

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Orazul International España Holdings S.L.

v.

Argentine Republic

(ICSID Case No. ARB/19/25)

DECISION ON THE CLAIMANT'S PROPOSAL TO DISQUALIFY DR. INKA HANEFELD

Issued by:

Mr. David R. Haigh KC
Prof. Alain Pellet

Secretary of the Tribunal

Ms. Anna Toubiana

11 September 2022

PARTIES' REPRESENTATIVES

Orazul International Spain Holdings S.L.

Sr. José Arango
Calle Serrano 41, 4to piso
28001, Madrid
España
and
Ms. Silvia Marchili
Ms. Jessica Marroquin
White & Case LLP
200 South Biscayne Blvd
Suite 4900
Miami, 33131-2352
United States of America
and
Mr. Paul Friedland
White & Case LLP
1221 Avenue of the Americas
New York, NY 10020
United States of America
and
Mr. Ignacio Madalena
White & Case LLP
Paseo de la Castellana 7
28046, Madrid
Spain
and
Mr. Javier Constanzo
Mr. Nicholas Eliashev
Tavarone, Rovelli Salim & Miani Abogados
Tte. Gral. J.D. Perón 537, 5th Floor
(C1038AAK) Buenos Aires,
Argentine Republic

Argentine Republic

Dr. Carlos Alberto Zannini
Procurador del Tesoro de la Nación
Dr. Horacio Pedro Diez
Dr. Sebastián Antonio Soler
Subprocuradores del Tesoro de la Nación
Ms. Mariana Mabel Lozza
Directora Nacional de Asuntos y
Controversias Internacionales
Ms. Maria Alejandra Etchegorry
Subdirectora Nacional de Asuntos y
Controversias Internacionales
Procuración del Tesoro de la Nación,
Posadas 1641
CP 1112ADC, Buenos Aires
Argentine Republic

Table of Contents

I.	THE PARTIES	3
II.	PROCEDURAL BACKGROUND	3
III.	SUMMARY OF THE PARTIES’ ARGUMENTS AND DR. HANEFELD’S EXPLANATIONS	4
	A. Claimant’s Arguments	4
	1. Legal Standard	4
	2. Grounds for Disqualification	5
	B. Respondent’s Arguments.....	6
	1. Legal Standard	6
	2. Grounds for Disqualification	7
	C. Dr. Hanefeld’s Explanations.....	8
IV.	THE UNCHALLENGED ARBITRATORS’ ANALYSIS	10
	A. Applicable Legal Standards.....	10
	B. Analysis	12
V.	DECISION	15

I. THE PARTIES

1. The Claimant is Orazul International España Holdings S.L., a company incorporated under the laws of Spain (“**Orazul**” or the “**Claimant**”).
2. The Respondent is the Argentine Republic (“**Argentina**” or the “**Respondent**”).
3. The Claimant and the Respondent are collectively referred to as the “**Parties.**”

II. PROCEDURAL BACKGROUND

4. Pursuant to Procedural Order No. 4, dated 1 July 2022, the Hearing on Jurisdiction and Merits (the “**Hearing**”) began on 1 September 2022 at the ICSID facilities in Washington, D.C.
5. On 9 September 2022, the Claimant filed a proposal for the disqualification of the President of the Tribunal, Dr. Inka Hanefeld (the “**Proposal**”).
6. On the same date, the Secretary of the Tribunal acknowledged receipt of the Proposal and confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Proposal.
7. On the same date, by a letter sent by the Secretary of the Tribunal, Mr. David R. Haigh KC, and Professor Alain Pellet (the “**Unchallenged Arbitrators**”), invited the Claimant to submit their “*subsequent letter,*” as stated in its Proposal, by 12:00 pm and the Respondent to file a written response by 3:00 pm. The Unchallenged Arbitrators also requested the Parties to appear for oral arguments at 4:30 pm on the same day.
8. In line with the Unchallenged Arbitrators’ time deadlines, the Claimant filed a subsequent letter in support of its proposal for the Disqualification of Dr. Inka Hanefeld (“**Supplemented Proposal**”), and the Respondent filed its response to the Claimant’s Proposal (the “**Response**”).
9. The Parties also presented their oral arguments in support of their positions on the afternoon of 9 September 2022 (“**Oral Arguments**”).
10. Before the start of the Oral Arguments, Dr. Inka Hanefeld furnished her explanations pursuant to ICSID Arbitration Rule 9(3) (the “**Explanations**”), which were transmitted to the Parties by the Secretary of the Tribunal.

