

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AES CORPORATION

Claimant

and

THE ARGENTINE REPUBLIC

Respondent

ICSID Case No. ARB/02/17

**DECISION ON THE RESPONDENT'S PROPOSAL TO DISQUALIFY
ALL MEMBERS OF THE TRIBUNAL**

Chair of the ICSID Administrative Council

Mr. David Malpass

Secretary of the Tribunal

Mr. Gonzalo Flores

Date: April 6, 2022

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I. PROCEDURAL BACKGROUND

1. This decision concerns the Argentine Republic's proposal to disqualify all members of the Tribunal in *AES Corporation v. Argentine Republic* (ICSID Case No. ARB/02/17) pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9.
2. On November 3, 2021, Argentina submitted its disqualification proposal (**Proposal**).
3. On November 5, 2021, the Secretary of the Tribunal: (i) confirmed receipt of the Proposal; (ii) conveyed to the parties and to members of the Tribunal a schedule for the parties' further submissions on the Proposal and arbitrators' explanations (if any); and (iii) confirmed that in accordance with ICSID Arbitration Rule 9(6), the proceeding would be suspended until a decision on the Proposal had been taken.
4. On November 17, 2021, in accordance with the schedule, counsel for the AES Corporation submitted a Reply to the Respondent's Proposal (**Reply**).
5. On November 19, 2021 the Secretary of the Tribunal circulated copies of three communications received on that same date from Prof. Ricardo Ramirez Hernandez, Mr. Stephen Drymer and Prof. Domingo Bello Janeiro, respectively, in accordance with the schedule and ICSID Arbitration Rule 9(3) (**Arbitrators' explanations**).
6. On November 29, 2021, the Argentine Republic submitted its *Comentarios Finales de la República Argentina sobre la Propuesta de Recusación* (**Final Comments**). Argentina submitted an English version of its Final Comments on December 2, 2021.
7. Also, on November 29, 2021, the Claimant communicated via email that it had "no further submissions to make beyond those contained in its Reply dated November 17, 2021, except to reiterate its respectful request that the Proposal be promptly denied."

II. THE PARTIES' POSITIONS

A. RESPONDENT'S POSITION

(1) Applicable Standard for Disqualification

8. The Argentine Republic recalls that under Art. 14 (1) of the ICSID Convention, arbitrators must inspire full confidence in their impartiality and independence of judgment.¹
9. Argentina submits that: (a) under Art. 57 of the ICSID Convention a party may challenge any of the members of the tribunal on account of any fact indicating a *manifest* lack of the qualities required in Art. 14(1) of the Convention; (b) “‘manifest’ means ‘evident’ or ‘obvious’, [relating] to the ‘ease with which the lacked of the required qualities is perceived’”²; and (c) “[i]mpartiality refers to the absence of bias or predisposition towards a party.”³
10. Additionally, Argentina asserts that, to succeed on a disqualification proposal, a party must establish an *appearance of bias* of the challenged arbitrator[s], from a reasonable and informed third person’s point of view, on an objective evaluation of all the facts.⁴
11. Finally, Argentina claims that the lack of confidence in the impartiality and independence of the arbitrators can be grounded on a *multitude of factors* which, taken together, evidence

¹ Proposal, ¶ 95; Final Comments, ¶ 53.

² Proposal ¶ 97, referring to *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36) (“*Eiser*”), Decision on the Kingdom of Spain’s Application for Annulment, June 11, 2020, ¶ 206; *Caratube International Oil Company LLP & Devinci Salah Hourani v. Kazakhstan* (ICSID Case No. ARB/13/13) (“*Caratube*”), Decision on the Proposal for Disqualification of Bruno Boesch, March 20 2014, ¶ 55; *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) (“*Burlington*”), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, December 13, 2013, ¶ 68; and *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20) (“*Blue Bank*”), Decision on the Parties’ Proposal to Disqualify a Majority of the Tribunal, November 12, 2013, ¶ 61; Final Comments ¶ 57 citing *Caratube* ¶ 64.

³ Proposal, ¶ 96 referring to *Eiser*, ¶ 162; *Caratube*, ¶ 52; *Burlington*, ¶ 65; and *Blue Bank*, ¶ 58.

