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INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS IN INVESTMENT-STATE ARBITRATION: THE BLUE BANK CASE

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Abstract

Investment-State arbitration has emerged as an essential mechanism for the resolution of disputes between investors and states. It serves as a means to settle conflicts that may arise from investment agreements or treaties. Central to the integrity and fairness of this arbitration process is the principle of independence and impartiality of arbitrators. The credibility and legitimacy of investment arbitration heavily rely on the assurance that arbitrators possess these qualities, ensuring a level playing field for all parties involved.

This paper will analyze the application of the standard for independence and impartiality through the landmark decision of the International Centre for Settlement of Investment Disputes (ICSID) – the Blue Bank Case.

The paper delves into the factual background of the dispute, analyzing the arguments presented by both parties in support of their respective proposals for disqualification. It explores the legal framework governing challenges to arbitrators' independence and impartiality, including relevant provisions of the ICSID Convention and the applicable arbitration rules.

Furthermore, the paper critically evaluates the tribunal's decision on the disqualification proposal, examining the reasoning and legal principles relied upon by the tribunal in reaching its conclusion. The impact of this decision on the broader field of investment arbitration is analyzed, highlighting the significance of maintaining a fair and unbiased tribunal composition in ensuring the legitimacy and integrity of the arbitration process. Finally, it sheds light on the challenges associated with ensuring a fair and unbiased arbitration process in investment disputes and highlights the significance of upholding the principles of independence and impartiality in international arbitration.

Keywords: arbitrator, independence, impartiality, investment-state arbitration, legal standard

3. Introduction

Investment-state international disputes have become increasingly common in the global arena, with governments and foreign investors seeking resolutions for conflicts arising from investment agreements. With the signing of the first Bilateral Investment Treaties (BITs), the treaty-based investor–state arbitration

has inevitably emerged as a mechanism for resolution of disputes.[155] From a time perspective, the investment–state dispute settlement (hereinafter: ISDS) arise after the signing of the very first International Investment Agreements, but it really expanded during the 2000s based on the 1990s treaties that were, generally speaking, really investor-friendly, offering significant protection of the investor. ISDS as a mechanism is opened up based on international treaties, mostly Bilateral Investment Treaties (BITs), but also Treaties with Investment Provisions (TIPs), such as the Energy Charter Treaty or NAFTA.[156]

These investment-state disputes often involve complex legal issues and engage the State's responsibility with a demand to repair a wrongful act made by this very state.[157] Hence, the resolution of investment-state disputes requires the intervention of impartial and independent arbitrators to ensure a fair and just outcome. The principles of independence and impartiality are fundamental to the integrity and legitimacy of the arbitration process, ensuring that the rights of both parties are protected and that justice is served.

In investment-state disputes, independent arbitrators play a crucial role in safeguarding the interests of both the state and the investor. Their independence guarantees that they are free from any external influences or pressures that may compromise their ability to render fair and unbiased decisions. This independence is especially crucial in cases where powerful economic interests or political considerations may come into play, potentially undermining the integrity of the dispute-resolution process.

Impartiality, on the other hand, requires arbitrators to approach each case with an open mind and without any preconceived notions or biases. They must remain neutral throughout the proceedings, ensuring that no party is favored or disadvantaged based on personal or institutional affiliations. Impartial arbitrators are essential in creating an environment of trust and confidence, where both parties can have faith in the fairness and objectivity of the arbitration process.

To uphold the principles of independence and impartiality, various international rules and standards have been developed. Institutions such as the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) have established guidelines and codes of conduct for arbitrators involved in investment disputes. These guidelines emphasize the importance of selecting arbitrators who possess the necessary expertise, integrity, and independence to ensure a fair and just resolution of the dispute.

Despite these efforts, challenges persist in maintaining the independence and impartiality of arbitrators in investment-state disputes. Concerns regarding conflicts of interest, party-appointed arbitrators, and the potential for repeat appointments have raised questions about the neutrality of the arbitration process. As a result, ongoing discussions and reforms within the field of international arbitration continue to address these challenges, seeking to strengthen the safeguards in place and enhance public confidence in the system.