III. SUMMARY OF THE PARTIES' ARGUMENTS AND DR. HANEFELD'S EXPLANATIONS

A. CLAIMANT'S ARGUMENTS

11. The Claimant proposes the disqualification of Dr. Inka Hanefeld “*in light of information recently obtained and events that demonstrate a lack of independence and impartiality on Dr. Hanefeld’s part, including an undisclosed conflict of interest with Respondent’s legal expert. Dr. Hanefeld’s lack of independence and impartiality, unfortunately, has been confirmed by her conduct and rulings throughout the ongoing hearing on jurisdiction, liability and quantum (the “Hearing”). Given these circumstances, Claimant is of the view that Dr. Hanefeld cannot properly discharge her mandate as President of this Tribunal.*”¹

1. Legal Standard

12. The Claimant submits its Proposal pursuant to Article 57 of the ICSID Convention, also citing to Article 14 of the ICSID Convention and Rule 6(2) of the ICSID Arbitration Rules.²
13. Reference is made to the *Blue Bank v. Venezuela* and *CC/Devas (Mauritius) Ltd. v. India* cases in support of the position that “*the mere ‘appearance of pre-judgment of an issue’ and the concern that ‘an arbitrator will not approach an issue impartially, but rather with a desire to conform to his or her own ... view’ has been found sufficient to uphold a challenge to an arbitrator.*”³ In addition, the Claimant references the *Eiser v. Spain ad hoc* committee decision in which it annulled an award “*based on an arbitrator’s failure to disclose a relationship with an expert.*”⁴
14. In its Supplemented Proposal, the Claimant adds a reference to Article 10 of the ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in International Investment Disputes (Version Four).⁵

¹ Claimant’s Proposal of Disqualification, 9 September 2022, (“*Proposal*”), p. 1.

² *Id.*

³ *Id.*, p. 2; citing to *Blue Bank Int’l & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB 12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal dated 12 Nov. 2013, para. 59; *CC/Devas (Mauritius) Ltd., et al. v. India*, UNCITRAL, Decision on the Respondent’s Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator dated 30 Sept. 2013, para. 58. The Claimant also cites to *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña dated 13 Dec. 2013, para. 66; *Caratube Int’l Oil Company LLP and Devinci Salah Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch dated 20 Mar. 2014, para. 57.

⁴ *Id.*, p. 2, citing to *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment dated 11 June 2020, para. 223.

⁵ Claimant’s Supplemented Proposal of Disqualification, 9 September 2022, (“*Supplemented Proposal*”), p. 2.

15. During the Oral Arguments, the Claimant further referenced the ICSID Discussion Paper, “*Possible Improvements of the Framework for ICSID Arbitration*” in support of its position.⁶

2. Grounds for Disqualification

16. The Claimant submits that Dr. Hanefeld lacks the necessary independence and impartiality to serve as the Tribunal’s President. The Claimant states that Dr. Hanefeld has, throughout the Hearing, “*systematically conducted herself in a way that casts serious doubts as to her impartiality, independence, and her ability to discharge her mandate, as required by the ICSID Convention and the ICSID Rules.*”⁷
17. The Claimant first relies on the ground that Dr. Hanefeld failed to disclose a relationship with the Respondent’s expert, Prof. Jorge Viñuales.⁸ The Claimant explains that it “*has recently discovered*” that Dr. Hanefeld has an undisclosed pre-existing professional relationship with Prof. Viñuales as both were co-arbitrators in the Stockholm Chamber of Commerce arbitration *Green Power Partners K/S, SCE Solar Don Benito APS v. the Kingdom of Spain*, (the “**Green Power Arbitration**”) while the present case was pending.⁹
18. The Claimant submits that Dr. Hanefeld failed to disclose that she was “*servicing as arbitrator in another arbitration with Argentina’s legal expert in an investment treaty case brought by another investor operating in the power generation sector.*”¹⁰ In the Claimant’s view, one aggravating factor in this failure to disclose is that the *Green Power Arbitration* and the present case have strong similarities, including jurisdictional questions, investment treaty disputes concerning claims by a foreign investor operating in the power generation sector and a State’s alleged failure to abide by its commitments concerning remuneration in the power generation sector.¹¹
19. The Claimant further states that its “*consternation regarding this undisclosed conflict of interest is further compounded by ... the treatment of the legal experts in these proceeding.*”¹²