⁴ Proposal ¶¶ 99-101 referring to *Blue Bank*, ¶¶ 59-60; *Burlington*, ¶¶ 66-67; *Caratube*, ¶ 64 and *Eiser*, ¶ 206; Final Comments, ¶ 53 referring to *Landesbank Baden-Württemberg and others v. Kingdom of Spain* (ICSID Case No. ARB/15/45) (“*Landesbank*”), Decision on the Second Proposal to Disqualify the Members of the Arbitral Tribunal, December 15, 2020, ¶ 131.

that decisions made by an arbitral tribunal are based on “*factors other than those related to the merits of the case.*”⁵

(2) The factual circumstances of the case

12. The Respondent submits that the Tribunal members in this case shall be disqualified because of a series of procedural decisions, which - taken as a whole - have undermined Argentina’s confidence in their independence and impartiality.⁶
13. Argentina asserts that, although a tribunal has discretion to conduct the proceedings, it may not curtail a party’s due process rights.⁷ The Tribunal allegedly did so, with decisions that displayed an “erratic” and “contradictory” behavior, destroying Argentina’s confidence on its members.⁸
14. Argentina’s Proposal is primarily founded on the Tribunal’s decision of September 2, 2021, confirmed on October 20, 2021, to: (a) reject the Respondent’s request for a postponement of the hearing in this case; and (b) hold the hearing remotely. The Respondent elaborates extensively on its submissions on the Proposal on the factual and legal arguments that it presented before the Tribunal with regard to these points and on the procedure that led to the Tribunal’s decisions.
15. In its Final Comments, counsel for the Argentine Republic states that its Proposal has been raised as a consequence of the Tribunal having “forced –without expressing any substantive reason– the Argentine Republic to appear at the only Hearing scheduled in this case [...] knowing that the State would not be able to exercise its right of defence at that Hearing” and that “... the Tribunal’s passive attitude toward this situation (and not a procedural decision) [...] constitutes a serious breach of a fundamental rule of procedure

⁵ Proposal ¶102 referring to *VM Solar Jerez GmbH and others v. Kingdom of Spain* (ICSID Case No. ARB/19/30), Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil, July 24, 2020, ¶ 92; *see also* Proposal ¶¶ 111-112.

⁶ Proposal, ¶ 1.

⁷ Final Comments, ¶¶ 2-4 citing *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12) (“*Vattenfall II*”), Recommendation on the Second Proposal to Disqualify the Tribunal, July 6, 2020, ¶139.

⁸ Proposal, ¶¶ 1, 9, 94 and 112; Final Comments, ¶¶ 2, 4–5 and 7.

that has destroyed the State's confidence in the independence and impartiality of the Members of the Tribunal.”⁹

a. ***Decision to hold the hearing remotely against procedural agreements in place and without considering the adverse effect on Argentina’s due process right***

16. Argentina states that its Proposal is based “on the effect of certain decisions made by the Tribunal [...] against the Parties’ agreement and the applicable procedural rules, that the Hearing would be held remotely.”¹⁰

17. Argentina claims that the Tribunal decided to hold a remote hearing, despite the parties’ agreement and Argentina’s due process concerns.¹¹

18. According to Argentina, the hearing in this case shall be held *in-person* at the seat of the Centre in Washington DC:¹²

- i. in accordance with the parties’ agreement, memorialized in Procedural Order No. 2 of February 19, 2020, Articles 62 and 63 of the ICSID Convention, ICSID Administrative and Financial Regulation 26 and Arbitration Rule 26;
- ii. in view of the complexity of the case, which involves events spanning over two decades, compounded by the Claimant’s late decision to introduce new factual and expert evidence and arguments with its Reply in March 2021;
- iii. in consideration to the inherent complexities of a remote hearing with multiple witnesses and experts, which would have required holding, at least, three weeks in reserve; complexities that have been heightened by the COVID-19 conditions, general travel and gathering restrictions, and fundamental procedural issues that were not decided on time by the Tribunal.

⁹ Final Comments, ¶¶ 1-2.

¹⁰ Proposal, ¶ 6.

¹¹ Proposal, ¶¶ 4–10 and 104–105; Final Comments, ¶ 16.

¹² Proposal, ¶¶ 10-41, Final Comments, ¶¶ 11-18.

19. Argentina submits that “[a]t no time did the Parties agree on the possibility that the Hearing might be held remotely”¹³ and the fact that it had agreed to participate in remote hearings in other ICSID proceedings, should not be considered as a general consent to this modality of hearings.¹⁴
20. Argentina recalls that on September 2, 2021, the Tribunal rejected its request.¹⁵ Argentina claims that in its decision the Tribunal failed to make any reference to the procedural agreements in Procedural Order No. 2, merely stating that remote hearings were now “*standard practice*” and that “*counsel for both parties have ample experience in the issue.*”
21. Argentina claims that the Tribunal, in adopting this decision: (i) failed to take into account the multiple difficulties - raised in due course by Argentina - that had arisen since the parties confirmed their availability for an *in-person* hearing on the scheduled dates; and (ii) did not explain how it expected to be able to examine the large number of witnesses and experts in this case in the reduced time of work effectively available in a remote hearing.

