

**IN THE MATTER OF AN ARBITRATION
UNDER THE ICSID CONVENTION**

**PCA Case No. IR-2020/1
ICSID Case No. ARB/12/12**

BETWEEN:

**1. VATTENFALL AB; 2. VATTENFALL GMBH;
3. VATTENFALL EUROPE NUCLEAR ENERGY GMBH;
4. KERNKRAFTWERK KRÜMMEL GMBH & CO. OHG;
5. KERNKRAFTWERK BRUNSBÜTTEL GMBH & CO. OHG**

Claimants

-and-

FEDERAL REPUBLIC OF GERMANY

Respondent

**RECOMMENDATION PURSUANT TO
THE REQUEST BY ICSID DATED 8 MAY 2020
ON THE RESPONDENT'S PROPOSAL TO DISQUALIFY
ALL MEMBERS OF THE ARBITRAL TRIBUNAL
DATED 16 APRIL 2020**

Hugo Hans Siblesz

**Secretary-General
Permanent Court of Arbitration**

6 July 2020

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I. Introduction

1. The present recommendation (the “**Recommendation**”) concerns the arbitration proceedings commenced in 2012 by 1. Vattenfall AB; 2. Vattenfall GmbH; 3. Vattenfall Europe Nuclear Energy GmbH; 4. Kernkraftwerk Krümmel GmbH & Co. oHG; 5. Kernkraftwerk Brunsbüttel GmbH & Co. oHG (the “**Claimants**”), against the Federal Republic of Germany (the “**Respondent**”, and together with the Claimants, the “**Parties**”) under the Energy Charter Treaty of December 17, 1994 (the “**Treaty**” or the “**ECT**”). Vattenfall AB is a Swedish company; the remaining claimants are subsidiaries of Vattenfall AB incorporated in Germany.
2. These arbitration proceedings are administered by the International Centre for the Settlement of Investment Disputes (“**ICSID**”) pursuant to the Convention on the Settlement of Disputes between States and Nationals of Other States (the “**ICSID Convention**”) and the Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”).
3. By letter dated 8 May 2020 from Ms. Jara Mínguez Almeida, Legal Counsel at ICSID, I have been asked to provide a recommendation to ICSID on the Respondent’s Application for the Disqualification of the Tribunal (the “**Proposal**”), submitted on 16 April 2020.
4. The Respondent’s Proposal is based on allegations that:
 - (a) Judge Brower, as a member of the Tribunal, failed to disclose an issue conflict stemming from his 10 October 2014 Concurring and Dissenting Opinion in *The PV Investors v. The Kingdom of Spain* (“**Judge Brower’s Opinion**”), concerning Article 26(7) of the Treaty (“**Ground One**”);
 - (b) The Tribunal engaged in “illicit deliberations” by considering the Preliminary Award on Jurisdiction in *The PV Investors v. The Kingdom of Spain* and Judge Brower’s Opinion, which were unknown to the Parties (“**Ground Two**”).
 - (c) The Tribunal decided to hold a hearing on certain quantum matters by videoconference over the objections of the Respondent, which considers an in person hearing to be necessary (“**Ground Three**”).
 - (d) The Tribunal maintained an “impossible procedural calendar” and refused the Respondent’s requests for extensions in light of the challenges posed by the present public health situation of the coronavirus pandemic (“**Ground Four**”).
5. Additionally, the Respondent considers that Judge Brower’s comments on the Proposal constitute a further ground for disqualification, insofar as he “left the role of an arbitrator, ‘descended into the fray’ and abandoned all the distance required for independent judgment”¹ (“**Ground Five**”).

II. Procedural History

A. The Arbitration Proceedings

6. On 31 May 2012, the Secretary-General of ICSID registered the Claimants’ request for the institution of arbitration proceedings.
7. The Tribunal in this arbitration comprises of The Honorable Charles Brower, Professor Vaughan Lowe QC, and Professor Albert Jan van den Berg, presiding arbitrator.

¹ Respondent’s Final Observations Regarding the Second Proposal for Disqualification of the Tribunal at para. 5.

8. On 27 September 2013, the Claimants submitted their *Memorial on the Merits*.
9. On 22 August 2014, the Respondent submitted its *Counter-Memorial on the Merits*, a *Memorial on Jurisdiction*, and a request to address objections to jurisdiction as a preliminary question.
10. On 7 September 2014, the Tribunal issued Procedural Order No 8 in respect of the Respondent's request, joining the objections to jurisdiction to the merits of the dispute.
11. On 1 September 2015, the Claimants submitted a *Reply on the Merits* and a *Counter-Memorial on Jurisdiction*.
12. On 27 April 2016, the Respondent submitted a *Rejoinder on the Merits* and a *Reply on Jurisdiction*.
13. On 18 July 2016, the Claimants submitted a *Rejoinder on Jurisdiction*.
14. From 10 to 21 October 2016, the Tribunal held a hearing in respect of the Parties' arguments on jurisdiction, liability, and damages.
15. On 2 May 2017, the Parties submitted their *First Post-Hearing Submissions* simultaneously.
16. On 14 September 2017, the Parties submitted their *Second Post-Hearing Submissions* simultaneously.
17. On 11 December 2017, the ICSID Secretariat, writing on behalf of the Tribunal, advised the Parties that "the Tribunal is making progress in the drafting and expects to be able to notify its decision in the first quarter of 2018."
18. In December 2017 and February and May 2018, the Respondent wrote to the Tribunal, seeking leave to introduce certain additional documents into the record, the specifics of which were considered in my Recommendation on the Respondent's Proposal to Disqualify all Members of the Arbitral Tribunal dated 12 November 2018 (see paragraphs 25 to 28 below). The Tribunal denied each of these requests and provided reasons for these decisions.
19. On 7 March 2018, the Tribunal wrote to the Parties, posing certain questions.
20. On 4 and 23 April 2018, respectively, the Parties wrote to the Tribunal regarding its questions of 7 March 2018.
21. On 8 May 2018, the Tribunal received a non-disputing party submission from another party, and on 30 May 2018, the Parties provided their written comments on this non-disputing party submission.
22. On 26 June 2018, the ICSID Secretariat, writing on behalf of the Tribunal, advised the Parties that "the Tribunal now expects to be able to issue its ruling in the Fall of this year."
23. On 31 August 2018, the Tribunal issued a decision on one of the Respondent's objections to jurisdiction.

B. The Tribunal's Request for Further Submissions

24. On 26 October 2018, the ICSID Secretariat, writing on behalf of the Tribunal, requested additional submissions from the Parties. The Secretariat's letter provided as follows:

I write on behalf of the Tribunal regarding the Tribunal's assessment of its jurisdiction and alleged damages in these proceedings.

The Tribunal has carefully considered each Party's submissions and evidence as presented in this matter. However, in the Tribunal's view, the Parties have not sufficiently addressed certain issues which may be relevant to the Tribunal's jurisdiction over the Third, Fourth and Fifth Claimants, as well as with respect to damages.

Further to the Tribunal's power to judge its own competence (Article 41(1), ICSID Convention), and to consider on its own initiative whether any dispute or claim is within the jurisdiction of the Centre and its own competence (Rule 41(2), ICSID Arbitration Rules), the Tribunal seeks the Parties' views on the following questions:

1. What is the rationale of Article 25(2)(b) ICSID Convention read together with Article 26(7) ECT?
2. What is the meaning of "foreign" in "foreign control" in Article 25(2)(b) ICSID Convention read together with "controlled by Investors of another Contracting State" in Article 26(7) ECT?
3. Is a domestic subsidiary (the Third Claimant) of a locally incorporated company referred to in Article 25(2)(b) ICSID Convention read together with Article 26(7) ECT (the Second Claimant) also to be treated as such a locally incorporated company (the Second Claimant)?
4. Does the same analysis apply to the domestic subsidiaries, being the Fourth and Fifth Claimants, held by the Third Claimant?
5. Or, is or are such domestic subsidiaries (the Third, Fourth and Fifth Claimants) to be treated as part of the Investment made through the locally incorporated company (the Second Claimant)?
6. Is the situation of a domestic subsidiary (the Third, Fourth and Fifth Claimants) of a locally incorporated company (the Second Claimant) referred to in Article 25(2)(b) ICSID Convention read together with Article 26(7) ECT to be distinguished from the situation considered in *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, ¶¶ 28-38?
7. Having regard to the answers to the above questions, what would be the consequences for each Party's case on jurisdiction and liability?

