NORMS FOR THE DISQUALIFICATION OF ARBITRATORS UNDER THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES CONVENTION.

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ABSTRACT:
Arbitrators who do not possess the attributes of independence and impartiality are disqualified under the International Centre for Settlement of Investment Disputes Convention. In contrast, the law on the criterion of “Manifest Absence” of qualifications in an arbitrator that the Convention contemplates has not yet been decided since it has not provided much light on what is meant by the phrases manifest lack and clear and convincing evidence. During the recent past, arbitrators have been subjected to several challenges about their independence and impartiality in connection to the subject matter under consideration. This article, in light of the lack of clarity in the Convention, focuses on the numerous judgments that have contributed to the shift in jurisprudence surrounding the disqualification of arbitrators and have created a new dimension, similar to that of some other arbitration rules. It discusses the three major standards laid down in these decisions for determining manifest lack of qualities in an arbitrator under the ICSID.

INTRODUCTION:
Since its inception in 1966, the International Convention on the Settlement of Investment Disputes between Nationals of One State and Nationals of Another State (the ICSID Convention) has served to promote economic growth by providing a forum for the resolution of investment disputes. Accordingly, the International Centre for Settlement of Investment Disputes (ICSID) was formed as a venue for the settlement of investment disputes between signatory States and nationals of other contractual States via the dispute resolution system provided by the Convention. It is important to note that the arbitrators designated by the parties to these disputes play an important role in the adjudication of these issues. As a result, they have a legal obligation to maintain their independence throughout the proceedings.

In a disagreement, the parties have the right to a fair hearing, which means that the dispute will be heard by arbitrators who are independent, unbiased, and competent. They have the right to have an arbitrator dismissed if he or she does not possess these characteristics. Because of this, Article 14 of the International Convention on the Settlement of Investment Disputes (ICSID Convention) protects the rights of the parties by establishing certain specific qualities that an individual must possess in order to be appointed as an arbitrator, failing which, pursuant to Article 57 of International Convention on the Settlement of Investment Disputes, the concerned party is entitled to propose that the arbitrator be disqualified.

Part II of the article addresses the attributes necessary in an arbitrator under the International Convention on the Settlement of Investment Disputes (ICSID Convention), the claimed absence of which is a factor in the proposed challenge. Third, we look at what it takes to effectively disqualify an arbitrator from serving. Part IV focuses on the change in jurisprudence regarding the criterion for disqualifying an arbitrator that has occurred in recent years. As a conclusion, Part V of the paper recommends that specific sets of norms be incorporated into the ICSID in order to create a more favourable environment for successful arbitrator challenges.

**CHARACTERISTICS OF A SUCCESSFUL ARBITRATOR:**

ICSID stipulates that the members of the arbitral Tribunal must be people of good moral character who are also well-known in their disciplines of law, business, industry, or finance, and who can be relied on to make independent decisions in their fields of expertise. The attribute of ‘independence’ is mentioned in the English and French versions of the ICSID Convention, whilst the ‘quality of impartiality’ is acknowledged in the Spanish version. These attributes of independence and impartiality, on the other hand, have often been seen as two sides of the same coin and have been employed interchangeably. A scenario may emerge in which a person who is entirely capable of exercising independent judgement is disqualified because he has a conflict of interest in a specific instance, or vice versa. As a result, the need of independence and impartiality is a subjective examination based

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6 Convention On Settlement Of Investment Disputes Between States And Nationals Of Other States (Icsid Convention), Mar. 18, 1965, 575 Unts 159.

7 Id. Art. 14.


11 Schreuer, *Supra Note* 1, At 49.
on external, objective facts and circumstances (ensuring arbitrator bias).\footnote{James Ng, \textit{When The Arbitrator Creates The Conflict: Understanding Arbitrator Ethics Through Iba Guidelines On Conflict Of Interest And Published Challenges}, 2 McGill J. Disp. Resol. 23, 25 (2015-2016).}

The ICSID Rules of Procedure for Arbitration Proceedings (ICSID Rules) are designed to guarantee that members of the Tribunal pass the ICSID’s Article 14 criteria.\footnote{James Crawford, \textit{Challenges To Arbitrators In Icsid Arbitration, In Practising Virtue Inside International Arbitration} 596, 603 (Oxford University Press 2015).} The arbitrators thus appointed in a dispute must sign a statement as soon as the Tribunal’s first session is convened, according to Rule 6(2). Such a statement assures that the arbitrator is obligated to operate fairly, independently, and impartially throughout the arbitration procedure, among other things.\footnote{Greg C. Nwakoby & Charles Emenogha Aduka, \textit{Challenge Of Arbitrator Under Icsid}, 36 J.L. Pol’y & Globalisation 171 (2015).} The arbitrator must reveal important facts, such as his independence, impartiality, fairness, and secrecy in the arbitral procedure, according to the statement.\footnote{Kröll, \textit{Supra Note} 10, At 264.} As a result, if the declaration is not submitted before the end of the Tribunal’s first session, the arbitrator is presumed to have resigned under Rule 8(2).\footnote{16 Nwakoby \textit{Supra Note} 14, At 171.}