b. *Decision not to postpone the hearing*

22. Argentina recalls that, as early as July 29, 2021, it raised with Claimant’s counsel the need to reschedule the hearing (scheduled in October 2020 for November 8 through 19, 2021) in view of the restrictions imposed by the COVID pandemic.¹⁶
23. Having failed to agree on the matter with the Claimant, Argentina requested the Tribunal to reschedule the hearing, for a series of reasons including:
 - Aside from all of the work needed to appropriately prepare a remote hearing with multiple witnesses and experts, a remote hearing would require holding, **at least**, three weeks in reserve (as opposed to the two weeks reserved by the Tribunal);

¹³ Proposal, ¶ 10

¹⁴ Proposal, ¶¶ 31-33, Final Comments ¶¶19-21.

¹⁵ Proposal, ¶¶ 19-20.

¹⁶ Proposal, ¶ 12.

- The COVID-19 conditions (compounded at the time by the Delta variant) and the resulting constraints had rendered it impossible to hold the Hearing in November 2021 as scheduled;
- The impact of the pandemic in the procedural calendars in other cases involving Argentina’s *Procuración del Tesoro de la Nación*, which resulted in a significant increase in Argentina’s defence workload during 2021;
- The postponement of the date of the national elections in Argentina to November 14, 2021 (halfway through the hearing scheduled dates), which would have hindered the work of the defence team during the conduct of the Hearing (as voting is compulsory in Argentina); and
- The fact that the Claimant submitted a Reply almost twice as long as its New Memorial, which largely exceeded the function of a reply, incorporating a witness not proffered before and a new expert report.

24. In addition, the Argentine Republic explained that, even if the possibility was considered of holding a remote hearing in this case, the Argentine *Procuración del Tesoro de la Nación* could not ensure the participation of its team, witnesses and experts in safe conditions on the originally scheduled dates.¹⁷

25. The Respondent recalls that on September 2, 2021, the Tribunal rejected its request for postponement, despite Argentina’s due process concerns.¹⁸

26. Argentina claims that, in adopting this decision, the Tribunal:

- i. failed to take into account the multiple difficulties - raised in due course by Argentina - that had arisen since the parties confirmed their availability for an *in-person* hearing on the scheduled dates;

¹⁷ Proposal, ¶ 16.

¹⁸ Proposal, ¶¶ 2–9.

- ii. did not explain how it expected to be able to examine the large number of witnesses and experts in this case in the reduced time of work effectively available in a remote hearing; and
- iii. appeared to sympathize with the Claimant when stating that rescheduling the hearing in 2022 would have “*a profound dilatory effect in a case that has been pending for almost two decades.*”¹⁹

27. On September 24, 2021, Argentina requested the Tribunal to **reconsider** its September 2 decision. In doing so, Argentina elaborated further on some of its prior arguments and raised others:

- i. The evolution of the proceeding, from the Original Memorial to the New Memorial and the Reply, evidenced a gross disproportion between AES’ original claim and its present claim, leading Argentina to seek additional legal counsel to assist in the preparation of its defense. Postponing the Hearing would be necessary to allow the new law firm to become acquainted with the case;²⁰
- ii. In September 2021, Argentina’s only expert scheduled to appear at the hearing (Dr. Daniel Flores) was informed that a hearing in another ICSID case would be held during the third week of November, interfering with his participation in this hearing.²¹

28. Argentina notes further that it was open to consider alternatives proposing rescheduling the hearing in a hybrid form, holding the hearing in Buenos Aires or dividing the hearing in parts.

29. On October 4, 2021, Argentina informed the Tribunal that Dechert (Paris) LLP would act as co-counsel for the Respondent in this proceeding. On October 5, 2021, Dechert joined

¹⁹ Proposal, ¶ 21.

²⁰ Proposal, ¶ 35.

²¹ Proposal, ¶ 38.

Argentina's request for postponement of the hearing, to have sufficient time to become acquainted with the voluminous case record and adequately prepare for the hearing.

30. On October 13, 2021, the Tribunal wrote to the parties indicating that it would be inclined to bifurcate the hearing in two sections: a first session of seven days to be held in November 2021, to address issues of liability; and a second session of three days, to address issues of damages, to be held in February 2022.
31. On October 18, 2021, the Tribunal held a Pre-Hearing Conference with the parties. During the hearing, the parties reiterated their arguments on Argentina's request for postponement and modality of the hearing. During the conference, the parties also addressed pending procedural matters concerning the examination of witnesses and experts during the hearing.
32. On October 20, 2021, the Tribunal rejected Argentina's request for reconsideration, deciding to hold a 10-day hearing - remotely - from November 9 to 19, 2021 and asking the parties to hold March 16-18, 2022, in reserve, for a second hearing.
33. In Argentina's submission, this decision was "striking" as: (i) it "envisaged working days of seven and a half hours in remote mode (from 3pm to 10.30 pm Central European Time)," and "[a]ny reasonable person knows that such long days would only undermine the ability of the participants and of the Tribunal itself to profit from the Hearing;" and (ii) rested on the assumption that a rescheduling of the Hearing would cause a "prejudice that Claimant had failed to prove.