With respect to the alleged damages, the Tribunal has the following question (see Respondent's First Post-Hearing Submission, ¶ 464):

8. Having also regard to the answers to the above questions, including question 7, and if the Tribunal were to decide that the valuation date for quantification of the alleged damages is 29 June 2011 (corresponding to the date prior to the date of adoption of the 13th Amendment to the German Atomic Energy Act), what would be each Party's case regarding the alleged damages due?

The Tribunal invites the Parties to provide any comments on the above within 28 days, i.e., by Friday, 23 November 2018. The Parties may reply to the other side's comments within 28 days thereafter, i.e., by Friday, 21 December 2018.

With their comments, the Parties may submit new legal authorities, but no new factual or expert evidence (including domestic law cases) will be admitted, except in relation to question 8, in response to which the Parties may submit new factual or expert evidence as relevant.

C. The First Disqualification Proposal

25. On 12 November 2018, the Respondent wrote to the ICSID Secretary-General, proposing the disqualification of the Tribunal (the "**First Disqualification Proposal**"). In its proposal, the Respondent advanced two grounds for the disqualification, namely:

- (a) that the Tribunal had “assisted Claimants with the formulation of their claims and has given them an opportunity to remedy shortcomings at a time when Claimants themselves would not have been able to do so”; and
 - (b) that the Tribunal had treated the Parties unequally in its handling of the Respondent’s requests to introduce additional documents into the record.
26. On 24 January 2019, the ICISD Secretariat, on behalf of the ICSID Secretary-General, wrote to me, enquiring whether I would be willing to provide a recommendation on the First Disqualification Proposal to the Chairman of the ICSID Administrative Council. I responded in the affirmative.
27. On 4 March 2019, I provided the ICSID Secretary-General with my reasoned recommendation that the First Disqualification Proposal be rejected. In brief, I noted that I did not consider that the Tribunal’s request for further submissions was capable of supporting the inference that the Tribunal had intended to favor one party over the other or could not be relied upon to exercise independent judgment. I likewise noted that I did not consider that the Tribunal having sought additional documents and materials that it considered relevant while denying the Respondent’s request to introduce other materials was capable of supporting the inference that the Tribunal had intended to favor one party over the other or could not be relied upon to exercise independent judgment.
28. On 6 March 2019, the Acting Chairman of the ICSID Administrative Council determined that “the Proposal does not meet the standard set forth in Article 57 of the ICSID Convention for the disqualification of an arbitrator” and rejected it.

D. Proceedings Subsequent to the First Disqualification Proposal

29. On 14 March 2019, the Respondent wrote to the Tribunal, conveying its view that the Tribunal’s Question No. 8 of 26 October 2018 required a complete update of the Parties’ valuation models, that the Respondent would require at least six months to respond to an updated valuation from the Claimants, and that the Respondent reserved its right to request an oral hearing on the revised valuation reports.
30. On 15 March 2019, the Tribunal wrote to the Parties, clarifying its request for further submissions and fixing a calendar for submissions. Pursuant to this calendar, the Parties were accorded additional time for submissions in respect of the Tribunal’s Question No. 8, including 105 days for the Respondent to prepare its response to the Claimants’ revised valuation.
31. On 18 March 2019, the Claimants wrote to the Tribunal, objecting to, and requesting the amendment of, the briefing schedule fixed by the Tribunal. In the Claimants’ view, the adjustment of the valuation date requested by the Tribunal was “straightforward” and the Claimants’ response to Question No. 8 would be very limited. Accordingly, the Claimants considered the extended period granted to the Respondent to be unwarranted.
32. On 21 March 2019, the Respondent wrote to the Tribunal, objecting to the Claimants’ request for a shortened briefing schedule. Instead, the Respondent requested that the briefing schedule be amended to accord the Respondent additional time for its submissions on Questions Nos. 1-7 and for its rejoinder submission on Question No. 8.
33. On 22 March 2019, the Claimants provided their submission in respect of all of the Tribunal’s Questions Nos. 1-8.
34. On 27 March 2019, the Respondent wrote to the Tribunal, maintaining that the Claimants’ provision of its submissions did not alter the Respondent’s need for additional time in preparing its submissions.

35. On 11 April 2019, the Tribunal adopted a revised procedural calendar, granting the time periods for submissions requested by the Respondent. In the same letter, the Tribunal invited the Parties to indicate their availability for a hearing in early 2020, should such a request be made.
36. On 18 April 2019, the Parties both wrote to the Tribunal. The Respondent indicated that it could not be available on the dates proposed by the Tribunal and requested later dates. The Claimants recorded their objection to the timetable adopted by the Tribunal and the amount of time granted to the Respondent, but confirmed their availability on the proposed hearing dates.
37. On 19 April 2019, the Tribunal wrote to the Parties, noting the non-availability of counsel on the proposed hearing dates and the need to proceed efficiently and expeditiously and proposing to bifurcate the proceedings between (a) jurisdiction and liability and (b) quantum, with further proceedings on quantum to be determined only in the event of a finding on liability.
38. On 26 April 2019, the Parties both responded to the Tribunal's proposals. The Claimants agreed to the Tribunal's proposal, noting their view that "[a] decision on jurisdiction and liability could be rendered without substantial delay" and that the consent of the Parties to bifurcation was not required under the ICSID Convention. The Respondent objected to the Tribunal's proposal, asserting that issues of liability and quantum were intertwined and questioning the propriety of the Tribunal proposing bifurcation without a request from either party and after already having conducted a hearing in 2016 that included quantum matters.
39. On 6 May 2019, the Tribunal wrote to the Parties indicating that it had decided not to bifurcate the proceedings and invited the Parties to indicate their potential availability for a hearing later in 2020.
40. On 7 May 2019, the Claimants wrote to the Tribunal setting out their objections to the manner in which the proceedings were being conducted and the delay being permitted in the proceedings. Under the circumstances, the Claimants proposed that Germany agree to strike the Claimants' submission on Question No. 8 and that the Tribunal proceed to render a decision on the record before it, without submissions on Question No. 8.
41. On 15 May 2019, the Respondent wrote to the Tribunal, declining to agree to the Claimants' proposal and asserting that because the Claimants had already made their submission on Question No. 8, a full response from the Respondent was unavoidable.
42. On 3 June 2019, the Tribunal adopted a procedural calendar envisaging a potential hearing on remaining quantum matters, if requested, during the period of 1-3 June 2020.
43. On 20 June 2019, the Claimants wrote to the Tribunal advising it that they had succeeded in selling a portion of their Residual Electricity Production Volumes (a credit under the German Nuclear Phase-Out Law of 2002) that the Claimants had previously calculated as having no value. The Claimants indicated that they would set out the effect of this sale on their damages claim once the transfer had been completed.
44. On 3, 12, and 29 July, as well as 6 and 20 August 2019, the Parties exchanged correspondence regarding the circumstances by which this sale came about and the implications for the present proceedings. In the course of these exchanges, the Respondent requested the disclosure of certain documents relating to proceedings in the Hamburg Regional Court.
45. On 23 August 2019, the Claimants provided an updated damages claim, reducing the value of their claim by the amount of the sale.
46. On 28 August 2019, the Respondent requested a four-week extension of the deadline for its response to Question No. 8, to address the Claimants' updated damages claim. On 3 September 2019, the Claimants opposed this application.