To understand that “Independence and Impartiality are States of mind,”\footnote{Suez, Sociedad General De Aguas De Barcelona S.A. And Vivendi Universal S.A. V. The Argentine Republic, Icsid Case No. Arb/03/19 Awg Group V. The Argentine Republic (Uncitral), Decision On The Proposal For Disqualification Of A Member Of The Arbitral Tribunal, ¶28-30 (Oct. 22, 2007) (“Suez I”); William Park, \textit{Supra Note} 2, At 20.} it is required to realise that because only the challenged arbitrator’s actions may indicate such a state of mind, it becomes more impossible to analyse the “inner workings of an arbitrator’s mind with absolute precision,” as the term is defined.\footnote{Jeffrey Waincymer, \textit{Procedure And Evidence In International Arbitration} 292-293 (Kluwer Law International 2012).} Irrespective of the safeguards provided by the Convention and Rules, which are intended to ensure the integrity of the arbitration process,\footnote{Gb Born, \textit{International Commercial Arbitration} 463 (Kluwer Law International The Hague 2009).} it has been observed that the parties have time and again proposed disqualification of appointed arbitrators for a lack of the required qualities, which are enshrined in Article 14 of the International Chamber of Commerce.\footnote{Christine Meerah Kim, \textit{Issue Conflict In Investor-State Dispute Settlement: Focusing On The Challenges Against Professor Francisco Orrego Vicuna In Cc/Devas Et Al. V. India And Repsol V. Argentina}, 27 Geo. J. Legal Ethics 621, 624 (2014).} It is important to note that in the recommendations for disqualification, the ability to make a judgement independently and impartially has been brought to the forefront of the discussion.\footnote{Schreuer, \textit{Supra Note} 1, At 1202; Audley Sheppard, \textit{Arbitrator Independence In Icsid Arbitration In International Investment Law For The 21st Century} 132 (C. Binder Al Ed. 2009).} In accordance with Article 58 of the ICSID Convention, when just one member of the tribunal is challenged, the uncontested arbitrators of the tribunal (Co-arbitrators) are empowered to make a decision on the proposed disqualification of the challenged member. However, in the event that the majority of the tribunal’s decisions are challenged, the Chairman of the ICSID’s Administrative
Council (Chairman) makes the decision on the challenge.

However, while the ICSID Convention provides that the parties may propose disqualification of an arbitrator if they can demonstrate that the arbitrator possesses a manifest lack of the qualities referred to in Article 14, the ICSID Convention is silent on the circumstances that actually constitute a “manifest lack” of the qualities of an arbitrator. Co-arbitrators and the Chairman have previously discussed these standards in their decisions on disqualification proposals and have subsequently contributed to the development of challenge jurisprudence under the International Centre for Settlement of Investment Disputes, specifically the standard of “manifest lack” that must be met in order to disqualify an arbitrator from a proceeding.

CLEARLY DEMONSTRABLE DEFICIT (MANIFEST LACK):

It is provided in the Convention and the Rules that, in order to disqualify an arbitrator, the concerned party must make a disqualification proposal as soon as the concerned party becomes aware of any grounds for prospective disqualification. The “clear and obvious deficiency” of qualifications in the arbitrator, as stipulated by Article 14, is a reason for probable disqualification under Article 57.

Article 57 serves an “evidentiary” function, i.e., it places a “burden of evidence on the challenged party” to demonstrate a “clear and plain absence” of certain characteristics. As a result, the manifest lack requirement is critical since it ensures that the decision delivered by the Tribunal is effective and legitimate, which is especially important in light of the increasing number of challenges against arbitrators.

The standard for disqualifying an arbitrator under the ICSID, on the other hand, is a moot point, because a lower standard of proof to demonstrate manifest lack makes it easier to disqualify an arbitrator, whereas a strict standard will make it relatively difficult to disqualify an arbitrator under the ICSID. Another dispute is whether the term “manifest” denotes the severity of a lack of traits as defined by Article 14 or if it represents the level of evidence necessary to show a lack of such qualities.