However, besides the established rules, guidelines, and codes of conduct for the appointed arbitrators in investment disputes, applying the principles of independence and impartiality in a specific case, is mostly determined by the interpretation of the legal standard on a case-to-case basis.

One of the most evocable cases dealing with the question of independence and impartiality of the arbitrators is the ICSID Case – Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela (hereinafter: the Blue Bank case).[158] Hence, this paper will analyze the application of the principles of independence and impartiality through the lens of the ICSID Decision in the Blue Bank case.

[155] Choukroune L., Nedumpara. J. J.: International Economic Law, Cambridge University Press, 2022, p.611
[156] Ibid, p.613
[157] Ibid, p.597
[158] ICSID Case No. ARB/12/20 – November 12, 2013 – Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal (hereinafter: *the Decision*)

The impressions on the case's ruling among scholars and legal practitioners range from controversial to remarkable. The attention on the case is based on the decision for disqualification of an arbitrator based on his position in a global law firm, acting elsewhere in another case against the respondent state. The significance of the decision is that it departs from the established practice of interpretation of the legal standard for the disqualification of an arbitrator, thus becoming the first-ever ruling decided by ICSID itself that disqualified an arbitrator from a panel.

The parties of the dispute are Blue Bank International & Trust (Barbados) Ltd (hereinafter: *Blue Bank* or *the Claimant*) and the Bolivarian Republic of Venezuela (hereinafter: *Venezuela* or *the Respondent*). Based on the Trust Deed, Blue Bank was appointed trustee of the Qatar Trust, to administrate and manage the assets of the trust, including shareholdings in two BVI companies which were indirect shareholders in two Venezuelan companies, affected by the alleged termination of concession contracts.

1. Facts of the case

On June 25, 2012, Blue Bank filed a request for arbitration at the International Centre for Settlement of Investment Disputes (ICSID) against Venezuela, claiming that Venezuela has breached the 1994 Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (hereinafter: *the BIT*), in force since 1995.[159] Blue Bank asked for damages of approximately $250 million, based on allegations of expropriation by the termination of concession contracts concerning its tourism and hospitality business, which were contrary to Venezuela's obligations under the BIT.

On October 8, 2012, the Claimant appointed Mr. Jose Maria Alonso, a national of Spain, as arbitrator. The appointment was accepted by Mr. Alonso with the submission of his curriculum vitae, declaration, and statement, in accordance with Rule 6(2) of the ICSID Arbitration Rules.

In his statement, Mr. Alonso pointed out that he is a Partner at Baker & McKenzie Madrid, S.L.P. in charge of the Dispute Resolution department in Madrid, since 2012. Baker & McKenzie Madrid, S.L.P. is a firm belonging to Baker & McKenzie International (Swiss Verein), and all the firms that are part of it are independent entities; therefore the remuneration of the Partners depends mainly on the turnover of each particular firm. He emphasized that neither himself nor Baker & McKenzie Madrid, have or have had any relationship with the parties in the proceedings. In addition, he indicated that he was aware of the existence of a parallel ICSID arbitration proceeding against Venezuela in an unrelated matter, initiated by Baker & McKenzie New York and Baker & McKenzie Caracas in 2011, in which both firms represented a company called Legreef Investments. However, considering the independent structure of the firms belonging to Baker & McKenzie International, neither himself nor Baker & McKenzie Madrid have any relationship with Legreef Investments and those arbitration proceedings, thus he will not be provided with any information, intervention, or take part in it. Hence, he considered himself completely independent and impartial to act in the capacity of the arbitrator in the Blue Bank proceedings.

Venezuela submitted a proposal for the disqualification of Mr. Alonso, based on his position at Baker & McKenzie, a global legal firm that represented another arbitration case against Venezuela. The request was submitted by Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.

On November 5, 2012, Venezuela appointed Dr. Santiago Torres Bernardez, a national of Spain, as arbitrator, who accepted his appointment and submitted his curriculum vitae, declaration, and statement. The Claimant submitted a proposal for his disqualification, based on his repeat appointments by Venezuela and Argentina and allegations of "systematic findings in favor of the states". On September 2, 2013, Dr.