47. On 4 September 2019, the Tribunal issued a revised procedural calendar, granting the majority of the extension requested by the Respondent.
48. On 5 September 2019, the Tribunal issued Procedural Order No. 38, granting the Respondent's request for the disclosure of certain of the Claimants' own submissions to the Hamburg Regional Court, directing the Claimants to inform the Tribunal concerning any further settlements for the sale of Residual Electricity Production Volumes, and denying the Respondent's other requests.
49. In its order, the Tribunal also noted that the Parties' exchanges had included "a series of very serious accusations of conspiracy, manipulation of the arbitration proceedings, bad faith conduct, and other activities". The Tribunal indicated that, should either side wish to maintain such accusations, it should submit a fully particularised submission, accompanied by supporting evidence.
50. On 11 September 2019, the Respondent informed the Tribunal that it intended to make a submission pursuant to Procedural Order No. 38 on what it considered to be professional misconduct by the Claimants, but requested a six-week extension of the deadline to do so, noting that it would need to consider the documents to be produced pursuant to Order No. 38 and was occupied with preparing its Response to the Tribunal's Question No. 8. At the same time, the Respondent requested the Tribunal to reconsider those portions of its Order No. 38 denying the Respondent's other requests.
51. On 17 September 2019, the Claimants opposed the Respondent's requests.
52. On 24 September 2019, the Tribunal issued Procedural Order No. 39, granting the Respondent's request for additional time to make a submission on professional misconduct, permitting the Respondent to introduce witness testimony regarding the proceedings before the Hamburg Regional Court, and denying the Respondent's other requests.
53. On 23 October 2019, the Respondent submitted its Response to Tribunal's Question No. 8.
54. On 31 October 2019, the Claimants wrote to the Tribunal, indicating that they considered the Respondent's Response to go well beyond the scope of Question No. 8 and that they were preparing an application to strike portions of the Respondent's Response. Accordingly, Claimants sought an extension of the deadline for their second-round submission on Question No. 8.
55. On 6 November 2019, the Respondent submitted its Submission pursuant to Procedural Order No. 38.
56. On 14 November 2019, the Claimants submitted an application to strike portions of the Respondent's Response to Question No. 8. The Respondent opposed this application on 22 November 2019. On 3 December 2019, the Tribunal issued Order No. 40, denying the Claimants' application.
57. On 2 December 2019, the Claimants reiterated their request for additional time to prepare their second-round submission on Question No. 8. Respondent opposed this request on 3 December 2019.
58. On 4 December 2019, the Claimants proposed an extended deadline for the submission of their second-round submission on Question No. 8. On 6 December 2019, the Respondent indicated that it would not oppose the Claimants' request, but requested restrictions on the scope of the Claimants' second-round submission. The Respondent also indicated that it would require additional time for the preparation of its Rejoinder on Question No. 8.

59. On 13 December 2019, the Tribunal adopted a revised procedural calendar, granting in part the Claimants' requested extension.
60. On 20 December 2019, the Respondent requested that the Tribunal revise the deadline for its Rejoinder to Question No. 8, due to the prior commitments of its experts. The Claimants opposed this request.
61. On 31 December 2019, the Tribunal granted each side a one week extension on its second-round submission on Question No. 8 and indicated that no further extensions would be granted.
62. On 31 January 2020, the Respondent wrote to the Tribunal seeking an extension of the timetable for the submission of its Rejoinder to Question No. 8 and a postponement of the reserved hearing dates. The Respondent also requested that the Tribunal reserve additional hearing days. The Respondent opposed all of these' requests on 4 February 2020.
63. On 5 February 2020, the Respondent provided its response to the Claimants' Submission pursuant to Procedural Order No. 38.
64. On 6 February 2020, the Tribunal issued Procedural Order No. 42, denying the Respondent's requests of 31 January 2020 and setting out its reasons for this decision.
65. On 7 February 2020, the Claimants wrote to the Tribunal to indicate that they had received the proceeds of a further sale of Residual Electricity Production Volumes and proposed to reduce their quantum claim by the amount of the sale as an offset.
66. On 11 February 2020, the Respondent wrote to the Tribunal, challenging the circumstances of the Claimants' sale of Residual Electricity Production Volumes and requesting that the Claimants be ordered to produce additional information and documents relating to the sale.
67. On 14, 17, 20, and 25 February and 2, 4, 6, 9, 10, and 12 March 2020, the Tribunal and the Parties exchanged extensive additional correspondence regarding Residual Electricity Production Volumes. On 13 and 25 February 2020, the Claimants submitted offset calculations relating to the sale of Residual Electricity Production Volumes.

E. The COVID-19 Pandemic and the Public Disclosure of the *PV Investors v. Spain* Award

68. On 17 March 2020, the Tribunal wrote to the Parties, noting developments in the spread of the novel coronavirus and increasing restrictions on travel and movement. The Tribunal proposed to conduct the June 2020 hearing by videoconference and invited the Parties' views.
69. On 23 March 2020, the Parties responded to the Tribunal's proposal. The Claimants agreed to proceed by videoconference hearing; the Respondent opposed the proposal (for reasons set out in relation to the Third Ground for disqualification) and requested that alternative, later hearing dates be identified.
70. On 27 March 2020, the Respondent wrote to the Tribunal regarding the public disclosure of the 2014 Partial Award on Jurisdiction in *The PV Investors v. Spain* and Judge Brower's Opinion thereto. The Respondent set out a series of questions for Judge Brower regarding the Tribunal's knowledge of or discussions concerning his opinion in *The PV Investors v. Spain*.
71. On 30 March 2020, the Tribunal wrote to the Parties, indicating that the June 2020 hearing would proceed by videoconference and setting out its reasons for this decision.
72. Also on 30 March 2020, Judge Brower wrote to the Parties, declining to answer the Respondent's questions in light of the confidentiality of the Tribunal's deliberations.

73. On 3 April 2020, the Respondent wrote to the Tribunal, reiterating its questions to Judge Brower as questions to the entire Tribunal. The Claimants opposed the Respondent's questions to the Tribunal on 8 April 2020.
74. On 7 April 2020, the Respondent wrote to the Tribunal, requesting additional time for the submission of its Rejoinder to Question No. 8 and the postponement of the June 2020 hearing. As grounds for this request, the Respondent cited the Claimants' reduction of their quantum claim by way of the second and third offsets and the effect of the novel coronavirus in impeding the Respondent's coordination with its client and preparation for the hearing. The Claimants opposed these requests on 10 April 2020.
75. On 8 April 2020, the Tribunal wrote to the Parties, declining to answer the Respondent's questions, but giving leave for both sides to provide any comments they wished to make in respect of *The PV Investors v. Spain*.
76. On 8 April 2020, the Respondent wrote to the Tribunal, requesting an extension of the deadline given to provide comments regarding the decisions in *The PV Investors v. Spain*.
77. On 13 April 2020, the Tribunal wrote to the Parties, adjusting the timetable for the Parties to provide comments in respect of *The PV Investors v. Spain* and denying the Respondent's requests for additional time for the submission of its Rejoinder to Question No. 8 and the postponement of the June 2020 hearing.

F. The Second Disqualification Proposal

78. On 16 April 2020, the Respondent wrote to the ICSID Secretary-General, requesting the disqualification of all three members of the Tribunal.
79. On 24 April 2020, in accordance with the schedule established by ICSID, the Claimants wrote to the ICSID Secretary-General, opposing the Respondent's Proposal.
80. On 1 May 2020, the ICSID Secretariat wrote to the Parties, conveying the comments of each member of the Tribunal on the Respondent's Proposal.
81. On 8 May 2020, the Parties wrote simultaneously to the ICSID Secretary-General. In these communications the Respondent maintained its Proposal, and the Claimants indicated that they had no further comments to provide.
82. On 8 May 2020, the ICSID Secretariat, on behalf of the ICSID Secretary-General, wrote to me, enquiring whether I would be willing to make a recommendation on the Respondent's Proposal to the Chairman of the ICSID Administrative Council.
83. On 11 May 2020, I responded that I would be willing to provide a recommendation on the Respondent's Proposal.
84. On 12 June 2020, the Respondent wrote to the ICSID Secretary-General, taking note of the annulment decision issued on 11 June 2020 in *Eiser v. Kingdom of Spain* (ICSID Case No. ARB/13/36) (the "**Eiser Annulment Decision**") and requesting that the Parties be afforded the opportunity to comment on the implications of the Eiser Annulment Decision for the present proposal.
85. On 15 June 2020, the Claimants wrote to the ICSID Secretary-General, opposing the Respondent's request on the grounds that the Eiser Annulment Decision is not relevant to the Proposal.

86. On 16 June 2020, the ICSID Secretariat invited the Parties to make simultaneous submissions on the implications of the Eiser Annulment Decision for the present Proposal. The ICSID Secretariat also requested that I refrain from providing my recommendation until I had received and considered the Parties' further submissions.
87. On 22 June 2020, the Parties made simultaneous submissions on the implications of the Eiser Annulment Decision.

III. Observations on the Applicable Law and Timeliness

A. The Legal Basis for a Disqualification Proposal under the ICSID Convention

88. The legal basis for the Proposal that the Tribunal be disqualified is Article 57 of the ICSID Convention, which provides:

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.