As a result, three primary principles have been established for the interpretation of Article 57 of the International Centre for Settlement of Investment Disputes. The severe evidence of manifest deficiency, also known as the Amco Asia standard, is followed by reasonable doubt, also known as

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22 Waincymer, Supra Note 18, At Pg. 292-293.
23 Icsid, Supra Note 6, Art. 57.
26 Peter Horn, Supra Note 24, At 356-357.
27 Maria Nicole Cleis, The Independence And Impartiality Of The Icsid Arbitrator 31 (Brill 2017).
30 Daele, Supra Note 5, At 218.
the *Vivendi* standard, and finally, rejection based on the appearance of bias, also known as the *Blue Bank* standard.\(^{32}\)

I. THE FAILURE TO MEET AMCO STANDARDS OR STRICT PROOF INDICATING MANIFEST LACK

In the *Amco Asia*\(^{33}\) case, the Co-arbitrators decided on the proposal to disqualify the arbitrator appointed by the Claimant,\(^{34}\) the strict standard of proof for establishing a manifest lack of qualities in an arbitrator was established. This was the first case\(^{35}\) in which an arbitrator was challenged, and it established the strict standard of proof. This case involved a disqualification request from the Respondent on the grounds that the challenged arbitrator had advised the Claimant on tax matters several years prior to the current arbitration proceedings, and that the law firm of the challenged arbitrator had a profit-sharing agreement with the Claimant’s counsel, and that the Claimant’s counsel had shared the premises of their office and administrative services six months after the initiation of the arbitration proceedings with the challenged arbitrator. It was argued that the challenged arbitrator lacked independence towards the Claimant\(^{36}\) on these grounds because it was necessary to demonstrate the appearance of non-reliability from the standpoint of a reasonable person.\(^{37}\)

Upon rejecting the challenge, the Co-arbitrators pointed out that the term ‘manifest’ might imply a variety of things depending on the dictionary definition, including ‘evident,’ ‘obvious,’ and ‘plain.’ The data showing absence of characteristics must reflect not just a conceivable lack of qualities, but also a quasi-certain lack of qualities or, if that is not feasible, a very likely lack of qualities.\(^{38}\) Furthermore, it was noticed that the presence of a link could not be used as a basis for disqualifying an arbitrator since the party appointing method presumes some connection between the appointed arbitrator and the party chosen to arbitrate.\(^{39}\)

In a similar vein, in *Suez II*\(^{40}\), the Respondent questioned the independence and impartiality of the arbitrator nominated by the Claimant on the basis of previous appointments and a personal connection with the Claimants.\(^{41}\) As part of its decision to reject the proposal, the Tribunal relied on the strict standard and noted that Article 56 places a heavy burden of proof on the challenging party to prove not only facts that indicate a lack of qualities, but also that the lack is manifest or highly

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32 Horn, *Supra Note* 24, At 357.
33 *Amco Asia Corporation And Others V. Republic Of Indonesia*, Icsid Case No. Arb/81/1, Decision On The Proposal To Disqualify Arbitrator (June 24, 1982) (“Amco Asia”).
34 Vasani, *Supra Note* 29, At 200.
36 Cleis, *Supra Note* 27, At 32.
38 *Amco Asia*, *Supra Note* 33, At ¶29.
39 Horn, *Supra Note* 24, At 358.
41 Bottini, *Supra Note* 8, At 355-356.
probable, rather than just possible or quasi-certain.\textsuperscript{42}

In a similar vein, in PIP,\textsuperscript{43} the arbitrator nominated by the Claimant was challenged on the basis of several appointments in ICSID against the Respondent in earlier instances with a similar set of circumstances, which was upheld.\textsuperscript{44} While rejecting the request, the Chairman relied on the rigorous threshold established in Suez II, noting that manifest lack under Article 57 refers to a clear or certain absence of attributes.\textsuperscript{45}

Additionally, in Universal Compression\textsuperscript{46}, the Chairman noted that Article 57 imposes a “high bar for disqualification” and a heavy burden of proof on the challenging party to establish objective facts indicating that the independence and impartiality of the arbitrators has been manifestly impacted, while rejecting the challenge against the majority of the Tribunal.\textsuperscript{47}

A challenger claimed in OPIC Karimum\textsuperscript{48} that the challenged arbitrator’s independence and impartiality were jeopardised by frequent nominations of the challenged arbitrator by a single party or its counsel.\textsuperscript{49} While rejecting the challenge, the Co-arbitrators pointed out that, under Article 57, “it is not sufficient to prove an appearance of a lack of characteristics,” but that the challenged party must clearly and objectively establish a manifest lack of independence in order to succeed.\textsuperscript{50}

