Poncet’s attendance is indicative of a manifest lack of independence or impartiality.
150. Spain makes much of counsel’s role in the organization of the events. Whatever the extent of that role may be, neither the characteristics of the events, nor the frequency of the interaction lend support to the conclusion that they reveal a “*relationship*” between counsel and the arbitrators, let alone the “*close*” relationship Spain alleges. Sir Christopher attended this academic event only once (2017). Although Dr. Poncet has taken part in the moot more times (including 2017-2019) and in ancillary and social events surrounding it, the type of event and the context of the social encounters are insufficient to demonstrate a “*relationship*” with counsel. Absent demonstration of a “*relationship*” between the two arbitrators and counsel, the Respondent’s serious and unsupported accusation that the

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<sup>279</sup> Greenwood Explanations I, ¶ 2; Poncet Explanations I.

<sup>280</sup> See, e.g., Resp. Comments III, ¶¶ 44, 46, 69; Resp. Comments IV, ¶¶ 19, 30.

<sup>281</sup> Resp. Comments IV, ¶ 19.

alleged “*relationship*” has motivated the Tribunal’s partiality towards the Claimants in this proceeding must also fail.<sup>282</sup>

151. In its arguments, Spain relies on other sets of rules or guidelines in addition to the ICSID Convention and the ICSID Arbitration Rules. The Chair has previously observed that the ICSID Convention and ICSID Arbitration Rules govern this proceeding, and some other rules or guidelines may only serve as useful references. It is useful to note, however, that reference to the same sets of guidelines on which the Respondent seeks to rely suggests that the facts at issue here are unproblematic. For example, the IBA Guidelines mentioned by Spain,<sup>283</sup> include in Section 4.3.4 (Green List) the scenario in which “[t]he arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties.”<sup>284</sup> Placement on the IBA Guidelines Green List indicates that “no appearance and no actual conflict of interest exists from an objective point of view.”<sup>285</sup>

***b. Non-Disclosure***

152. The Chair sees no basis to conclude that the non-disclosure of the arbitrators’ participation in the events in question must lead to their disqualification. As the Chair has previously held, absence of disclosure cannot *in and of itself* make an arbitrator partial or lacking in independence; only the facts and circumstances that s/he did not disclose may call into question the qualities required by Article 14(1) of the ICSID Convention.<sup>286</sup> Where the undisclosed facts do *not* themselves support a finding of manifest lack of independence or

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<sup>282</sup> See, e.g., Resp. Comments III, ¶ 81.

<sup>283</sup> See, e.g., Resp. Comments IV, ¶¶ 21, 50.

<sup>284</sup> **RA-004**, IBA Guidelines on Conflict of Interest, 23 October 2014, p. 26.

<sup>285</sup> **RA-004**, IBA Guidelines on Conflict of Interest, 23 October 2014, p. 19.

<sup>286</sup> See, e.g. *Getma International et al. v. Republic of Guinea*, ICSID Case No. ARB/11/29, Decision on Proposal to Disqualify Mr. Bernardo Cremades, 28 June 2012, ¶ 80 (“*Getma*”). This principle transcends the ICSID context, and it is recognized by other sets of guidelines on which the Respondent itself has relied. See, e.g., **RA-004**, IBA Guidelines on Conflict of Interest, 23 October 2014, p. 18, ¶ 5.

impartiality (as the Chair has concluded in this case), failure to disclose them may not serve as a ground for disqualification.<sup>287</sup>

*c. Conclusion*

153. On the basis of the foregoing and upon careful review of the Parties' submissions and the arbitrators' explanations, the Chair finds that a third party undertaking a reasonable evaluation of the facts underlying the second ground for disqualification would *not* conclude that Sir Christopher or Dr. Poncet manifestly lack the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the second ground must be rejected.

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<sup>287</sup> See, e.g., *Getma*, ¶ 84.

**V. DECISION**

154. Having considered all the facts alleged and the arguments submitted by the Parties, and for the reasons stated above, the Chair rejects the Respondent's Second Proposal to disqualify all the members of the Tribunal in this case.

*[Signed]*

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David Malpass  
Chair of the ICSID Administrative Council