[159] Blue Bank, ICSID Case No. ARB/12/20, Request for Arbitration (June 22, 2012)

Torres Bernardez submitted explanations, as well as, his resignation in accordance with Rule 9(3) and Rule 8(2) of the ICSID Arbitration Rules, respectively, thus the Chairman did not rule on the challenge against him.

Since Mr. Alonso and Dr. Torres Bernardez were a majority of the tribunal, the proposals for their disqualification were treated as a proposal for disqualification of the majority of the tribunal, decided by the Chairman in accordance with Article 58 of the ICSID and Rule 9 of the ICSID Arbitration Rules.

2. The arguments of the Parties and the applicable law

Since Dr. Torres Bernardez has resigned from the Tribunal, the proposal for his disqualification was not addressed by the Chairman, thus it will not be analyzed in the present text. Hence, the text will focus on the arguments and decisions relating to the proposal for the disqualification of Mr. Jose Maria Alonso.

2.1. Respondent's arguments

The Respondent's proposition for disqualification of Mr. Alonso was based on Mr. Alonso's position at Baker & McKenzie, due to the fact that the same firm represented another company in parallel arbitration proceedings against Venezuela.

It took notice that Baker & McKenzie is known as a global legal practice, thus each office cannot be considered as a separate legal entity. In addition, due to the fact that Mr. Alonso was the Managing Partner of the Litigation and Arbitration Department of Baker & McKenzie Madrid and a Member of the Steering Committee of the Global Arbitration Practice Group and the Steering Committee of the Baker & McKenzie International European Dispute Practice Group, part of his remuneration depended on the global income of the firm. Hence, the outcome of both cases against Venezuela, the *Blue Bank case* and the *Longreef case* will have direct or indirect remunerative interest on him. In addition, positive outcomes in both cases would significantly contribute to Baker & McKenzie's expansion and recognition within the arbitration community. Furthermore, it pointed out that considering the similarity of the issues argued in both cases against Venezuela, Mr. Alonso would basically have to decide on similar arguments that his firm is arguing against Venezuela in the *Longreef case*.

In a nutshell, his position at the firm, the recognition of Baker & McKenzie as a global firm, and the benefits, for himself and for the firm, from a positive outcome in both cases that the firm is representing against Venezuela, together with the similarity of the issues that are subject of the dispute in both cases, are enough to raise reasonable doubts of Mr. Alonso's impartiality and independence.

2.2. Claimant's arguments

The Claimant argued that Venezuela had not established a "manifest lack of impartiality or independence", a legal standard that is required for the disqualification of an arbitrator, according to Article 14(1) and Article 57 of the ICSID Convention.

It noted that the Respondent mischaracterized the facts in regard to Mr. Alonso's status and functions in the firm and to the structure and operation of Baker & McKenzie International. Due to the fact that Mr. Alonso is not and has never been directly involved anyhow in cases against Venezuela, the Respondent's allegations do not meet the threshold of "manifest lack" as an established legal standard for the disqualification of an arbitrator.

2.3. Explanations by Mr. Jose Maria Alonso

In his explanations, Mr. Alonso emphasized that Baker & McKenzie Madrid, the firm where he is a Partner, and Baker & McKenzie New York and Caracas, the firms that are leading the *Longreef case* against Venezuela, are separate and independent entities. Hence, his firm is completely autonomous and does not receive commands from any other firm, which presumes his independence as an arbitrator in the Blue Bank case.

As to his status and position, he stressed that he is not leading the global arbitration practice of Baker & McKenzie International, but only Baker & McKenzie Madrid. His membership in the Steering Committee does not mean that he manages the global arbitration practice of Baker & McKenzie International. Additionally, this Committee does give instructions or interfere in the management of any individual case.

As to his income, Mr. Alonso explained that any favorable result in the *Longreef case* for Baker & McKenzie New York and Caracas would have a "nonexistent or insignificant" impact on his personal income, as his income depends primarily on the economic return by Baker & McKenzie Madrid.

Finally, Mr. Alonso noted that the legal standard for the disqualification of an arbitrator under the ICSID Convention and the IBA Guidelines differs. The first requires a "manifest lack of impartiality or independence", while the latter only "justifiable doubts". However, as he has never personally represented any of the parties, nor anyhow been involved or has any interest in the *Longreef case*, neither of those legal standards are met.