89. In the Proposal, the Respondent proposes disqualification based on the first sentence of Article 57, *i.e.*, the existence of facts "indicating a manifest lack of the qualities required by paragraph (1) of Article 14." According to Article 14(1) of the ICSID Convention,

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.

90. The Respondent questions neither the high moral character of the members of the Tribunal nor their competence in the field of international law. The Proposal addresses only whether the members of the Tribunal may be "relied upon to exercise independent judgment". I note that the term "independent judgment" also encompasses the concept of impartiality.

91. Rule 9 of the ICSID Arbitration Rules provides:

Disqualification of Arbitrators

- (1) 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.
- (2) The Secretary-General shall forthwith:
 - (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
 - (b) notify the other party of the proposal.
- (3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.
- (4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

- (5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.
- (6) The proceeding shall be suspended until a decision has been taken on the proposal.

92. I note that decisions on challenges previously brought in other cases under the ICSID Convention or other procedural frameworks are not binding upon me. However, this does not preclude me from considering such decisions and the arguments of the Parties based upon them, to the extent that I find that they shed light on the issues arising in relation to this proposal for disqualification.

B. Burden and Standard of Proof under Article 57 of the ICSID Convention

93. Under Article 57, the burden is on the challenging party to establish the existence of the required facts and to prove that such facts indicate a “manifest lack” of the quality required of an arbitrator, that is, that such an arbitrator lacks the quality of being a person who can be relied upon to exercise independent judgment and impartiality of judgment. The standard of proof required is that the challenging party must prove not only facts indicating the lack of independence or impartiality, but also that the lack is “manifest” or highly probable, not just possible.

94. I note that the standard imposed by Articles 14 and 57 has been considered in a number of prior decisions. The Chairman of the ICSID Administrative Council has stated that “manifest” in Article 57 of the ICSID Convention means “evident” or “obvious” and relates to “the ease with which the alleged lack of the required qualities can be perceived”.² Proof of actual bias is not required; rather, “it is sufficient to establish the appearance of dependence or bias.”³ Finally, the legal standard applicable to disqualification is an objective one, and “the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.”⁴

95. As summarized in my Recommendation on the First Disqualification Proposal, the applicable legal principles are as follows. Pursuant to Article 57 of the ICSID Convention, the challenging party carries the burden to establish, first, the existence of facts on the basis of which a “manifest” lack of the qualities of an arbitrator can be inferred. Second, the challenging party must establish that such inference is reasonable, considering the circumstances of the case. Article 57 of the ICSID Convention contains an objective standard. Subjective perceptions or beliefs of the challenging party are insufficient to disqualify an arbitrator.

C. Relationship between Disclosure and Independence and Impartiality

96. ICSID Arbitration Rule 6(2) requires that prospective arbitrators make the following declaration:

² *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, para. 61 (**Respondent’s Attachment 107**).

³ *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 Tribunal, 3 October 2017, para. 68 (**Respondent’s Attachment 112**).

⁴ *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 Tribunal, 3 October 2017, para. 69 (**Respondent’s Attachment 112**).

To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____.

I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.

97. The scope of this obligation has been considered in a number of prior decisions. In particular, it is clear that the standard for disclosure under Rule 6(2) is not the same as the standard for removal under Articles 57 and 14(1). The standard for disclosure under Rule 6(2) has been equated with the standard of “likely to give rise to justifiable doubts”; disqualification, however, requires a “manifest lack” of the qualities required of an arbitrator. As such, “non-disclosure would itself indicate manifest lack of impartiality only if the facts or circumstances surrounding such non-disclosure are of such gravity (whether alone or in combination with other factors) as to call into question the ability of the arbitrator to exercise independent and impartial judgment.”⁵

D. Timeliness of a Proposal

98. Rule 9(1) of the ICSID Arbitration Rules states that a party seeking the disqualification of an arbitrator must do so “promptly” after the party has obtained knowledge of the relevant facts on which the challenge is based.
99. Neither the ICSID Convention, nor the ICSID Arbitration Rules specify a precise number of days within which a proposal for disqualification must be filed, and it is well established that the timeliness of a proposal must be evaluated on a case-by-case basis.⁶ I will address the timeliness of the Respondent’s Proposal below, in considering the specific grounds for disqualification set out therein.

IV. Observations on the Grounds on which the Proposal Is Based

100. In the following sections, I shall set out my considerations regarding each of the five grounds for the Proposal put forward by the Respondent.

⁵ *Tidewater Inc., Tidewater Investment Srl, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C., Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Decision On Claimants’ Proposal To Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, para. 40 (**Respondent’s Attachment 135**).

⁶ *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 Tribunal, 3 October 2017, para. 70 (**Respondent’s Attachment 112**); *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, para. 68 (**Respondent’s Attachment 116**).

A. Ground One: Non-Disclosure of Judge Brower’s Opinion in *The PV Investors v. Spain*

101. The Respondent submits that Judge Brower “failed to disclose for almost six (6) years that he had an issue conflict and, indeed, had already delivered his opinion on the very matter that is also at the heart of this arbitration, i.e. Article 26(7) ECT.”⁷ The Respondent notes that it became aware of Judge Brower’s 2014 Opinion in *The PV Investors v. Spain* only in March 2020.
102. According to the Respondent, Judge Brower’s Opinion deals with matters “on which Respondent had the right to be informed and to receive the opportunity to make contrary submissions from the outset.”⁸ In particular, the Respondent notes Judge Brower’s assertion that, under the Treaty, investors must have equal access to arbitration, irrespective of the form of arbitration taken. In the Respondent’s view “[i]n the present arbitration, the differences in outcome between ICSID and Non-ICSID arbitration under Article 26 ECT are of pivotal importance.” According to the Respondent, however, whereas Judge Brower interpreted the Treaty in *The PV Investors v. Spain* as according rights to domestic investors in all forms of arbitration, the Respondent submits that domestic investors are never granted such rights.⁹
103. The Respondent submits that Judge Brower’s “disclosure duty does not only cover aspects that do give rise to disqualification grounds under Article 14 ICSID Convention. The declaration covers every aspect ‘that might cause [...] independent judgment to be questioned by a party.’ Hence, already the potential suffices.”¹⁰ According to the Respondent, this understanding is reinforced in the recent annulment committee decision in *Eiser v. Kingdom of Spain*,¹¹ which held that disclosure “must be approached from the point of view of a party”¹² and that the lack of disclosure in that matter “created a ‘manifest appearance of bias’”.¹³
104. In sum, the Respondent contends that “[t]he *PV Investors* concerns multiple aspects that indeed would have and now do cause Respondent to question Judge Brower’s reliability for independent judgment.”¹⁴ Specifically, the Respondent notes:

Judge Brower has openly presumed that Article 26(7) ECT would permit self-standing claims of domestic subsidiaries, not only in ICSID proceedings, but also in UNCITRAL/SCC arbitrations. That is, he has pre-judged a matter at the heart of this arbitration’s jurisdictional problem, namely whether Vattenfall’s domestic subsidiaries can bring their full losses, comprising E.ON’s shares.¹⁵

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⁷ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 66.

⁸ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 74.

⁹ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 79.

¹⁰ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 137.

¹¹ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/36/36, Decision on the Kingdom of Spain’s Application for Annulment, 11 June 2020.

¹² Respondent’s Comments on the Eiser Annulment, para. 27.

¹³ Respondent’s Comments on the Eiser Annulment, para. 33.

¹⁴ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 141.

¹⁵ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 141.