⁶ Parties’ Oral Arguments on the Claimant’s Disqualification Proposal of Dr. Hanefeld, 9 September 2022 (“*Oral Arguments*”), Tr. 14:9-17. *See also* the Claimant’s reference to Articles 4.1 and 4.2 of the International Bar Association’s Rules of Ethics for International Arbitrators of 1987, Supplemented Proposal, fn. 3.

⁷ Proposal, p. 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*, p. 4.

¹¹ *Id.*, p. 3; Oral Arguments, Tr. 16:9-22; 17:1; Supplemented Proposal, p. 3.

¹² Proposal, p. 4.

20. With regard to the treatment of legal experts, the Claimant submits that the Tribunal allowed Prof. Viñuales to testify at the Hearing despite the fact that the Claimant had withdrawn its request to cross-examine him due to its expert, Prof. Christoph Schreuer, suffering from serious COVID-19 aftereffects and thus being unable to testify at the Hearing.¹³ For Claimant, the Tribunal’s decision created an imbalance.¹⁴
21. The Claimant further relies on a second ground for disqualification pursuant to which “*Dr. Hanefeld’s conduct during the Hearing has confirmed her bias towards Argentina, or at the very least, her lack of impartiality with respect to Claimant.*”¹⁵ In the Claimant’s view, Dr. Hanefeld’s questioning of the witnesses at the Hearing is based on presumptions of contested facts and “*has been more akin to cross-examination of an adverse witness than the fact-gathering exercise that is expected from an neutral arbitrator.*”¹⁶ In support of its position, the Claimant cites to various passages of the Hearing transcript.¹⁷
22. In the Oral Arguments, the Claimant also addressed Dr. Hanefeld’s “*closed*” questions to the witnesses, which, in its view, distort “*the substantive evidentiary record.*”¹⁸

B. RESPONDENT’S ARGUMENTS

23. In its Response, the Respondent rejects the Claimant’s “*baseless attempt to curtail and inhibit the Tribunal’s prerogative to freely test the parties’ arguments and the evidence on which they rely. The obvious aim of Claimant’s application is to obtain the presiding arbitrator’s resignation and derail the ongoing Hearing. Neither objective should be permitted to succeed.*”¹⁹

1. Legal Standard

24. The Respondent contends that “*all members of the Tribunal are equally held to the same standard of impartiality and independence.*”²⁰ The President is not held to a different standard than that of the co-arbitrators.
25. The Respondent further cites to the “*Green List*” of the IBA Guidelines on Conflicts of Interest in International Arbitration (“**IBA Guidelines**”) and submits that the present

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*, p. 5.

¹⁶ *Id.*

¹⁷ See Supplemented Proposal, pp. 2-5; see also e.g., Oral Arguments, Tr. 20:8-22; 21:1-22; 22:1-22; 23:1-16.

¹⁸ Oral Arguments, Tr. 57:1-18.

¹⁹ Respondent’s Response to the Claimant’s Disqualification Proposal, 9 September 2022 (the “Response”), p. 1.

²⁰ *Id.*, p. 2.

situation does not fall within the scenarios provided in the Green List, and in any case, need not be disclosed.²¹

26. In its Response, Argentina disagrees with the Claimant's reference to the *Eiser v. Spain* case as the arbitrator's failure to disclose in that case arose from a "*clearly distinguishable situation*" involving the roles of damages expert and counsel in an arbitration, and also by the extent for those past and present interactions.²²
27. The Respondent further cites to the waiver provision embodied in Rule 27 of the ICSID Arbitration Rules to argue that the Claimant has waived its right to make its objection.²³
28. In that regard, the Respondent makes reference to Rule 9 of the ICSID Arbitration Rules, which provides that a disqualification proposal shall be made "*promptly*."²⁴ For the Respondent, the Claimant had three months to state its "*reasons regarding a purported conflict of interest in relation to the Green Power case, if that were a genuine concern*."²⁵