2.4. The decision by the Chairman

- The Legal Standard

Before deciding on the facts of the case, the Chairmen had to deal first with establishing the applicable legal standard for the disqualification of an arbitrator. He based his decision on Article 14(1) and Article 57 of the ICSID Convention, noting that even though IBA Guidelines may be a good reference, his decision is bound by the standard required in the ICSID Convention.

The Chairman followed the generally accepted understanding that the rules required an arbitrator to be both impartial and independent, referring to the absence of any bias, predisposition, or external control on the arbitrator. Hence, any fact indicating a "manifest" lack of his/her impartial or independent judgment should be considered a ground for disqualification. As to the meaning of the word "manifest", the Chairman referred to other previous decisions dealing with Article 57, where it is understood as "evident" or "obvious", indicating the simplicity to recognize the lack of the arbitrator's qualities.[160]

The Chairman noted that the legal provisions in the ICSID Convention do not require proof of existence, but it suffices to establish the appearance of bias or dependence.[161] However, the Chairman concluded that a subjective belief of the party is not enough to meet the requirements for disqualification of an arbitrator, but the applicable legal standard is an "objective standard based on a reasonable evaluation of the evidence by a third party."[162]

- The challenge of Mr. Alonso

Considering the arguments of the parties and the explanation of Mr. Alonso, the Chairman found that sharing the corporate name of Baker & McKenzie and the existence of an International

[160] Supra Note 4, the Decision, para 61
[161] Ibid, para 59
[162] Ibid, para 60

Arbitration Steering Committee globally, together with Mr. Alonso's statement that his income depends primarily, but not exclusively on the economic return of Baker & McKenzie Madrid, implies "a degree of connection or overall coordination" between the firms within Baker & McKenzie International.[163]

Moreover, considering that the proceedings in both cases, the *Blue Bank case,* and *Longreef case* are ongoing and there are similar issues disputed in both cases, it would be "highly probable" that Mr. Alonso would have to decide legal issues that will also be relevant for the *Longreef case*.[164]

Hence, the Chairman found that based on a reasonable evaluation of the presented facts, a third party would find a manifest lack of impartiality of Mr. Alonso, and thus he accepted the Respondent's proposal for his disqualification.

3. Reflections and Critical Appraisal

3.1. General remarks on independence and impartiality

The independence and impartiality of adjudicators are fundamental principles of any international or domestic adjudicatory system. Independent and impartial decision–makers are prerequisites for every sound adjudicatory system, thus it strengthens the system's legitimacy, builds trust, and acceptance, and contribute to the sustainability of the adjudicatory system.

As such, the principle of independence and impartiality of the adjudicators is recognized as a general principle of law within the meaning of Article 38(1)(c) of the International Court of Justice (ICJ). On an international level, the concept is well-recognized by international courts and tribunals.[165]

In arbitration, ICSID is not the only system that incorporates the principles of independence and impartiality or arbitrators. For example, the International Chamber of Commerce (ICC) Arbitration Rules require that "every arbitrator must be and remain impartial and independent of the parties involved in arbitration".[166] The 2013 UNCITRAL Arbitration Rules require the "authorities to have regard to considerations as are likely to secure the appointment of an independent and impartial arbitrator […]".[167] The arbitration rules of the Stockholm Chamber of Commerce (SCC) and the London Court of International Arbitration (LCIA) also have requirements for the independence and impartiality of every arbitrator.[168]

Independence, in the context of investment-state arbitration, refers to the arbitrator's freedom from any external influence or bias that may compromise their decision-making process. The arbitrator should