105. The Claimants submit that “Judge Brower’s Dissent lacks relevance” because it concerned a question not at issue in the present proceedings.¹⁶ *The PV Investors v. Spain* concerned the rights of locally incorporated companies in proceedings under the UNCITRAL Rules, not pursuant to the ICSID Convention.¹⁷
106. Moreover, the Claimants argue that, even if Judge Brower’s Opinion were relevant, it would not amount to a manifest lack of impartiality. The Claimants consider it “well-settled that the expression of an opinion on an issue relevant in a particular arbitration is not tantamount to bias or impartiality, irrespective of whether it is expressed in an academic article, or through a decision in an arbitration.”¹⁸
107. Finally, the Claimants submit that “Judge Brower was under no obligation to disclose neither the Majority Decision, nor his Dissent” in *The PV Investors v. Spain*.¹⁹ The Claimants cite the IBA Guidelines on Conflicts of Interest in International Arbitration and submit that, for the ICSID Rules, Judge Brower’s circumstances “are not such that they would prompt disclosure since they do not, in the words of the unchallenged members of the arbitral tribunal in *Suez v. Argentina*, ‘reasonably cause [the arbitrator’s] reliability for independent judgment to be questioned by a reasonable person.’”²⁰

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108. In his comments, Judge Brower submits that there was no issue conflict as his Opinion in *The PV Investors v. Spain* did not address an issue in dispute in the present proceedings. According to Judge Brower, his Opinion addressed only whether “Article 26(7) of the Energy Charter Treaty (ECT) should have been interpreted to accord to claimants proceeding under the UNCITRAL Rules and those of the Stockholm Chamber of Commerce (SCC) the same treatment as that Article accords to claimants proceeding under the ICSID Convention and its Article 25(2)(b).”²¹ However, Judge Brower contends, “[i]t took no position as to the consequences of a proper application of that Article 25(2)(b) in any case, including the present one.”²²
109. Judge Brower further submits that he was under no obligation to disclose his Concurring and Dissenting Opinion. Judge Brower recalls the classification of previously expressed legal opinions in the IBA Guidelines on Conflicts of Interest in International Arbitration and notes that his Opinion was not focussed on this case.²³

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110. As an initial matter, I note that the first ground for disqualification in the Respondent’s Proposal was raised in a timely fashion. The Respondent’s Proposal was submitted on 16 April

¹⁶ Claimants’ Reply to the Second Disqualification Proposal, para. 22.

¹⁷ Claimants’ Reply to the Second Disqualification Proposal, para. 22

¹⁸ Claimants’ Reply to the Second Disqualification Proposal, para. 23.

¹⁹ Claimants’ Reply to the Second Disqualification Proposal, para 25.

²⁰ Claimants’ Reply to the Second Disqualification Proposal, para. 25, quoting *Suez v. Argentina*, ICSID Case No. ARB/03/17 and ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008, para. 46 (**Respondent’s Attachment 181**).

²¹ Response of Judge Brower to Challenge of 17 April 2020, para. 2.

²² Response of Judge Brower to Challenge of 17 April 2020, para. 2.

²³ Response of Judge Brower to Challenge of 17 April 2020, para. 9.

2020, 20 days after I understand the Respondent to have obtained a copy of Judge Brower's Opinion on 27 March 2020. I consider that the Proposal, with respect to this ground, was filed promptly for the purpose of Rule 9(1) of the ICSID Arbitration Rules.

111. Turning to the substance of the Respondent's proposal, I note that, although presented as a question of disclosure, the Respondent's first ground for disqualification is premised on the assumption that Judge Brower's Opinion in *The PV Investors v. Spain* constitutes an issue conflict with respect to the present proceedings. This starting assumption, however, is contested by both the Claimants and Judge Brower. Because the question of whether Judge Brower's Opinion constituted an issue conflict bears on his disclosure obligations and on whether any failure of disclosure suffices to establish a manifest lack of the qualities required of an arbitrator, I consider it essential to examine whether Judge Brower's Opinion gives rise to such conflict.
112. In international arbitral proceedings, an "issue conflict" denotes a situation in which an arbitrator is inappropriately predisposed to favor a particular outcome with respect to the issues at stake in the proceedings. As described in *CC/Devas (Mauritius) Ltd. et al. v. India*, the leading decision on this question relied upon by the Respondent, an issue conflict is "based on a concern that an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own previously expressed view."²⁴ This concern must be parsed carefully, however, and cannot mean that an arbitrator that has previously ruled on an issue or applied a treaty in another matter is thereby automatically conflicted with respect to that issue or that treaty. Arbitrators are expected to be knowledgeable of the law and to have potentially extensive prior experience in the resolution of disputes within his or her area of specialization. As such, "knowledge of the law or views expressed about the law are not *per se* sources of conflict that require removal of an arbitrator."²⁵ Nor does "a prior decision in a common area of law" suffice to "automatically support a view that an arbitrator may lack impartiality."²⁶ Instead, an issue conflict requires (a) "an appearance of pre-judgment of an issue likely to be relevant to the dispute" and (b) "on which the parties have a reasonable expectation of an open mind."²⁷
113. In the present case, the alleged issue conflict stems from a significant question of the interpretation of the Treaty, concerning the status of foreign controlled local subsidiaries, a category which may include four of the five Claimants in the present proceedings. Article 26(7) of the Treaty provides as follows:

²⁴ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic Of India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, para. 58 (**Respondent's Attachment 201**).

²⁵ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic Of India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, para. 58 (**Respondent's Attachment 201**).

²⁶ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic Of India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, para. 58 (**Respondent's Attachment 201**).

²⁷ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic Of India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, para. 58 (**Respondent's Attachment 201**).

An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State”.

In other words, Article 26(7) provides that a controlled local subsidiary of a foreign investor will meet the nationality requirement of the ICSID Convention, which requires the agreement of the parties before such a subsidiary can be considered a party to a dispute falling within the jurisdiction of the Centre. However, nothing in the Treaty directly addresses the status of a controlled local subsidiary of a foreign investor for the purposes of the Treaty itself (as opposed to the purposes of the ICSID Convention). Instead, the text of Article 26(1) of the Treaty provides for dispute resolution only for “[d]isputes between a Contracting Party and an Investor of another Contracting Party” and the text of the definition of “Investor” does not include controlled local subsidiaries. In short, the Treaty appears to provide for the treatment of controlled local subsidiaries in ICSID Convention proceedings, without providing a clear textual avenue for how and under what circumstances such controlled local subsidiaries may access the ICSID Convention.

114. The jurisdictional issue in *The PV Investors v. Spain* concerned the right of local Spanish subsidiaries to bring claims as claimants in proceedings initiated pursuant to the Treaty and the UNCITRAL Rules. The majority of that tribunal ruled that this was not permitted, as Article 26(7) only provided for the treatment of controlled local subsidiaries under the ICSID Convention. Judge Brower disagreed, giving rise to the Opinion at issue in this disqualification Proposal. At no point, however, did anyone in the *PV Investors* proceedings appear to have questioned whether local Spanish subsidiaries would have been entitled to stand as claimants had those arbitral proceedings been brought under the ICSID Convention.
115. The jurisdictional issue in the present proceedings concerns whether Vattenfall’s German incorporated subsidiaries are entitled to stand as Claimants in their own right and bring claims in respect of their full alleged losses, including alleged losses in excess of Vattenfall AB’s percentage interest in these subsidiaries. The Respondent in these proceedings argues that Article 26(7) of the Treaty provides for “procedural standing” only and that such local subsidiaries “would only be entitled to recover alleged damages attributable to the share of the controlling foreign entity.”²⁸
116. Under these circumstances, I do not consider that any issue conflict arises. The question of jurisdiction at issue in *The PV Investors v. Spain* is fundamentally different from that at issue in these proceedings. I note that Judge Brower’s Opinion was premised on the assumption that controlled local subsidiaries would be entitled to stand as claimants in proceedings under the ICSID Convention, but do not see that he decided that issue or decided the scope of rights available to such local subsidiaries. On the contrary, Judge Brower’s assumption appears to have been shared by the other members of the *PV Investors* tribunal²⁹ and by all of the parties in those proceedings,³⁰ none of whom appear to have argued otherwise. Moreover, the view that controlled local subsidiaries would have access, in some form, to the ICSID Convention also appears to be shared—albeit subject to a caveat—by the Respondent in the present

²⁸ The Respondent’s Counter-Memorial, para. 593.

²⁹ *The PV Investors v. Spain*, ICSID Case No. ARB/12/12, Preliminary Award on Jurisdiction, 13 October 2014, paras. 261, 267 (**Respondent’s Attachment 95**).