2. Grounds for Disqualification

29. The Respondent rejects the Claimant's grounds for disqualification.
30. As to the first ground, the Respondent contends that the extent of the relationship between Dr. Hanefeld and Prof. Viñuales was limited to a relationship of "*co-arbitrators, appointed by opposing parties*."²⁶ This is a different situation than that of counsel and expert, for example.²⁷ In the present case, pursuant to the IBA Guidelines, Dr. Hanefeld's relationship of co-arbitrator with Prof. Viñuales need not be disclosed.²⁸
31. In the Respondent's view, the Claimant's arguments related to an alleged imbalance in the treatment of the legal experts fail.²⁹ The Claimant failed to inform the Tribunal that Prof. Schreuer could not participate at the Hearing until the eve of the Hearing.³⁰ In any

²¹ *Id.*

²² *Id.*, p. 3, citing to *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment dated 11 June 2020, para. 228.

²³ Oral Arguments, 42:13-22; 44:1-6.

²⁴ Response, pp. 2-3; Oral Arguments, Tr. 43:7-14.

²⁵ Response, p. 3.

²⁶ Oral Arguments, Tr. 44:12-19.

²⁷ *Id.*

²⁸ *Id.*, Tr. 44:20-22; 45:1-12.

²⁹ Response, p. 4.

³⁰ *Id.*

event, the Respondent notes, the decision to hear Prof. Viñuales at the Hearing was taken by the Tribunal as a whole after hearing the Parties.³¹

32. As to the second ground, the Respondent argues that Dr. Hanefeld’s questioning at the Hearing merely “*tested Respondent’s evidence with Claimant’s evidence, and Claimant’s evidence with Respondent’s evidence, respectively.*”³² The President of the Tribunal did not second-guess the Claimant’s use of documents at the Hearing but was seeking additional information to “*understand the content and context of relevant documents mentioned by Claimant at the Hearing.*”³³
33. The Respondent further dismisses the Claimant’s examples of Dr. Hanefeld’s improper questioning of the Claimant’s witnesses and experts at the Hearing.³⁴ In the Respondent’s view, the Tribunal’s questions were “*aimed indeed to test the evidence and the arguments and to try to understand what the arguments are about and what is the evidence that supports the arguments.*”³⁵

C. DR. HANEFELD’S EXPLANATIONS

34. In her communication of 9 September 2022, Dr. Hanefeld indicated the following:

“Reference is made to Claimant’s proposal dated 9 September 2022 to disqualify me in my capacity as presiding arbitrator in the present proceedings (“Proposal”).

In response, according to Rule 9(3) of the ICSID Arbitration Rules and having due regard to Article 14(1) of the ICSID Convention and Rule 6(2) of the ICSID Arbitration Rules, I hereby confirm my independence and impartiality and wish to comment as follows:

Regarding Claimant’s submission that “[b]ased on the text of the Green Power Award, at the very minimum, over the past five years, Dr. Inka Hanefeld and Prof. Jorge Viñuales have had a professional relationship within the context of an arbitration [...]”, I note that the circumstances of the proceedings which Claimant makes reference to (“Green Power Proceedings”) are as follows:

³¹ Oral Arguments, Tr. 43:2-12.

³² Response, p. 3.

³³ *Id.*

³⁴ *Id.*, p. 4.

³⁵ Oral Arguments, Tr. 26:12-17.

The Green Power Proceedings that were conducted under the SCC arbitration rules are unrelated to the present proceedings and any sort of “professional relationship” between Prof. Viñuales and me has been very limited. More concretely:

The Green Power Proceedings were the only proceedings or occasion that I recall when I interacted with Prof. Viñuales.

The Green Power Proceedings pertained to Energy Charter Treaty claims and the issue of jurisdiction in light of intra-EU objections.

The tribunal in the Green Power Proceedings, which was composed of Prof. Viñuales and me as co-arbitrators along with Prof. Hans van Houtte as presiding arbitrator, was fully constituted in late December 2016. A two-day in-person jurisdictional hearing took place in early February 2019. In late September 2019, the parties agreed to postpone the hearing on the merits, and the proceedings were eventually suspended until mid-January 2022. Another one-day virtual jurisdictional hearing followed in late March 2022. The final award was rendered in mid-June 2022.