Furthermore, in Getma,\textsuperscript{51} when the appointment of an arbitrator by the Claimant was challenged on the grounds that the challenged arbitrator’s brother had been chosen as an arbitrator by the Claimant in another case with comparable circumstances, the challenged arbitrator’s appointment was upheld. While rejecting the request, the Chairman pointed out that mere assumptions, presumptions, or beliefs are insufficient grounds for disqualifying an arbitrator from hearing a case.\textsuperscript{52}

However, in Abaclat I,\textsuperscript{53} when the Chairman weighed the suggestion of the Secretary General of the Permanent Court of Arbitration, the rigorous criterion was used in a different context than in the previous two decisions.\textsuperscript{54} The Respondents objected to the majority decision of the Tribunal on the grounds that it lacked independence.\textsuperscript{55} In this case, it was noted that the Amco\textsuperscript{56} test would...

\textsuperscript{42} Suez II, Supra Note 40, At ¶29.
\textsuperscript{44} Horn, Supra Note 24, At 361.
\textsuperscript{45} Pip, Supra Note 43 At ¶22.
\textsuperscript{47} Id. At ¶71-72.
\textsuperscript{49} Cleis, Supra Note 27, At 37.
\textsuperscript{50} Opic Karium, Supra Note 48, At ¶44-45.
\textsuperscript{52} Id. At ¶58-60.
\textsuperscript{53} Abaclat & Ors. V. Argentine Republic, Icsid Case No. Arb/07/5, Decision On Proposal To Disqualify Majority Of The Arbitral Tribunal (December 19, 2011). (“Abaclat I”).
\textsuperscript{54} Cleis, Supra Note 27, At 45, 46.
\textsuperscript{55} Abaclat I, Supra Note 53, At ¶46, 71, 86, 104.
\textsuperscript{56} Amco Asia, Supra Note 33.
be applied if the party that filed the challenge claimed that the award was incorrect.57

Accordingly, the Respondent brought an arbitration challenge against a claimant’s chosen arbitrator in Alpha58 based on a relationship that the challenged arbitrator had with the Claimant’s lawyer that had begun while they were both attending higher studies at the same institution at the same time.59 While rejecting the request, the Co-arbitrators relied on the dictionary definition of the word “manifest”60 and pointed out that Article 57 incorporates a “stringent condition of manifest absence of attributes” established by Article 14 in order to reject the motion.61

In Conoco I62, the Respondent objected to the arbitrator nominated by the Claimant because of the connection between the Claimant’s lawyers and the arbitrator who was being challenged by the Respondent.63 While dismissing the request, the co-arbitrators noted that the ICSID judgments identify ‘manifest’ under Article 57 as ‘obvious’, ‘evident,’ and ‘very likely,’ rather than ‘just possible,’ and that the challenged party has a significantly greater burden.64 Additionally, they concluded that objective evidence must be shown to establish a manifest absence of the qualifications specified in Article 14(1).65

The Tribunal also made a distinction between the standards established by external norms or guidelines (the IBA Guidelines) and those established under the ICSID Convention. First and foremost, the IBA guidelines are not legal rules and cannot supersede any arbitral rules chosen by the parties, and secondly, conflict of interest under standard 2(b) of the IBA guidelines, i.e., for disqualification of an arbitrator, there must be relevant facts and circumstances arising since the appointment of the arbitrator that give rise to justifiable66 doubts from the point of view of a reasonable third person regarding the arbitrator’s independence.67

II. VIVENDI STANDARD OR THE FEASIBLE HESITATION

An application68 for disqualification of an arbitrator was made in Vivendi69 by an uncontested arbitrator who fiercely criticised the criteria applied in Amco Asia and

57 Cleis, Supra Note 27, At 46.
58 Alpha Project Holding Gmbh V. Ukraine, Icsid Case No. Arb/07/16, Decision On Proposal To Disqualify Arbitrator (May 19, 2010). ("Alpha").
60 Alpha, Supra Note 58, At ¶37.
61 Daele, Supra Note 5, At 228.
63 Id. At ¶1, 2, 6.
64 Id. At ¶56
65 Id.
66 Bottini, Supra Note 8, At 347.
67 Conoco I, Supra Note 62, At ¶59.
68 Schreuer, Supra Note 1, At 938.
69 Cleis, Supra Note 27, At 33; Compania De Aguas Del Aconquija S.A. & Vivendi Universal V. Argentine Republic, Icsid Case No. Arb/97/3, Decision On The Proposal To Disqualify President Of The Tribunal (Oct. 3, 2001). ("Vivendi").
established a new criterion for judging whether an arbitrator exhibits an evident lack of characteristics.\textsuperscript{71}