³⁰ *The PV Investors v. Spain*, ICSID Case No. ARB/12/12, Preliminary Award on Jurisdiction, 13 October 2014, paras. 242, 245, 247 (**Respondent’s Attachment 95**).

proceedings, which “does not dispute that, in theory, locally incorporated operating companies can have procedural standing (not substantive rights) under the ECT and the ICSID Convention if they show that they are controlled by a foreign investor.”³¹

117. As I understand the Respondent’s view of the relevance of Judge Brower’s Opinion, by indicating that he considered controlled local subsidiaries to be “investors” for the purposes of the Treaty, he must necessarily have decided that such subsidiaries could bring claims for the full amount of their alleged losses, and not only for the share of their losses corresponding to the interest of the controlling foreign parent.³² I do not, however, find sufficient reasons to draw this inference. No one in *The PV Investors v. Spain* appears to have suggested, as the Respondent now does, that controlled local subsidiaries could be parties in proceedings under the ICSID Convention, yet at the same time limited in the claims they could bring to those corresponding to the interest of their foreign parent. The parties and tribunal in *The PV Investors v. Spain* do not appear to have engaged with the distinction between substantive rights and procedural standing that the Respondent advances in the present proceedings. This appears to be a novel argument, and I take no view of any kind on its merits or demerits. That point not having been raised or argued in *The PV Investors v. Spain*, however, I do not see reasons to infer that Judge Brower’s Opinion expressed any firm view on the matter. I also take note of Judge Brower’s assertion that his Opinion took no position on this question. As such, I see no basis to infer either that he has pre-judged an issue in the present proceedings or that he lacks an open mind in considering the Respondent’s jurisdictional arguments.
118. Turning to the question of disclosure that forms the core of the Respondent’s first ground for disqualification, I accordingly do not consider this to be a matter of a wrongful non-disclosure by Judge Brower of an issue conflict. The question is rather whether Judge Brower was under an obligation to disclose that he had considered and rendered an opinion on another aspect of Article 26(7) of the Treaty in unrelated proceedings. Given that Judge Brower’s Opinion did not take a position on issues in dispute in the present proceedings, I do not consider that it would reasonably give rise to justifiable doubt as to his impartiality, such as to require disclosure under Rule 6(2). In any event, I do not see that his non-disclosure of the Opinion can support an inference that Judge Brower manifestly cannot be “relied upon to exercise independent judgment”.

B. Ground Two: The “Illicit Deliberations” of the Tribunal concerning *The PV Investors v. Spain*

119. The Respondent submits that the Tribunal, “for years, has been deliberating about matters unknown to the Respondent and therefore restricted the Respondent’s defense possibilities.”³³ The Respondent argues that the Tribunal and Judge Brower’s refusal to answer its questions regarding whether, and if so when, the Tribunal had discussed Judge Brower’s Opinion, “constitute *prima facie* evidence for the appearance that the Tribunal has been deliberating for years about *The PV Investors* without disclosing this matter to the Parties.”³⁴ The Respondent also considers the Tribunal’s focus on Article 26(7) of the Treaty in its Questions Nos. 1-7 of 26 October 2018 suggests that it was deliberating regarding *The PV Investors v. Spain*.³⁵

³¹ The Respondent’s Rejoinder, para. 724.

³² Respondent’s Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, paras. 101-103.

³³ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 89.

³⁴ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 83.

³⁵ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 84.

120. According to the Respondent, “any year-long deliberation on a matter outside the record of the arbitration and without providing Respondent an opportunity to make the submissions on a matter indeed unknown to it, is a violation of Respondent’s right to be heard.”³⁶ The Respondent notes that it cannot establish the contents of the Tribunal’s deliberations with certainty, but submits that the appearance of bias arising from the Tribunal’s Questions Nos. 1-7 and its refusal to answer the Respondent’s question is sufficient.³⁷
121. Finally, the Respondent submits that the recent annulment decision in *Eiser v. Kingdom of Spain* establishes that illicit deliberations are not a novelty and that the participation of a conflicted arbitrator may taint the Tribunal’s deliberations.³⁸

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122. The Claimants submit that “the notion of ‘illicit deliberations’ is a novelty to international arbitration, made up by Germany.”³⁹ According to the Claimants, there are no rules restricting the matters on which a tribunal may deliberate.⁴⁰
123. The Claimants submit that the Respondent’s account of the Tribunal’s supposed deliberations is speculative and the inferences it would draw unreasonable.⁴¹ According to the Claimants, no inferences can reasonably be drawn from the Tribunal refusing to answer the Respondent’s questions on deliberations it is obliged to keep secret.⁴² Nor can inferences be reasonably drawn from the Tribunal’s Questions.⁴³ In any event, the Claimants consider that, even if the Tribunal had deliberated regarding *The PV Investors v. Spain*, there would have been nothing improper. The Claimants submit that “[t]here is no basis for assuming that any deliberation on *PV Investors* would have been to the detriment of Germany.”⁴⁴ According to the Claimants, the Tribunal “was under no obligation to inform the Parties of its underlying internal – and confidential – motivations for raising Questions 1-7, let alone invite the Parties to comment on every potential legal authority pertinent to the questions.”⁴⁵ Finally, the Claimants argue that the Respondent contradicts itself in arguing that the Tribunal supposedly had deliberations on Article 26(7) of the Treaty, which were allegedly improper for involving matters not known to the Parties, while at the same time arguing that these same deliberations prompted the Tribunal to pose an extensive set of questions to the Parties.⁴⁶

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124. I note that the second ground for disqualification in the Respondent’s Proposal was raised in a timely fashion. The Respondent’s Proposal was submitted on 16 April 2020, 20 days after I

³⁶ Respondent’s Second Proposal for Disqualification of the Tribunal, para 149.

³⁷ Respondent’s Second Proposal for Disqualification of the Tribunal, paras. 151-156.

³⁸ Respondent’s Comments on the Eiser Annulment, paras. 75-76.

³⁹ Claimants’ Reply to the Second Disqualification Proposal, para. 28.

⁴⁰ Claimants’ Reply to the Second Disqualification Proposal, para. 28.

⁴¹ Claimants’ Reply to the Second Disqualification Proposal, paras. 30-32.

⁴² Claimants’ Reply to the Second Disqualification Proposal, para. 33.

⁴³ Claimants’ Reply to the Second Disqualification Proposal, para. 34.

⁴⁴ Claimants’ Reply to the Second Disqualification Proposal, para. 38.

⁴⁵ Claimants’ Reply to the Second Disqualification Proposal, para. 41.

⁴⁶ Claimants’ Reply to the Second Disqualification Proposal, para. 42.

understand the Respondent to have obtained a copy of Judge Brower's Opinion on 27 March 2020. I consider that the Proposal, with respect to this ground was filed promptly for the purpose of Rule 9(1) of the ICSID Arbitration Rules.

125. Turning to the substance of the Respondent's Proposal, it would suffice to note that the Respondent's allegations are entirely speculative. The Respondent has introduced no direct evidence of the Tribunal's deliberations, but relies entirely upon three factual points:
- (a) that the tribunal in *The PV Investors v. Spain*, including Judge Brower, decided a question of the application of Article 26(7) of the Treaty;
 - (b) that the Tribunal posed to the Parties a series of questions concerning Article 26(7) of the Treaty; and
 - (c) that the Tribunal collectively, and Judge Brower individually, declined to answer the Respondent's questions regarding the content of the Tribunal's deliberations.

Taken together, I do not see that this matrix reasonably supports any inference as to what the Tribunal did or did not discuss.

126. Beyond this factual point, however, it appears to me that the Respondent considers it improper for the Tribunal to discuss any authority or legal theory other than those proposed by the Parties. In my view, there is no basis for such a restriction. Due process generally entails that a tribunal should not base its decision on legal theories or authorities that are beyond the Parties' reasonable contemplation, but it cannot require a tribunal in approaching its decision to close its mind to any considerations other than those advanced by counsel. This would also be at odds with the ICSID Convention's requirement that arbitrators have recognized competence in the field of law. The normal practice would rather be for a tribunal to explore such theories or authorities with the parties, but only if the tribunal in fact considered them essential to its decision-making.
127. Finally, I do not see that this conclusion is altered by the recent annulment decision in *Eiser v. Kingdom of Spain*. As I understand *Eiser*, it stands for the proposition that an award may be annulled where an arbitrator is found to be conflicted, and thus lacking the capacity to exercise independent judgment, after the proceedings are concluded. The rationale of *Eiser* is that it cannot be known to what extent the conflicted arbitrator influenced the decision-making of his or her colleagues, and the timing of the revelation is such that there is no opportunity for disqualification and no chance for the remaining members of the Tribunal to revisit their decision. In the present case, however, I do not see Judge Brower's Opinion as giving rise to an issue conflict and correspondingly see no impropriety in his involvement in the Tribunal's deliberations.
128. In sum, I do not consider that the record identified by the Respondent reasonably supports inferences regarding the content of the Tribunal's deliberations or an inference that the members of the Tribunal manifestly cannot be "relied upon to exercise independent judgment".