In the period of time between December 2016 and June 2022, the Green Power Proceedings were suspended for approximately two and a half years. Accordingly, my interactions with Prof. Viñuales were limited to the times when the Green Power Proceedings were actually active, and more precisely to the afore-mentioned three hearing days, occasional emails among the members of the tribunal and the tribunal’s deliberations. To the best of my knowledge, other than in the context of appointing the presiding arbitrator in the Green Power Proceedings, I have not had any bilateral contacts with Prof. Viñuales.

When Respondent introduced Prof. Viñuales as its party-appointed legal expert in the present proceedings, i.e., in October 2021, the Green Power Proceedings were suspended.

When the Tribunal in the present matter was notified, on 16 May 2022, that Prof. Viñuales would be called by Claimant to be cross-examined in the Hearing, the issuance of the final award in the Green Power Proceedings was already imminent and occurred in June 2022, i.e. months before the Hearing commenced in this case.

I considered whether the fact that Prof. Viñuales and I were acting as co-arbitrators in the Green Power Proceedings should be disclosed in the

present proceedings. My assessment was that the circumstances are not of a nature to give rise to reasonable doubts as to my independence and impartiality and that no such duty existed.

Having consulted the IBA Guidelines on Conflicts of Interest in International Arbitration, I noted that they do not contemplate the present situation.

I also considered, and I am still of the view, that, from the standpoint of a reasonable third party having knowledge of the present facts and circumstances, such facts and circumstances do not give rise to any appearance of dependence or bias, nor do they impede upon my ability to exercise independent judgement in the present matter.

As regards Claimant's references to the conduct of the Hearing, I note that any procedural decisions have been taken by the Tribunal as a whole. Moreover, I confirm that my conduct of the Hearing, including the questioning of witnesses, was driven solely by the objective of establishing the facts of the case and to test both Parties' offers of evidence.

I hereby confirm my impartiality and independence with respect to all involved in the present arbitration. I also confirm that I may be relied upon to exercise independent judgement."

IV. THE UNCHALLENGED ARBITRATORS' ANALYSIS

A. APPLICABLE LEGAL STANDARDS

35. 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."

36. The proposed disqualification in this case alleges that Dr. Hanefeld lacks the qualities required by paragraph (1) of Article 14 which, the Claimant says, requires persons

designated to serve on ICSID panels to be persons who, *inter alia*, “may be relied upon to exercise independent judgment.”³⁶

37. Article 14(1) of the ICSID Convention provides:

“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field 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.”

38. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Thus, it is expected that an arbitrator will be both impartial and independent.³⁷

39. There have been numerous decisions on the appropriate interpretation of these provisions. We take guidance from the *Blue Bank* decision, in which the Chairman of the ICSID Administrative Council observed:

“Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. [internal citations omitted] Independence and impartiality both ‘protect parties against arbitrators being influenced by factors other than those related to the merits of the case.’ [internal footnote omitted] Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.”³⁸

40. Rule 6 of the ICSID Arbitration Rules further provides that each arbitrator must sign a declaration declaring, among other things, that “*I shall judge fairly as between the parties, according to the applicable law.*” That Rule also requires an arbitrator to include disclosure of, “*(a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstances that might cause my reliability for independent judgment to be questioned by a party.*” It adds the acknowledgment of a “*continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.*”

³⁶ ICSID Convention, Art. 14(1); Supplemented Proposal, p. 1.

³⁷ *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 dated 12 Nov. 2013, para. 58.

³⁸ *Id.*, para. 59.