c. Procedural uncertainty in preparation for the hearing

34. In addition to the Tribunal's decision to – twice – reject Argentina's request for postponement of the hearing in this case, Argentina claims that the Tribunal failed to timely and properly decide key issues for the preparation for the hearing, leaving the parties in uncertainty.
35. Argentina takes issue in particular with the Tribunal's decisions on the examination of Claimant's witness Eduardo Dutrey, Fernando Pujals and Vicente J. Giorgio and Argentina's *quantum* expert, Daniel Flores.

36. Argentina recalls that following its October 20 decision to hold the hearing remotely, the Tribunal issued on October 21, 2021, Procedural Order No. 3 with arrangements for the forthcoming hearing. On October 28, following a further request from Argentina that the *quantum* experts be examined in a separate session in March 2022, the Tribunal determined that Dr. Daniel Flores (Argentina’s *quantum* expert) “shall appear before the Tribunal during the November dates scheduled for this hearing, on a day other than Friday 19, 2021.”
37. In Argentina’s submission, the Tribunal’s decision was “inconsistent with its prior decisions and closed the door on any effort or arrangement that Argentina could make to attempt to attend the Hearing under the conditions being imposed on it.”
38. In Respondent’s view, the Tribunal’s decision of October 28, 2021: (i) failed to consider the serious prejudice caused to Argentina by denying its right of defence and its due process right; (ii) undermined the principle of equality between the parties, by directing Argentina’s *quantum* expert to appear in less than 48 hours in two simultaneous hearings; (iii) implied an unexplained change of criterion by the Tribunal, from its October 13 indication that it would be inclined to divide the hearing in two sessions; (iv) forced Argentina to negotiate with Claimant its right of defence or its due process right; and (v) still failed to address the fact that several of Claimant’s witnesses were unavailable in November 2021, depriving Argentina of critical opportunities to make its case and violating its right of defence, making it necessary to seek alternatives date for their examination.
39. . For Argentina, the “Tribunal’s obstinate attitude to adamantly maintain the Hearing dates became by then devoid of any logic” and “the uncertainty about the unavailability of Claimant’s witnesses” violated its right of defence.

(3) Recommendation from a Third Party

40. The Respondent requests that the Chair of the Administrative Council seek a recommendation from a third party on the Proposal before rendering a decision.²²

²² Proposal, ¶ 113; Final Comments, ¶ 63.

41. Argentina bases this request on: (a) the fact that the President of the Tribunal was appointed by the Chair;²³ (b) the “seriousness of the reasons underlying the Disqualification Proposal;” (c) to “ensure full transparency of this proceeding”.²⁴

B. CLAIMANT’S POSITION

42. Claimant alleges that the Proposal: (a) is merely a tactic to postpone the finding of liability;²⁵ (b) does not meet the test of manifest lack of impartiality required by the ICSID Convention; and (c) is solely based on Argentina’s disagreement with the Tribunal’s procedural decisions.²⁶ Accordingly, the Proposal should be promptly rejected, so that the hearing on the merits can take place.²⁷

(1) Applicable Standard for Disqualification

43. AES agrees that: (i) Art. 14(1) of the ICSID Convention requires arbitrators to be impartial and independent;²⁸ (ii) where independence requires the absence of external influence or control, impartiality refers to the absence of bias or predisposition towards a party;²⁹ (iii) this is an objective standard and must be assessed from a third party’s point of view;³⁰ and (iv) the term “manifest” in Art. 57 of the Convention is to mean “evident” or “obvious.”³¹

44. Claimant adds that Argentina, as the party proposing the disqualification of the Tribunal members, bears the burden of proof and further submits that the lack of independence or

²³ Proposal, ¶ 113; Final Comments, ¶ 65.

²⁴ Proposal, ¶ 113; Final Comments, ¶ 63-65.

²⁵ Reply, ¶¶ 1 and 83.

²⁶ Reply, ¶ 1.

²⁷ Reply, ¶¶ 3, 85 and 90.

²⁸ Reply, ¶ 61.

²⁹ Reply, ¶ 62, citing *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) (“**Pey**”), Decision on the Proposal to Disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC, April 13, 2017, ¶ 44.

³⁰ Reply, ¶¶ 61-62.