C. Ground Three: The Tribunal's Decision to Proceed with the Hearing by Videoconference

129. The Respondent submits that the Tribunal's "decision to hold any hearing on quantum online despite Respondent's well-founded objection shows that it views the hearing as a mere formality, and hence creates an appearance of bias."⁴⁷

⁴⁷ Respondent's Second Proposal for Disqualification of the Tribunal, para. 163.

130. In response to the Tribunal's proposal to conduct the hearing by videoconference, the Respondent contends that the hearing on quantum in this matter was too complex and involved too many witnesses to proceed by videoconference.⁴⁸ The Respondent argues that video hearings could not approach the value of in-person cross-examination and raise concerns about witness coaching.⁴⁹ The Respondent further argues that proceeding by videoconference would greatly impede its ability to coordinate with its experts and counsel.⁵⁰
131. As a legal matter, the Respondent submits that it has a right to an oral hearing and further submits that the ICSID Rules "do not allow holding a hearing online against the will of one party," as online hearings are not provided for in the Rules.⁵¹ According to the Respondent, videoconference hearings may be appropriate for some hearings, such as those without witnesses or experts, or with smaller amounts at stake.⁵² The Respondent, however, considers a videoconference hearing inappropriate for the present proceeding and argues that there is increasing recognition that videoconferencing cannot fully substitute for all hearings.⁵³
132. Finally, the Respondent invites ICSID and the PCA to provide statistics on the number of hearings cancelled in March-June 2020.⁵⁴

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133. The Claimants submit that the Tribunal's decision to proceed with a hearing by videoconference provides "no basis to infer a lack of impartiality."⁵⁵
134. The Claimants argue that the contemplated hearing would be a "limited supplemental evidentiary hearing", the principal hearing in this matter having taken place in 2016.⁵⁶ As such, the Claimants contend that the Respondent had no absolute right to a further hearing, with hearings on ancillary matters being within the discretion of the Tribunal.⁵⁷ In any event, the Claimants argue, there is no right whatsoever to an in-person hearing: the ICSID Rules "neither explicitly allow nor deny the possibility of an oral hearing by videoconference."⁵⁸
135. Finally, the Claimants submit that even if the decision to proceed by videoconference were a procedural error, "there is no basis to infer bias".⁵⁹ The Claimants submit that the mere fact that a ruling is adverse to the preferences of a party cannot support an inference that the tribunal lacks impartiality.⁶⁰ The Claimants also note that a videoconference hearing would not be

⁴⁸ Respondent's Second Proposal for Disqualification of the Tribunal, para. 91.

⁴⁹ Respondent's Second Proposal for Disqualification of the Tribunal, para. 92.

⁵⁰ Respondent's Second Proposal for Disqualification of the Tribunal, para. 93.

⁵¹ Respondent's Second Proposal for Disqualification of the Tribunal, paras. 166-169.

⁵² Respondent's Second Proposal for Disqualification of the Tribunal, paras. 164-165.

⁵³ Respondent's Second Proposal for Disqualification of the Tribunal, paras. 171-174.

⁵⁴ Respondent's Second Proposal for Disqualification of the Tribunal, para. 175

⁵⁵ Claimants' Reply to the Second Disqualification Proposal, para. 46.

⁵⁶ Claimants' Reply to the Second Disqualification Proposal, paras. 47-48.

⁵⁷ Claimants' Reply to the Second Disqualification Proposal, para. 49.

⁵⁸ Claimants' Reply to the Second Disqualification Proposal, para. 50.

⁵⁹ Claimants' Reply to the Second Disqualification Proposal, para. 55.

⁶⁰ Claimants' Reply to the Second Disqualification Proposal, para. 56.

specifically detrimental to the Respondent, as the Claimants would also have to overcome the challenges associated with participants scattered across many locations.⁶¹

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136. I note that the third ground for disqualification in the Respondent's Proposal was raised in a timely fashion. The Respondent's Proposal was submitted on 16 April 2020, 17 days after the Tribunal decided to go ahead with a hearing by videoconference on 30 March 2020. I consider that the Proposal, with respect to this ground was filed promptly for the purpose of Rule 9(1) of the ICSID Arbitration Rules.
137. Turning to the substance of the Respondent's proposal, as I understand the Respondent's position, the Tribunal is said to have taken a decision that exceeds its powers under the ICSID Arbitration Rules and that disfavors the Respondent, creating an appearance of bias. I note that disqualification proceedings are not a mechanism for the appeal or annulment of a decision with which a party disagrees. To prevail, the Respondent must establish not that the Tribunal's decision was wrong, but that the record supports the inference that the Tribunal manifestly lacks impartiality and cannot be "relied upon to exercise independent judgment."
138. With respect to the Tribunal's powers under the ICSID Rules to conduct videoconference hearings, I consider this to be a matter that falls to the Tribunal itself to decide as a matter of *kompetenz-kompetenz*. While I take no position on the proper interpretation of this aspect of the ICSID Rules, I do not see that even an erroneous interpretation of the Rules would—without more—support an inference that the ruling was the product of a lack of independence or impartiality.
139. Turning to the appropriateness of a videoconference hearing in the present matter, I note that any arbitral tribunal is called on to balance considerations of efficiency and avoiding delay with ensuring that the parties are properly heard. It will frequently be the case that one party will be more concerned with speed and see less need to delve deeply into issues it considers straightforward, while the other may be less concerned regarding delay and prefer a more extensive exploration of the matter. Indeed, the recent record of the present proceedings, set out in detail above, shows stark differences between the Parties concerning the time required for the final procedural steps. Due process may be infringed if a party's opportunity to present its case is unduly curtailed; but due process may also be infringed if proceedings are so delayed as to impair the relief envisaged by the Treaty. The Tribunal itself is best placed to balance these considerations and I do 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. Accordingly, I do not consider that the Tribunal's decision to proceed with a hearing by videoconference can reasonably be considered to support an inference that the Tribunal manifestly cannot be "relied upon to exercise independent judgment."
140. Finally, with respect to the Respondent's request for statistics on the postponement of hearings at ICSID and the PCA, I consider that disqualification proceedings are intended to address a situation in which an arbitrator or tribunal's lack of the qualities required of them is already manifest. Disqualification proceedings are not a mechanism to develop evidence on the basis of which disqualification might be proposed. Accordingly, I do not see that the statistics sought by the Respondent would meaningfully add to the analysis set out above.

⁶¹ Claimants' Reply to the Second Disqualification Proposal, para. 57.

D. Ground Four: The Tribunal's Decision to Maintain its Procedural Calendar

141. The Respondent submits that the Tribunal “restricted Respondent’s right to defend itself against Claimants’ 29 June 2011 valuation by forcing an unbearable procedural calendar on Respondent” and refusing the Respondent’s requests for extensions in the face of the coronavirus pandemic.⁶²
142. According to the Respondent, it brought to the Tribunal’s attention (a) prior commitments by its quantum expert that limited her availability during the period allocated for the preparation of the Respondent’s Rejoinder to Question No. 8,⁶³ and (b) additional difficulties presented by the Respondent’s quantum expert team working remotely during the “stay at home” order in Texas, without access to their files or reference materials.⁶⁴ The Respondent further submits that it required additional time to prepare for an online hearing while its counsel team was scattered across different locations, working from home and juggling domestic responsibilities, and only able to prepare through remote technology, while also making the logistical arrangements necessary to participate in the videoconference hearing.⁶⁵
143. In the Respondent’s view, the Tribunal’s procedural decision shows no understanding of the real difficulties faced by the Respondent. Instead the Respondent considers that the Tribunal had “already made up its mind and prejudged the matter, unwilling to reconsider even in the face of unprecedented circumstances.”⁶⁶ The Respondent also considers that the Tribunal’s refusal to consider extensions disproportionately affects the Respondent, insofar as the coronavirus emerged during the period for the preparation of the Respondent’s Rejoinder to Question No. 8⁶⁷ and insofar as the Respondent’s counsel team is more significantly affected by public health considerations.⁶⁸

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144. The Claimants submit that the Respondent’s request for the postponement of the hearing must be seen against the background of the proceedings, in which the schedule “has been revised numerous times at the request of Germany.”⁶⁹ The Claimants consider there to be no basis “now for the Secretary-General of the PCA in his recommendation or the Chairman of the ICSID Administrative Council in his decision, to question this procedural decision taken by the Arbitral Tribunal with direct knowledge of the procedural history and the issues to be addressed”.⁷⁰
145. Moreover, the Claimants submit, even if the Tribunal was wrong, there is no evidence of a manifest lack of independence or impartiality. According to the Claimants, “[i]n essence, the argument is thus that, since Germany believes the decision was wrong, it must have been based

⁶² Respondent’s Second Proposal for Disqualification of the Tribunal, para. 101.