[163] Ibid, para 67
[164] Ibid, para 68
[165] For example, the Statute of the International Court of Justice provides that the Court *"shall be composed of a body of independent judges"* (Article 2 of ICJ Statute); The Statute of the International Tribunal of the Law of the Sea (ITLOS) provides that *"the Tribunal shall be composed of independent members […] with the highest reputation for fairness and integrity […]"* (Article 2 of ITLOS Statute); the European Convention on Human Rights (ECHR) in Article 21 recognize the principle of impartiality and independence as criteria for office of judges.
[166] Article 11, ICC Rules of Arbitration, entered into force from 1 January 2021. Available on: www.iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_11, accessed on 02.03.2023.
[167] Article 6 (7), 2013 UNCITRAL Arbitration Rules. Available on: www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf, accessed on 02.03.2023
[168] Article 18 of SCC 2017 Arbitration Rules: "Every arbitrator must be impartial and independent". Available on: www.sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf, accessed on 02.03.2023; and Article 5 (3) of LCIA 2020 Arbitration Rules: "All arbitrators shall be and remain at all times impartial and independent of the parties […]". Available on: www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx, accessed on 02.03.2023

not have any direct or indirect interest in the outcome of the dispute or any relationship that could create a conflict of interest. This principle guarantees that arbitrators approach the case objectively, without any preconceived notions or preferences that could potentially impact their decision.

Impartiality, on the other hand, requires arbitrators to be fair and unbiased throughout the arbitration proceedings. It ensures that arbitrators maintain an open mind, treat all parties equally, and provide each party with an equal opportunity to present their case. Impartiality also demands that arbitrators avoid any behavior or statement that could give rise to doubts about their neutrality or favoritism towards a particular party.

Considering the framework, one can easily notice that arbitration rules, in general, all have similar wording, but are usually more specific in labeling the concerns of impartiality and/or independence of arbitrators. Additionally, arbitration rules often contain disclosure rules and procedures for challenging arbitrators as a mechanism for ensuring their impartiality and independence. Given the fact that arbitrators are appointed based on a case-by-case approach, while judges in international courts and tribunals have longer mandates, it makes it understandable why the procedural and control mechanisms beforehand are more common in arbitration.[169]

3.2. The applicable legal framework

In the present case, the requirements for independence and impartiality of the arbitrators should be viewed from ICSID Convention's perspective. In order to evaluate the disqualification standard of the arbitrator, one must look back at the criteria for the appointment of an arbitrator. In this respect, the ICSID Convention provides similar language as other arbitration rules. Namely, Article 14 requires that arbitrators shall be "persons of high moral character […] who may be relied upon to exercise independent judgment."[170] If we compare the wording of the English, French, and Spanish version of the text, we can see slight differences. Namely, the English and French versions mention independent judgment, while the Spanish version mentions impartial judgment (esp: *"imparcialidad de juicio"*). Considering that all three versions of the text are authentic, there is a general consensus that both concepts – independence, and impartiality are applicable requirements. ICSID Rule 6 (2) impose a requirement to the arbitrator to disclose past and present business relationship with the parties (if any) and any other relevant information that may question his/her impartiality or independence.[171]

Article 57 of the Convention provides an opportunity for any party of the proceedings to propose a disqualification of an arbitrator based on a fact that indicates a "manifest lack" of the required qualities for an arbitrator, or on the grounds that an arbitrator was ineligible for appointment to the Tribunal.[172] Article 58 is more of a procedural nature, providing procedural rules on how a decision should be taken when a disqualification proposal is on the table.[173]

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[169] Giorgetti C. and Others: Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options, Journal of World Investment & Trade 21 (2020), p.447

[170] Article 14 Convention on the settlement of investment disputes between states and nationals of other states (hereinafter: the ICSID Convention). Available on: www.icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf, accessed on 02.02.2023

[171] ICSID Arbitration Rules, Rule 6 (2)

[172] Article 57 of the ICSID Convention

[173] Article 58: The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to

3.3. The legal standard

The central issue in the present case is the interpretation of the legal standard necessary for the disqualification of an arbitrator and its application based on the facts in the present case.

Article 57 of the ICSID Convention requires a fact that indicates "a manifest lack of the qualities" that are required for an arbitrator under Article 14. This provision indicates a certain legal standard for the disqualification of an arbitrator. As such, the wording of the provision requires qualitative interpretation by the panel, or in the present case by the Chairman. The central question is: What does the word "manifest" mean?