³¹ Proposal’s Reply, ¶ 63 citing *Landesbank*, ¶ 126; *Blue Bank*, Decision on the Proposal to Disqualify Álvaro Castellanos Howell, March 2, 2018, ¶ 78 (“**Blue Bank II**”); *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38) (“**Repsol**”), Decision on the Proposal for Disqualification of the Majority of the Tribunal, December 13, 2013, ¶ 73, fn. 58.

impartiality has to be “manifest” or “highly probable, not just possible” to meet the high standard set forth in Art. 57 of the ICSID Convention.³²

(2) The factual circumstances of the case

45. The Claimant submits that, with the Proposal, Argentina intends to relitigate the Tribunal’s reasoned decisions with which it disagrees and ultimately avoid a hearing in November.³³ Argentina’s Proposal is meritless and marks the culmination of Argentina’s tactics to delay the hearing.³⁴ Argentina has accomplished its goal, since the Proposal automatically suspended the proceedings; the hearing did not take place as scheduled.³⁵

46. After recalling the facts that led to the Respondent’s proposal for the disqualification of the members of the Tribunal, the Claimant submits that the Proposal shall be rejected because:

a. *Argentina failed to meet the standard under Art. 57 of the ICSID Convention³⁶ since there was no denial of Argentina’s due process rights³⁷*

47. The Claimant submits that the Proposal is “based solely on its disagreement and dissatisfaction with the Tribunal’s adverse procedural decisions which, in and of themselves, cannot serve as the basis to disqualify a tribunal.”³⁸

48. Claimants submit that the parties never agreed to hold an *in-person* hearing.³⁹ Instead, the parties agreed to the hearing dates in October 2020, when it was impossible to guarantee an *in-person* hearing.⁴⁰ Accordingly, the format of the hearing was left open to

³² Reply, ¶ 63 citing, *Vattenfall II*, ¶ 93.

³³ Reply, ¶ 83

³⁴ Reply, ¶ 83.

³⁵ Reply, ¶ 84.

³⁶ Reply, ¶¶ 66, 76 and 81.

³⁷ Reply, ¶ 3.

³⁸ Reply, ¶ 69.

³⁹ Reply, ¶¶ 15 and 26.

⁴⁰ Reply, ¶ 13–14.

discussion,⁴¹ Argentina never ruled out the possibility of having a virtual hearing.⁴² Further, ICSID tribunals have consistently decided to hold virtual hearings over a party's objection, with the Chair of the Administrative Council rejecting proposals for the disqualification of tribunals on that basis.⁴³

49. Claimant also disputes that the complexity and factual background of the case have changed since the hearing dates were initially set.⁴⁴ The Claimant's Reply did not introduce new claims or experts but merely added one witness and one expert report.⁴⁵ Neither these additions nor the increase in Argentina's workload justified a hearing reschedule or extension.⁴⁶ In the Claimant's view, prioritizing Argentina's workload would be unfair to AES since Argentina either took on additional commitments or failed to address its conflicts in a timely fashion.⁴⁷

50. Claimants further submit that the alleged "new circumstances" upon which Argentina based its request for reconsideration were existing circumstances that Argentina chose not to disclose earlier:⁴⁸ As to the issue of witness examination, Claimants submit that since AES withdrew the witness statements of Messrs. Dutrey and Pujal and the related claims,⁴⁹ their cross-examination would serve no purpose⁵⁰ and that Argentina knew that Dr. Flores would have to attend another hearing since at least February 2021.

51. Claimants notes that the Tribunal indeed bifurcated the hearing – extending the hearing days to a total of 13, as requested by Argentina⁵¹ – but reserved the second session to

⁴¹ Reply, ¶¶ 14–15.

⁴² Reply, ¶¶ 14, 16.

⁴³ Reply, ¶ 26 referring to *Landesbank*, ¶ 137.

⁴⁴ Reply, ¶ 20.

⁴⁵ Reply, ¶ 20.

⁴⁶ Reply, ¶ 20.

⁴⁷ Reply, ¶¶ 22, 24 and 45.

⁴⁸ Reply, ¶ 28.

⁴⁹ Reply, ¶ 11.

⁵⁰ Reply, ¶ 41.

⁵¹ Reply, ¶ 48.

address damages,⁵² thus rejecting to use of the additional dates to examine experts.⁵³ The Claimant submits that the Tribunal’s decision was neither striking nor implied a change of criterion.⁵⁴

52. For the Claimant, there “was nothing improper about the manner in which the Tribunal reached the procedural decisions of which Argentina complains.”⁵⁵ The Tribunal gave ample opportunity to the parties to present their respective positions, made it clear that it had taken note of Argentina’s views before rejecting them, and gave reasons for its decisions.