⁶³ Respondent’s Second Proposal for Disqualification of the Tribunal, paras. 103-105.

⁶⁴ Respondent’s Second Proposal for Disqualification of the Tribunal, paras. 111-114.

⁶⁵ Respondent’s Second Proposal for Disqualification of the Tribunal, paras. 115-122.

⁶⁶ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 186.

⁶⁷ Respondent’s Second Proposal for Disqualification of the Tribunal, para. 187.

⁶⁸ Respondent’s Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, para. 188.

⁶⁹ Claimants’ Reply to the Second Disqualification Proposal, para. 60.

⁷⁰ Claimants’ Reply to the Second Disqualification Proposal, para. 76.

on bias.”⁷¹ Not only do the Claimants consider this not grounds to infer a lack of independence and impartiality, they emphasize that the Tribunal granted the Respondent numerous extensions over the Claimants’ objections and that “[i]f anything, the schedule set by the Arbitral Tribunal on Question No. 8 has catered more to Germany’s preferences than to Claimants.”⁷²

* * *

146. I note that the fourth ground for disqualification in the Respondent’s Proposal was raised in a timely fashion. The Respondent’s Proposal was submitted on 16 April 2020, three days after the Tribunal decided to maintain its procedural calendar on 13 April 2020. I consider that the Proposal, with respect to this ground was filed promptly for the purpose of Rule 9(1) of the ICSID Arbitration Rules.
147. Turning to the substance of the Respondent’s Proposal, however, I again consider this to be a procedural matter that falls to the Tribunal to decide. As with the decision to proceed with a hearing by videoconference, decisions on extensions and scheduling necessarily involve the weighing of competing considerations and the balancing of the rights and interests of the Parties. It is the Tribunal that is familiar with the issues and stake and the detailed history of these proceedings and that is thus placed to effectively balance such competing considerations. An adverse procedural decision does not by itself give rise to an inference of bias, and I do not see anything in the Tribunal’s decision to maintain its procedural calendar that could reasonably be considered to support an inference that the Tribunal manifestly cannot be “relied upon to exercise independent judgment.”

E. Ground Five: Judge Brower’s Comments on the Respondent’s Disqualification Proposal

148. The Respondent submits that Judge Brower’s Comments of 1 May 2020 are themselves an independent ground for disqualification.⁷³
149. According to the Respondent, Judge Brower’s Comments show that his non-disclosure of his Opinion in *The PV Investors v. Spain* “was not an ‘honest exercise of discretion’”.⁷⁴ Rather than offering an explanation for non-disclosure, or engaging with his disclosure obligations, the Respondent considers that Judge Brower “misrepresent[ed] the Parties’ prior submissions on substantive rights under the ECT” in an effort to “negate the confluence between his 2014 Dissent and the present arbitration’s issue”.⁷⁵ Indeed, the Respondent notes that Judge Brower nowhere addressed ICSID Arbitration Rule 6(2), concerning disclosures.
150. As a legal matter, the Respondent relies upon *Burlington Resources v. Ecuador*⁷⁶ for the proposition an arbitrator’s response to a disqualification proposal may itself constitute grounds

⁷¹ Claimants’ Reply to the Second Disqualification Proposal, para. 78.

⁷² Claimants’ Reply to the Second Disqualification Proposal, para. 79.

⁷³ Respondent’s Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, para. 128

⁷⁴ Respondent’s Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, para. 129.

⁷⁵ Respondent’s Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, para. 129.

⁷⁶ *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 (**Respondent’s Attachment 108**).

for disqualification.⁷⁷ The Respondent considers that Judge Brower neglected Rule 9(3) of the ICSID Rules, which permits arbitrators to provide factual explanations in response to a disqualification proposal but not, in the Respondent's view, arguments or submissions.⁷⁸ Instead, the Respondent submits, Judge Brower's Comments "abandoned all the distance required for independent judgment" and "focused his entire submission on a rebuttal of Respondent."⁷⁹ Effectively, the Respondent argues, he "chose to act . . . as an advocate arbitrator in order to supplement Claimants over-brief submissions."⁸⁰ The Respondent considers the tone of Judge Brower's comments to be in keeping with his public comments on other occasions that led to his disqualification in *Perenco v. Ecuador*⁸¹ and *Vale v. BSG Resources*.⁸²

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151. The Claimants decline to respond to this ground for disqualification.

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152. I note that the Respondent's fifth ground for disqualification was raised in a timely manner. Judge Brower's comments were made on 17 April 2020; the Respondent identified this as a further ground for disqualification 21 days later, in its submission of 8 May 2020. I consider that the Proposal, with respect to this ground was filed promptly for the purpose of Rule 9(1) of the ICSID Arbitration Rules.

153. Turning to the substance of the Respondent's proposal, I concur with the general point recognized in *Burlington Resources v. Ecuador* that an arbitrator's response to a disqualification proposal may itself evidence a lack of impartiality, even where the initial grounds for disqualification would not. Exchanges regarding the circumstances alleged to give rise to grounds for disqualification may well reveal animosity towards a party that is incompatible with continued service as an arbitrator.

154. Having reviewed Judge Brower's Comments, I do not consider that his Comments are like those giving rise to disqualification in *Burlington Resources*, *Perenco*, or *Vale*. Judge Brower's Comments remain focused on responding to the points raised by the Respondent in its Disqualification Proposal and do not engage with extraneous matters or devolve into *ad hominem* attack. Importantly, I do not agree with the Respondent's characterization of his comments as having failed to offer an explanation for his non-disclosure of his Opinion in *The PV Investors v. Spain*. As I understand Judge Brower's Comments, his rationale for non-

⁷⁷ Respondent's Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, para. 141.

⁷⁸ Respondent's Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, para. 137.

⁷⁹ Respondent's Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, paras. 131-132.

⁸⁰ Respondent's Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, para. 134.

⁸¹ *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Challenge to Arbitrator, 8 December 2009 (**Respondent's Attachment 188**).

⁸² *Vale S.A. v. BSG Resources Limited*, LCIA Case No. 142683, Decision on Challenge to Full Tribunal, 4 August 2016; see Respondent's Final Observations Regarding the Second Proposal for Disqualification of the Tribunal, para. 144.

disclosure is that no issue conflict was created by his Opinion as it dealt with an aspect of Article 26(7) of the Treaty distinct from that at issue in present proceedings. The Respondent disagrees with this view, but that does not suffice to make Judge Brower's Comments something other than a response to the Respondent's Proposal.

155. Taken as a whole, I do not consider that Judge Brower's comments can reasonably be considered to support an inference that he manifestly cannot be "relied upon to exercise independent judgment."

V. Conclusion

156. It follows from the legal principles set out above that a party proposing the disqualification of an arbitrator must prove the existence of objective facts from which a reasonable third person may infer a manifest lack of the arbitrator's impartiality or independence. Subjective inferences or beliefs are insufficient.

157. As set out above, I do not consider that the record before me can reasonably be considered to support an inference that either Judge Brower or the Tribunal as a whole manifestly cannot be "relied upon to exercise independent judgment." Therefore, I conclude that the Respondent has not discharged its burden of proving that Judge Brower (with respect to Grounds One and Five), or any of the three members of the Arbitral Tribunal (with respect to Grounds Two to Four), manifestly lacks any of the qualities required under Article 14(1) of the ICSID Convention in relation to the four grounds on which the Proposal is based, or the fifth ground arising from Judge Brower's response to the Proposal itself.

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VI. Recommendation

158. For the foregoing reasons, I recommend that the proposal to disqualify the Tribunal be rejected.

[signed]

Hugo Hans Siblesz

Secretary-General
Permanent Court of Arbitration

The Hague, 6 July 2020