B. ANALYSIS

41. The proposed disqualification appears to rely on two separate sets of concerns arising from Dr. Hanefeld’s failure to disclose her prior service as a co-arbitrator with Prof. Viñuales, Respondent’s legal expert, in the *Green Power* case (the “**failure to disclose**”) and certain other actions either in providing directions for Prof. Viñuales to appear and present his opinions and be cross-examined even after Prof. Schreuer was unable to attend and testify (the “**expert direction**”), or various interventions by Dr. Hanefeld during the Hearing in the form of questions for witnesses (“**questioning of witnesses**”) or challenging the Claimant’s preparation of Ms. Bertone’s evidence (“**witness preparation**”) or interactions with counsel for the Claimant on the use of documents (“**document directions**”) or listing of Cerros Colorado’s contemporaneous complaints about Argentina’s measures (“**direction to provide list of complaints**”).
42. While we propose to address the failure to disclose question initially on its own, we understand the Claimant’s contention to be that this omission should be considered in the context of the other matters summarized above which, the Claimant submits, show that “*Dr. Hanefeld’s conduct during the hearing has confirmed her bias towards Argentina, or at the very least, her lack of impartiality with respect to Claimant. This is especially true with respect to her questioning of the witnesses at the Hearing. From the outset, Dr. Hanefeld’s questions of the witnesses have been based on presumptions of facts that remain contested in the Arbitration.*”³⁹
43. Under Rule 6 of the ICSID Rules, ICSID arbitrators are expected to assure the parties that they will judge the issues before them fairly and that they will, in any event, disclose “*any other circumstance*” that might cause their “*independent judgment to be questioned by a party.*” These disclosures are fundamental to the trust and confidence that parties are entitled to have in their decision-makers. In our opinion, it is not so much a question of strictly complying with published rules or guidelines, whether draft or merely proposed, or otherwise. It is rather a question of open-mindedly addressing the circumstances of an arbitrator’s background and relationships and determining whether any such circumstance might cause a party to question the arbitrator’s independent judgment.
44. We accept that the IBA Guidelines, although not binding, “*may serve as a useful reference.*”⁴⁰ They refer to serving with other arbitrators only in paragraphs 4.3.2 and 4.4.3

³⁹ Supplemented Proposal, p. 2.

⁴⁰ See e.g., *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 dated 12 Nov. 2013, para. 62; *Misen Energy AB (publ) and Misen Enterprises AB v. Ukraine* (ICSID Case No. ARB/21/15), Decision on the Respondent’s proposal to disqualify Dr. Stanimir A. Alexandrov dated 15 Apr. 2022, para. 107.

of the Green List. Thus, by this standard, as Dr. Hanefeld concluded, these circumstances do not give rise to any duty to disclose.

45. The Claimant's counsel candidly acknowledged that its legal team⁴¹ (like the Argentine legal team, as it happens)⁴² had become aware of the release of the *Green Power* decision in late June or possibly early July 2022. Thus, notwithstanding becoming informed in that fashion that Prof. Viñuales and Dr. Hanefeld had served as co-arbitrators in that case, neither party reacted at that time. The Claimant did not promptly complain about Dr. Hanefeld serving with Prof. Viñuales who is appearing as an expert for Argentina. As the Claimant's disqualification proposal shows, it was not until early on 9 September 2022 that the Claimant complained about this failure to disclose. The Claimant says this action was prompted in part by Dr. Hanefeld's casual acknowledgement when greeting Prof. Viñuales in the Hearing the day before to the fact that they knew one another, without any further explanation.⁴³ The Claimant's perception was that this reference appeared to make light of this fact, an entirely inappropriate gesture.
46. Upon learning that a party was proposing to call the evidence of an expert witness with whom she was then sitting as a co-arbitrator in another case, it is our opinion that it would have been advisable for Dr. Hanefeld to have disclosed that fact to the parties and their legal counsel. Any doubt in that regard should have been resolved in favour of transparency. That being said, we have also concluded that this was not a case of a conflict of interest, as such. Thereafter, as events unfolded with the very public awareness of the *Green Power* case by both parties, it is our finding that the failure to disclose was fully mitigated in this case by the fact that neither Party considered the prior service by Dr. Hanefeld on a tribunal with Prof. Viñuales to have been a matter of sufficient concern as to prompt either the Claimant to complain or the Respondent to make their own disclosure about their expert. In any case, the circumstances of the present case are very different from the situation prevailing in *Eiser v. Spain*, where the challenged arbitrator and an expert had worked together in several cases in their respective roles.⁴⁴ While we do not find it necessary to invoke Rule 27 concerning waiver by a party where there has been a failure to state promptly an objection of which it is aware, we are nevertheless persuaded that the failure to disclose in the circumstances of this case does not warrant a disqualification.
47. We turn therefore to the other matters on which the Claimant has relied in deciding to bring forward what it considers to be a "very serious issue."⁴⁵ As the recent learned article by the

⁴¹ Oral Arguments, Tr. 15:1; 54:16-22.

⁴² *Id.*, Tr. 66:7-13.

⁴³ *Id.*, Tr. 19:3-6.