53. In sum, AES argues that Argentina failed to establish the Tribunal’s manifest lack of impartiality.⁵⁶ While it rejected Argentina’s request to postpone the hearing, recognizing the prejudice that the Claimant would suffer in case of a delay,⁵⁷ the Tribunal granted some of Argentina’s requests.⁵⁸

b. *The grounds advanced by Argentina have already been rejected by the Chair in recent cases*⁵⁹

54. The Claimant refers to *Vattenfall II*,⁶⁰ where the Secretary-General of the PCA, in a recommendation requested by the Chair, opined that an adverse procedural decision⁶¹ or even an erroneous interpretation of the rules⁶² would not, *per se*, suggest a lack of independence or impartiality. The Chair agreeing with the third-party recommendation, rejected the disqualification proposal.

⁵² Reply, ¶¶ 38, 40 and 48.

⁵³ Reply, ¶¶ 50 and 53.

⁵⁴ Reply, ¶¶ 50 and 56.

⁵⁵ Reply, ¶76.

⁵⁶ Reply, ¶¶ 58, 76–77 and 82.

⁵⁷ Compare Reply, ¶ 40 with ¶ 47.

⁵⁸ Reply, ¶¶ 27, 48–49 and 78.

⁵⁹ Reply, ¶ 66.

⁶⁰ Reply, ¶ 72–74 citing *Vattenfall II*, ¶¶ 138 and 147.

⁶¹ Reply, ¶ 73 citing *Vatenfall II*, ¶ 147.

⁶² Reply, ¶ 72 citing *Vatenfall II*, ¶ 138.

*c. Adverse procedural decisions cannot serve as the basis for a disqualification proposal.*⁶³

55. Claimant argues that disagreement with a procedural decision is no measure of the Tribunal's lack of impartiality.⁶⁴ Argentina had ample time and multiple opportunities to present its position and be heard.⁶⁵ In Claimant's view, the Tribunal considered Argentina's concerns and issued reasoned decisions, balancing both parties' concerns.⁶⁶ According to Claimant no objective party would infer a (manifest) lack of impartiality from the Tribunal in this case.⁶⁷

(3) Recommendation from a Third Party

56. Claimant opposes Argentina's request for a third-party recommendation on the Proposal⁶⁸ as: (i) Argentina provided no evidence in support of its suggestion that it would be improper for the Chair to decide on the Proposal; (ii) the Chair routinely decides on disqualification proposals concerning arbitrators appointed by the Chair without obtaining recommendations from third parties;⁶⁹ and (iii) recommendations from third parties have only been obtained by ICSID on "rare occasions" under "exceptional circumstances",⁷⁰ which have not been identified in this case.⁷¹

⁶³ Reply, ¶ 66.

⁶⁴ Reply, ¶¶ 1, 68–70 and 75 relying on *Landesbank*, ¶¶ 140 and 142–44; and *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic* (ICSID Case No. ARB/07/5) ("*Abaclat I*"), Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014, ¶ 80.

⁶⁵ Reply, ¶¶ 77, 81.

⁶⁶ Reply, ¶¶ 77–82.

⁶⁷ Reply, ¶ 81.

⁶⁸ Reply, ¶¶ 86–87.

⁶⁹ Reply, ¶ 88 referring to **AES Annex 52**, *Landesbank*, ¶¶ 112–15; **AES Annex 51**, Eugene Kazmin v. Republic of Latvia (ICSID Case No. ARB/17/5), Decision on the Proposal to Disqualify All Members of the Tribunal, 14 October 2020, ¶¶ 3 and 85; *Repsol*, ¶¶ 16 and 87.

⁷⁰ Reply, ¶ 89 relying on *Abaclat*, Decision on the Proposal to Disqualify a Majority of the Tribunal, 21 December 2011 ("*Abaclat I*"), ¶ 4; *Landesbank*, ¶ 113.

⁷¹ Reply, ¶ 89.

III. THE TRIBUNAL MEMBERS' EXPLANATIONS

57. In accordance with the schedule and ICSID Arbitration Rule 9(3), Prof. Ricardo Ramirez Hernandez, Mr. Stephen Drymer and Prof. Domingo Bello Janeiro furnished their explanations on November 19, 2022, as follows:

58. Prof. Ramirez Hernandez:

“Dear Mr. Flores,

In accordance with ICSID Arbitration Rule 9(3), I hereby furnish my explanations to the Proposal for Disqualification submitted on November 3, 2021.

I will start with two preliminary remarks. First, I have always considered it my duty as an arbitrator/adjudicator to be impartial and exercise independent judgment, I comply with such duty in this case as I have done in all others in which I serve and have served. Second, I believe that the duty of a challenged adjudicator should be limited to clarifying the facts and avoid passing judgment or opining on the merits or substance of the challenge.