In the aforementioned instance, the Respondent filed a challenge against the arbitrator assigned by the Claimant on the basis of tax advice supplied to the Claimant by the company of the challenging arbitrator.\textsuperscript{72} When the proposal\textsuperscript{73} was initially rejected, the unchallenged arbitrators used what is known as the “appearance of bias” test\textsuperscript{74} to determine whether an arbitrator lacked independence or impartiality, but this did not constitute a manifest lack of independence or impartiality under Article 57. They also noted that there may be circumstances that create “an appearance of lack of independence or impartiality” from the perspective of a reasonable person but do not constitute a manifest lack of independence or impartiality under Article 57.\textsuperscript{75}

At the conclusion, it was noted that, first and foremost, the challenging party must prove the factual basis of the challenge, that is, the challenge cannot be founded on assumptions or inferences, and that the challenge must not be based on a legal theory.\textsuperscript{76} In the second instance, once such facts have been established, the next step would be to determine whether there is “a real risk of lack of impartiality based on these facts that could be reasonably apprehended by either party,”\textsuperscript{77} i.e., even though Article 57 mandates that lack of qualities must be ‘manifest,’ it is often sufficient to have “reasonable apprehension of bias.”\textsuperscript{78}

As in SGS vs. Pakistan,\textsuperscript{79} the appointment of the Respondent’s arbitrator was called into question since the company that assigned the challenged arbitrator was representing Mexico in another matter in which the attorney for Pakistan had been chosen as an arbitrator.\textsuperscript{80} The Co-arbitrators agreed with the argument made in Vivendi I, and they adopted a more assertive stance on the issue in general. They ruled that an arbitrator may be challenged based on an inference of lack of qualifications from the standpoint of a reasonable man on the basis of confirmed facts rather than on conjecture, and that this is permissible.\textsuperscript{82}

In EDF,\textsuperscript{83} the Respondent challenged the arbitrator assigned by the Claimant on the grounds that the arbitrator in question had a financial interest in the outcome of the arbitration proceedings.\textsuperscript{84} The Co-arbitrators, in rejecting the request, stated that if there is a reasonable question about the trustworthiness of the challenged arbitrator to

\textsuperscript{71} Id. At ¶22.
\textsuperscript{72} Bottini, Supra Note 8, At 348-349.
\textsuperscript{73} Loretta Malintoppi, Independence, Impartiality, And Duty Of Disclosure Of Arbitrators In The Oxford Handbook Of International Investment Law 796-797 (Oxford University Press 2015).
\textsuperscript{74} Bottini, Supra Note 8, At 349.
\textsuperscript{75} Vivendi, Supra Note 70, At ¶22.
\textsuperscript{76} Cleis, Supra Note 27, At 33.
\textsuperscript{77} Vivendi, Supra Note 70, At ¶25.
\textsuperscript{78} Fry, Supra Note 59, At 211.
\textsuperscript{80} Robert Azinian V. United Mexican States, Icsid Case No. Arb/97/2, Award (Nov 1, 1999).
\textsuperscript{81} Cleis, Supra Note 27, At 34.
\textsuperscript{82} Sgs, Supra Note 79, At ¶20.
\textsuperscript{84} Id. At ¶12, 35.
exercise independent judgement, she should be removed from the proceedings, according to the rules of procedure. 85

Observed in Abaclat I 86 was that the Amco standard would be used if the challenge was based on the wrongfulness of the award or on procedural grounds; otherwise, the two-fold test of reasonable doubt given down in Vivendi would be applied. 87

In a similar vein, in Repsol, 88 the Respondent brought a challenge against the President of the arbitral Tribunal on the basis of the connection that had developed with the Claimant’s lawyers. Argentina also sought to have the arbitrator appointed by the Claimant disqualified on the grounds that he had been appointed multiple times against Argentina and that he was predisposed to the issue at hand because he had written an article in which he expressed his opinion on a similar issue to the one at issue. 89 Following the Videndi standard, the Chairman dismissed the challenge and concluded that, in order to challenge an arbitrator, no exact evidence of dependency or prejudice is necessary, but that proving the appearance of such a state of mind from the viewpoint of a reasonable person would sufficient. 90 Urbaser 91 was another case where the Co-arbitrators took a similar stance when they rejected the challenge motion. 92

The Co-arbitrators in the Saint-Gobain case 93 noted, after taking into account both the Amco and the Vivendi standards, that there is no definitive response to the question of whether an arbitrator has shown an obvious lack of independence and impartiality in his or her decision. 94 They, on the other hand, relied on the Videndi standard and rejected the demand to disqualify the player. 95