⁴⁴ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment dated 11 June 2020, *see e.g.*, paras. 205-219.

⁴⁵ Oral Arguments, Tr. 10:1-5.

Honourable Marc Lalonde confirms, over the history of ICSID there have been numerous proposed disqualifications of arbitrators, but such challenges have only rarely ever been upheld.⁴⁶ This history is consistent with the language in Article 57 of the ICSID Convention that there must be a manifest lack of the qualities required in Article 14(1). As determined by the Chairman of the ICSID Administrative Council in the *Blue Bank* case, a number of decisions have concluded that the word “*manifest*” in Article 57 of the Convention means “*evident*” or “*obvious*” and that it relates to “*the ease with which the alleged lack of the qualities can be perceived.*”⁴⁷

49. We have reviewed the various interventions by Dr. Hanefeld on which the Claimant has relied to support its contention that she is biased in favour of Argentina. We first note that the expert direction to the parties that the Tribunal would hear Prof. Viñuales, notwithstanding the last-minute absence of Prof. Schreuer, was a Tribunal decision and not an action that could be attributed to Dr. Hanefeld individually. We have also considered the Claimant’s concern that Dr. Hanefeld’s questioning of the witnesses in some instances displayed qualities of pre-judging disputed factual or legal issues. It is our view that arbitrators should be permitted considerable latitude in the extemporaneous posing of questions in a hearing. While decorum and courtesy towards witnesses and the parties’ representatives must always prevail, it would not be in the best interests of the arbitral process unduly to restrict arbitrators in their efforts to determine the facts of a case.
50. The Claimant recalls the Chairman’s statement in the *Blue Bank* decision that “*Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.*”⁴⁸ With this guidance in mind, the Unchallenged Arbitrators have concluded that the questioning by Dr. Hanefeld, taken in the whole context of the Hearing, does not rise to the level of bias or dependence. The Claimant submitted that Dr. Hanefeld’s closed form of questioning, in which she appeared to endorse certain factual or legal conclusions, showed she was presuming contested matters to be established. We agree that it is preferable for an arbitrator to put questions in an open, rather than a conclusory, manner. But, we do not accept the Claimant’s contention that Dr. Hanefeld’s manner of questioning showed a bias or pre-judgement.
51. We do not find it necessary to review in great detail the particulars of the other matters on which the Claimant relies to show Dr. Hanefeld’s alleged bias. The document directions in

⁴⁶ M. Lalonde, *Quo Vadis Disqualification?*, in M. Kinnear, *BUILDING INTERNATIONAL INVESTMENT LAW – THE FIRST 50 YEARS OF ICSID*, p. 644. (Ed, M. Kinnear et as., Wolters Kluwer, 2016). *See also* the list of the Decisions on Disqualification since 1982, appearing on the ICSID website, citing 95 decisions, of which 5 were upheld (<https://icsid.worldbank.org/cases/content/tables-of-decisions/disqualification>).

⁴⁷ *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 dated 12 Nov. 2013, para. 59.

⁴⁸ *Id.*

the course of the Hearing do not support any such conclusion. As for Dr. Hanefeld's surprise that counsel would meet for many hours over the prior weekend in order to prepare a witness, in this case Ms. Andrea Bertone, her concern was quickly resolved through the intervention of Ms. Etchegorry who, like Ms. Marchili, understood the procedural direction governing communications with witnesses in a common way. Dr. Hanefeld accepted that common understanding. As for the impromptu direction for the Claimant to provide a list of complaints by Cerros Colorados about Argentina's measures, we find that it does not support the Claimant's proposal for disqualification. If anything, at the end of the day, it offered the Claimant the opportunity to supplement its opening statement and arose spontaneously from the interaction between Professor Pellet and the witness, Mr. Tierno. It did not, in any event, show bias or lack of independence by Dr. Hanefeld.

V. DECISION

52. For all these reasons, the Unchallenged Arbitrators have decided that they should not uphold the Claimant's proposed disqualification of Dr. Hanefeld under Articles 57 and 14(1) of the ICSID Convention.
53. Accordingly, the Claimant's proposal to disqualify Dr. Inka Hanefeld pursuant to Article 57 of the ICSID Convention is dismissed.

[signed]

Mr. David R. Haigh KC

[signed]

Professor Alain Pellet