After carefully reviewing the submissions from both parties, I don't identify any fact which requires any clarification or further elaboration.”

59. Mr. Stephen Drymer:

“Mr. Flores,

I refer to your 5 November 2021 email, and to the invitation to furnish explanations in relation to the Disqualification Proposal filed by Respondent and the response thereto submitted by Claimant.

With respect, I do not believe that I can provide any helpful explanation or comment regarding the circumstances discussed by the parties in their respective submissions. In particular, I consider that the Tribunal's various procedural rulings speak for themselves, and I have nothing to add to the reasons furnished by the Tribunal with those rulings.

For the sake of certainty, I wish to state that I consider that I have been and remain both impartial and independent, and able to exercise my obligations as an ICSID arbitrator in full accordance with the Convention and Rules.

I would be grateful if you would kindly forward this email to all concerned.”

60. Prof. Domingo Bello Janeiro:

“De acuerdo y en aplicación de la Regla de Arbitraje 9(3) del CIADI, por medio de la presente comunicación doy cumplida respuesta a la Propuesta de Recusación presentada el 3 de noviembre de 2021 por la República Argentina en el arbitraje AES CORPORATION VS REPÚBLICA ARGENTINA (ARB/02/17).

A tal efecto, tanto en este caso como en cuantos he tenido la oportunidad de participar en mi condición de árbitro, he cumplido escrupulosamente con mi obligación de imparcialidad y total independencia en mi actuación y proceder.

Sobre el particular en concreto de la presente recusación, cumpliré igualmente con mi obligación y deber de analizar con detalle y contribuir a aclarar los hechos sin proceder a debatir o cuestionar el fondo de la impugnación en cuestión.

En consecuencia, una vez estudiadas de manera minuciosa todas las presentaciones de las partes, no tengo nada más que añadir que no tengo constancia alguna de ningún tipo o categoría que exija por mi parte añadir en este momento procesal nada en particular, ni aclarar adicionalmente ningún aspecto ni tampoco elaborar ningún informe o documento añadido a lo que se ha expuesto.

Para concluir, añado que, en definitiva, me considero ahora, al igual que siempre a lo largo de todo el procedimiento, desde su inicio, totalmente idóneo para ejercer mi deber y obligación como árbitro con total independencia e imparcialidad, todo ello de absoluta conformidad con el Convenio y el Reglamento del CIADI.”

61. On November 29, 2021, the Argentine Republic commented, in connection with the Tribunal members explanations, that these “only ratify Argentina's loss of confidence in their independence and impartiality” and that “the Members of the Tribunal have, by their silence, ignored the factual circumstances put forward by Argentina.” The Claimant did not provide comments in this regard.

IV. ANALYSIS

A. TIMELINESS

62. Arbitration Rule 9(1) requires a proposal for disqualification to be filed “promptly.”⁷²
63. As the ICSID Convention and Arbitration Rules do not specify a number of days within which a disqualification proposal must be filed, the timeliness of a disqualification proposal must be determined on a case-by-case basis.⁷³
64. The Proposal was filed by the Respondent on November 3, 2021, *i.e.* 14 days after the Tribunal’s decision of October 20, 2021, rejecting Argentina’s request for reconsideration and confirming the dates and modality of the hearing, and six days after the Tribunal’s decision on the appearance of witnesses of October 28, 2021, which are at the core of Argentina’s Proposal.
65. The *promptness* of the Proposal has not been contended by the parties, and neither addressed *timeliness* in their submissions. On the basis of the information reviewed, the Chair is satisfied that the Proposal was submitted in a timely manner as required by ICSID Arbitration Rule 9(1).

B. RECOMMENDATION FROM A THIRD PARTY

66. It is uncontested that under Article 58 of the ICSID Convention, the decision on a proposal to disqualify all the members of a tribunal shall be taken by the Chair of the Administrative Council. ICSID has requested external recommendations on rare occasions, in consideration to the specific circumstances of each case. In each of those occasions it was expressly stated that the request was exceptional, that it should not be construed as the basis for future requests, and that the ultimate decision on the disqualification proposal would be taken by the Chair, as envisaged in Article 58.

⁷² ICSID Arbitration Rule 9(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.”

⁷³ *See, e.g. Abaclat II* ¶¶68; *Burlington*, ¶ 73.