III. THE BLUE BANK NORM VS. APPEARANCE OF PARTIALITY

While accepting the recommendation for the disqualification of the majority of the Tribunal’s members, Dr. Jim Yong Kim, the current Chairman, put forth this threshold. 96 On the basis that the challenged arbitrator had a direct or indirect pecuniary interest in how the current dispute was resolved, the Respondent filed a challenge against Mr. Jose Maria Alonso. 97 Contrary to this, the Claimants challenged the arbitrator nominated by the Respondent on the basis of the Respondent’s numerous appointments; nevertheless, after the Claimants filed their petition for disqualification, the arbitrator resigned. 98

85 Id. At ¶64.
86 Abaclat I, Supra Note At 53.
87 Cleis, Supra Note 27, At 46.
89 Horn, Supra Note 24, At 384-385.
90 Cleis, Supra Note 27, At 190.

92 Id. At ¶20, 43.
94 Id. At ¶57-59.
95 Id. At ¶60.
97 Id. At ¶22-32.
98 Id. At ¶45-54.
As part of his decision-making process for the challenge, Dr. Kim considered four factors. According to the ICSID Convention, Articles 57 and 14(1) do not need the demonstration of real dependency or bias, rather it is necessary to create the appearance of dependence or bias, according to the article. Two such concepts are applicable legal standard as defined by the International Centre for Settlement of Investment Disputes (ICSID Convention) and objective standard based on a reasonable review of evidence by a third party. Moreover, Dr. Kim pointed out that the subjective view of the party seeking the disqualification is not sufficient to meet the requirements of the Convention.

Moreover, Dr. Kim pointed out that the term manifest refers to anything that is 'evident' or 'obvious,' and that it refers to how easily an apparent lack of quality may be detected.

In conclusion, even while external norms and guidelines (such as the IBA Guidelines) might be important instruments in the decision-making process regarding a challenge, the challenge must be determined in accordance with the terms of the ICSID Convention. On the same lines, Dr. Kim approved the exclusion suggestion in Burlington Resources, using the Blue bank criteria as a basis for his conclusion.

It is also worth mentioning that the Caratube decision, in which the Co-arbitrators, for the first time, upheld a proposal for disqualification of their co-arbitrator, is an important decision in the ICSID challenge jurisprudence because it involved Bruno Boesch, who was challenged by the Claimant on the basis of his appointment in multiple cases with similar facts and circumstances. As a result, the Co-arbitrators sustained the challenge and relied on the standard established in Blue Bank, concluding that Article 57 and 14(1) of the ICSID Convention do not demand the necessity of exacting evidence. More specifically, the Co-arbitrators found that Mr. Boesch's neutrality and open mildness were tainted by the problem and circumstances being similar to those in the Ruby Roze case. Additionally, the ruling said that an arbitrator cannot be expected to maintain a "Chinese Wall" in his or her head in the ordinary course of business. Furthermore, on the issue of numerous appointments, the Co-arbitrator determined that a third party would discover a clear or obvious existence of disproportion within the tribunal when a third party inquired. Notwithstanding, as of late in Raffeisen, Respondent proposed preclusion of the Claimant named referee on the grounds of disproportion within the tribunal when a third party inquired.

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99 Vasani, Supra Note 29, At ¶199-202.
100 Blue Bank, Supra Note 102, At ¶59.
101 Blue Bank, Supra Note 102, At ¶60.
102 Blue Bank, Supra Note 102, At ¶60.
103 Blue Bank, Supra Note 102, At ¶61.
104 Blue Bank, Supra Note 102, At ¶62.
106 Id. At ¶79-80.
107 Caratube International Oil Company Llp & Mr. Devinecci Salah Hourani V. Republic Of Kazakhstan, Icsid Case No. Arb/13/13, Decision On The Proposal For Disqualification Of Arbitrator. ("Caratube").
108 Vasani, Supra Note 29, At 204.
109 Id. At ¶24-27.
110 Id. At ¶57.
111 Id. At ¶90.
112 Id. At ¶75.
113 Id. At ¶95.
114 Raffeisen Bank International Ag And Raffeisen Bank Austria D.D. V. Republic Of Croatia, Icsid Case No. Arb/17/34, Decision On The Proposal To Disqualify Arbitrator, (May 17, 2018). ("Raffeisen Bank").
different arrangements, inclination towards the issues in the current debate and relationship with the Claimant’s advice as a result of arrangements between them.\textsuperscript{115} The Chairman while excusing the test saw that, initially, larger part of the choices have presumed that manifest signifies ‘clear’ or ‘self-evident’, besides, the ICSID Convention doesn’t require confirmation of real reliance or predisposition; rather, it is adequate to set up the presence of reliance or inclination lastly, the lawful standard applied to a proposition to preclude a mediator is a true standard in light of sensible assessment of proof by an outsider.\textsuperscript{116}

Because of this, the trajectory of the rulings in Amco, Vivendi, and Blue Bank illustrates a significant change in the criterion for identifying manifest absence of qualifications in an arbitrator under the International Centre for Settlement of Investment Disputes.

\textbf{THE METAMORPHOSIS IN THE AREA OF CHALLENGE JURISPRUDENCE:}

Unlike the Respondent, the Tribunal in Amco Asia disregarded the reasonable doubt approach, and instead established a stringent threshold of proof.\textsuperscript{117} When compared to standards typical in other institutional arbitration systems, the rigorous standard has been strongly criticised since it puts a greater burden of evidence on the party claiming disqualification than is customary in such systems.\textsuperscript{118} The longstanding unwillingness of the ICSID Tribunal or Administrative Council to disqualify arbitrators is one of the reasons behind the high standard for disqualification imposed by the tribunal or Administrative Council.\textsuperscript{119} To be sure, the ICSID Convention was never intended to place an unusually high burden of proof on parties seeking to establish a lack of independence or predisposition,\textsuperscript{120} and by interpreting “manifest” under Article 57 as referring to the severity of a lack of qualities, the Tribunals may have strayed from the true intentions of the ICSID Constitution.\textsuperscript{121}

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Unlike the Respondent, the Tribunal in Amco Asia disregarded the reasonable doubt approach, and instead established a stringent threshold of proof.\textsuperscript{117} When compared to standards typical in other institutional arbitration systems, the rigorous standard has been strongly criticised since it puts a greater burden of evidence on the party claiming disqualification than is customary in such systems.\textsuperscript{118} The longstanding unwillingness of the ICSID Tribunal or Administrative Council to disqualify arbitrators is one of the reasons behind the high standard for disqualification imposed by the tribunal or Administrative Council.\textsuperscript{119} To be sure, the ICSID Convention was never intended to place an unusually high burden of proof on parties seeking to establish a lack of independence or predisposition,\textsuperscript{120} and by interpreting “manifest” under Article 57 as referring to the severity of a lack of qualities, the Tribunals may have strayed from the true intentions of the ICSID Constitution.\textsuperscript{121}

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‘strict doubt’ standard has been sustained, and vice versa, demonstrates that there is inconsistency in the understanding of the term manifest absence. When the Co-arbitrators heard the case of Simens v. Argentina, they noted that there was ‘a trace of development’ in this contradiction. Judge Brower and Professor Bello Janeiro examined the phrase manifest lack in the context of the justifiable doubt test as defined by the International Bar Association (IBA). This group of arbitrators pointed out that the criteria for disqualification of an arbitrator is not dissimilar to the one applicable under customary international law. ICSID arbitration in general would benefit greatly from the paradigm change in the criterion for disqualification of an arbitrator, as shown by the movement from the stringent standard test established in Amco Asia to the reasonable doubt test established in Vivindi.

Dr. Kim’s judgement in Blue Bank was a breath of fresh air in the ICSID challenge jurisprudence, especially in light of the rigorous standard that is often used when assessing whether or not to disqualify an arbitrator under the ICSID Rules of Procedure. It is also worth noting that, before to Blue Bank, only one successful challenge in Pey Casado vs. Chile was documented in the ICSID's history; however, after Dr. Kim’s judgement, three successful challenges in the decisions of Big Sky, Caratube, and Burlington have been recorded. The ruling in Blue Bank lowers the bar for challenging an arbitrator under the International Centre for Settlement of Investment Disputes. This trend is also suggestive of the fact that the International Centre for Settlement of Investment Disputes (ICSID) is moving away from the reasonable doubt standard that is used in most commercial arbitration procedures.

Nonetheless, on an examination of the perception of Dr. Kim in Blue Bank, it is obvious that there was a reasonable certification of the perceptions set down in the past choices relating to referee difficulties. Right off the bat, before Blue bank, in Urbaser, it was likewise seen that Article 57 doesn’t need genuine evidence of predisposition, rather an appearance of such inclination from a sensible and informed third individual’s viewpoint is adequate to legitimize the questions with respect to a judge’s freedom and fairness. Furthermore, the true norm of sensible assessment of the proof by an outsider was likewise seen in Suez I.