67. The circumstances in this case do not justify requesting an external recommendation. Argentina relies on: (a) the *seriousness* of the reasons underlying the Proposal; and (b) the need to “ensure full transparency of this proceeding.” Argentina has not substantiated why the alleged *seriousness* of its reasons distinguishes this case from other ones in which the Chair has decided disqualification proposals. It is also unclear how a request for a recommendation from a third-party would enhance the *transparency* of the decision-making process, as suggested by the Respondent.
68. Argentina’s suggestion that a recommendation from a third-party is warranted because the President of the Tribunal in this case was appointed by the Chair disregards the fact that these functions have been vested on the Chair by the ICSID Convention, with due consideration of this apparent overlap. Upholding Argentina’s proposition would unduly curb the Chair’s deciding function under Article 58 in every case in which an appointment of an arbitrator or annulment committee members falls upon him.
69. Argentina’s proposition also disregards the fact that the President of the Tribunal in this case was appointed by the Chair: (a) from the ICSID Panel of Arbitrators – which comprises appointees selected by the ICSID Contracting States –; (b) in consultation with the parties; and (c) in accordance with the parties’ agreed method of selection. Argentina does not explain either how this circumstance could have an effect on the challenge to the two co- arbitrators not appointed by the Chair.
70. Accordingly, the Chair will not seek an external recommendation and will proceed to decide the Proposal on the basis of the parties’ submissions and the arbitrators’ explanations, in accordance with Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9.

C. THE LEGAL STANDARD

71. The Proposal seeks to disqualify the three members of the Tribunal pursuant to Art. 57 of the ICSID Convention and ICSID Arbitration Rule 9.
72. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It provides that:

“A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.”

73. The parties are in agreement that Article 14 of the ICSID Convention requires arbitrators to be both independent and impartial.⁷⁴ The parties also agree on: (i) the meaning of *impartiality*; (ii) that a lack of impartiality must be “manifest” in order to give rise to a challenge; and (iii) that “manifest” means “evident” or “obvious.”⁷⁵
74. It is also common ground between the parties that the legal standard applied to a proposal to disqualify an arbitrator is an “objective standard based on a reasonable evaluation of the evidence by a third party.” Accordingly, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.
75. The Respondent’s disqualification proposal in this case has been triggered by its dissatisfaction with the Tribunal’s decisions on the dates and modality of the hearing and on procedural arrangements for the appearance of witnesses and experts. The Tribunal’s rulings and surrounding facts do not evidence a manifest unreliability to exercise independent and impartial judgement on the arbitrators who rendered it, as required under Articles 14 and 57 of the ICSID Convention.
76. As has been decided before by the Chair: “[t]he mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by

⁷⁴ See *supra* ¶¶ 8 and 43.

⁷⁵ See *supra* ¶¶ 9 and 43. Also, as noted in the *Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal* of October 22, 2007, in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* (ICSID Case No. ARB/03/19), ¶29: “The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp [...] Generally speaking independence relates to the lack of relations with a party that might influence an arbitrator’s decision. **Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties**” (emphasis added).

Articles 14 and 57 of the ICSID Convention. If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process.”⁷⁶

77. In recent past decisions, the Chair has also noted that “[n]either the ICSID Convention, nor the ICSID Arbitration Rules contemplate a disqualification proceeding as a mechanism to overturn procedural decisions that dissatisfy one of the Parties. Nor is a Party’s dissatisfaction with a procedural ruling the threshold to measure whether there is a manifest lack of impartiality or independence on the Tribunal.”⁷⁷

78. As concluded before by the Chair, the purpose of Art. 57 of the ICSID Convention is “to ensure that arbitrators possess the qualities required by Art. 14(1) of the ICSID Convention,” and Art. 57 is “not the appropriate mechanism to address alleged failures in the Tribunal’s reasoning.”⁷⁸

79. In the present case, the Tribunal exercised its powers under the ICSID Convention and Rules, issuing the necessary decisions for the conduct of the proceedings. It did so, after giving the parties the opportunity to be heard and taking into consideration their respective concerns. As noted in previous decisions, a procedural disagreement—or the fact that the tribunal’s decision was supported by the claimants and opposed by the respondent—cannot reasonably provide a basis for an inference of bias.

80. In the circumstances on this case, a third party undertaking a reasonable evaluation of the Tribunal’s procedural determinations of September and October 2021, and surrounding facts, would not conclude that they evidence a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

⁷⁶ See *Abaclat II*, ¶80.

⁷⁷ *Landesbank* ¶¶ 143

⁷⁸ *AS PNB Banka and others v. Republic of Latvia* (ICSID Case No. ARB/17/47), Decision on the Proposals to Disqualify Messrs. James Spigelman, Peter Tomka and John M. Townsend, June 16, 2020, ¶164.

V. DECISION

83. Having considered all of the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Chair rejects the Argentine Republic's Proposal to Disqualify all Members of the Tribunal.

[signed]

David Malpass
Chairman of the ICSID Administrative Council