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127 Daele, Supra Note 5, At 223.
128 Siemens Ag V Argentine Republic, Icsid Case No Arb/02/08, Decision On Proposal To Disqualify An Arbitrator (11 February 2005)
129 Sam Luttrell, Testing The Icsid Framework For Arbitrator Challenges, 31 No. 3 Icsid Rev. 597, 602 (2016).
130 Kim, Supra Note 20, At 636; Dimitropoulos, Supra Note 31, At 374-375.
131 Vasani, Supra Note 29, At 196.
132 Luttrell, Supra Note 143, At 605.
133 Víctor Pey Casado And President Allende Foundation V. Republic Of Chile (Icsid Case No. Arb/98/2), Decision On Proposal To Disqualify Arbitrator (Feb 21, 2006). (“Pey Casado”).
135 Vasani, Supra Note 29, At196.
136 Urbaser, Supra Note 92, At 43.
137 Suez I, Supra Note 17, At 39.
Even after accepting the disqualification suggestion, Dr. Kim has maintained his reliance on the much-criticized literal meaning of the word manifest, which has resulted in a high burden of evidence in disqualification recommendations under the International Centre for Settlement of Investment Disputes.\textsuperscript{138} The use of an appearance of bias rather than real evidence of prejudice by Dr. Kim, on the other hand, is an indicator that the International Centre for Settlement of Investment Disputes is leaning toward the reasonable doubt standard of review.\textsuperscript{139}

The eventual contrast in the standard of disqualification of an arbitrator under the ICSID Convention, that is, from an initially strict standard \textit{Amco Asia} to a much appreciated reasonable doubt standard \textit{Vivendi}, to an entirely new standard \textit{Blue Bank} that takes a middle ground by accepting the reasonable doubt standard while maintaining a high threshold for determining manifest lack of independence and impartiality of an arbitrator, is indicative of the paradigm shift.

CONCLUSION:

It has long been a source of considerable worry in the international arbitration community because there is no consistency in rules as a result of the existence of a conflict of interest in a dispute involving investment arbitration. As a result, it is essential to keep the arbiter free of smears and to avoid any manoeuvres that may be detrimental to the proceedings. This may seem to be straightforward, but it is not.

While the integrity of the arbitrator is critical to cross-border commerce and investment, it is also important to the wider community, which is either directly or indirectly affected by the arbitral process. As a result, the adjudicators of arbitration challenges should use a method that is consistent with public policy when dealing with arbitration challenges. It is important for the co-arbitrators or the Chairman to remember that the convention has been in effect for about half a century and that the meaning of the word “manifest” should be in accordance with the current situation and circumstances when deciding on a challenge.

ICSID’s threshold of “manifest lack,” which must be met before an arbitrator may be disqualified is ambiguous, making it difficult for the parties to have an arbitrator removed from the case under certain circumstances. Observations by Dr. Kim at Blue Bank have shown that the vast majority of challenge judgments have relied on a stringent criterion of manifest lack. The stringent standard, on the other hand, has a significant disadvantage in that it places a high burden of evidence on the challenged party to demonstrate a manifest absence of independence and impartiality. As a result of this shortcoming, the reasonable doubt test was established. The reasonable doubt standard is more favourable to the parties because it significantly reduces the burden of proof on the parties to establish a manifest lack, and it is also consistent with the standards used by the vast majority of arbitral tribunals and institutional arbitral bodies around the world.

While it is true that there has been a paradigm change in the standard of disqualification, with recent emphasis on the reasonable standard and appearance of bias tests, the absence of the concept of stare decisis leaves

\textsuperscript{138} Vasani, Supra Note 29, At 201, 202.

\textsuperscript{139} Vasani, Supra Note 29, At 200.
it unclear as to which criterion of manifest lack will be used.

Moreover, one of the key concerns about the paradigm change in the disqualification criterion is that it renders the procedure subject to frivolous objections against arbitrators on blatantly false and whimsical grounds in order to halt the arbitral process altogether. In order to avoid similar occurrences, the International Centre for Settlement of Investment Disputes (ICSID) should create a new set of rules, such as;

Define the phrase manifest lack as follows: The ICSID Convention does not provide a definition of manifest lack, and as a result, different interpretations of the phrase have resulted in the current state of uncertainty in arbitration disputes under the ICSID. ICSID will be able to address this present uncertainty by providing a definition for the word and;

The establishment of a set of rules that would serve as a test for establishing whether or not an arbitrator has a conflict of interest. These rules should, among other things, establish limitations on the degree of relationship between the arbitrator and the appointing party, the arbitrator's interest in the subject matter of the dispute, the arbitrator's ability to make multiple appointments, and the relationship between the members of the arbitral tribunal. When such regulations are implemented, it will be possible to create a clear boundary between when an arbitrator should be challenged and when they should not be.

A change to the International Centre for Settlement of Investment Disputes (ICSID) may only be made if all contracting nations have ratified, accepted, or authorised the change. As a result, revising the International Centre for Settlement of Investment Disputes Arbitration Rules to include such instructions is the most possible solution to this situation.

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