A brief analysis of the ICSID jurisprudence from today's perspective shows that it has applied three approaches to the interpretation of the Convention's requirements. First, in some cases, "manifest lack" required the party to show "evident" and "obvious" proof of partiality or lack of independence of an arbitrator. The second approach was considered proof of "reasonable doubts" to the arbitrator's impartiality or independence, while the third approach required an "appearance of a manifest lack" of an arbitrator's impartiality or independence.[174]

If we analyze the "manifest" from the perspective of "evident" or "obvious" proof, the legal standard for the disqualification of an arbitrator requires quite a high threshold. The indications of partiality or lack of independence of an arbitrator have to be highly possible, not just probable. Since the burden of proof is on the challenging party, it will require to show facts indicating a high probability of partiality or lack of independence. Basically, it sets a highly achievable burden of proof to the challenging party. Such an interpretation of the required legal standard was followed by ICSID tribunals in many different cases. For example, the interpretation of such a high threshold was for the first time introduced in the *Amco case,*[175] which was the first ICSID case that dealt with a proposal for disqualification of an arbitrator. The two arbitrators in the panel decided that the presented facts that the proposed arbitrator had previously given tax advice to the person who had control over the claimants; that the arbitrator's law firm and the claimant's legal representative had a business agreement for many years before the dispute; and that they shared administrative services and premises for six months since the arbitration proceedings started, were not enough to meet the threshold of this legal standard. They noted that the facts have to *"indicate not a possible lack of the quality, but a quasi-certain, or to go as high as possible, a highly probable one."*[176] In another case, an arbitrator was challenged because of her affiliation with a corporation that had stock in two of the claimants. The panel evaluated the links between the arbitrator and the claimant on four criteria: proximity, intensity, dependence, and materiality, concluding that the link was too *"remote and immaterial to suggest a manifest lack of independence or impartiality",* thus the disqualification request was rejected.[177] Another case where the same logic was followed by the ICSID's Secretary-General, was the *PIP case*.[178] Namely, the arbitrator was challenged on the basis that he was previously an arbitrator in a different ICSID case that

whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

[174] Horn P: A Matter of Appearances: Arbitrator Independence and Impartiality in ICSID Arbitration, New York University, Journal of Law & Business, Vol.11, No.2, 2014, p.357

[175] Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982) (unpublished). See more: Horn P., pp.357-358

[176] Ibid

[177] Suez case, ICSID Case Nos. ARB/03/17, ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal. See more: Horn P.: pp.359-360

[178] Participaciones Inversiones Portuarias SARL v. Gabonese Republic (hereinafter: PIP case), ICSID Case No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator (Nov. 12, 2009)

ruled against the challenging party, which triggered annulment proceedings and thus there was a risk of prejudice due to the previous exposure to similar legal issues and circumstances. The Secretary–General found that neither one of those allegations could reach the legal standard to establish the impartiality of the arbitrator.[179] Of particular interest is the reasoning in regards to the claims for exposure to similar facts and legal issues because it concerned the termination of the concession contract – very similar to the allegations made by the Blue Bank in the present case. The Secretary–General found that exposure to similar legal issues of such nature "does not justify disqualification", because the issue of expropriation is a recurring question that must be decided on a case-to-case basis.[180] What all these cases have in common is that they interpret the term "manifest" as "evident" and "obvious" which require a "heavy burden of proof".

The *PIP case,* in particular, is very interesting to compare with, from the perspective of the Blue Bank's case. It reveals how similar facts, based on the same conventional rules, can have different outcomes when the interpretation of the legal standard's threshold is differently applied.

In the present case, the word "manifest" was equalized with the words "evident" or "obvious", indicating the ease with which the arbitrator's lack of qualities can be seen. However, the controversy in the Chairman's decision is his understanding that such a standard "does not require proof of actual dependence or bias, but it is sufficient to establish the appearance of dependence or bias"[181], which basically made the Blue Bank case the first case decided by ICSID itself that successfully embrace a lower legal standard of proof for disqualification of an arbitrator.

The Chairman's decision shifted the legal standard from a "manifest" lack to an "appearance of manifest" lack of independence or impartiality. This lowered the threshold of the burden of proof, thus introducing a new approach to the interpretation of the legal standard. Instead of a quasi-certain lack of quality, this approach requires an "appearance" test in order to establish grounds for disqualification of an arbitrator. It means that the challenging party has to show only the appearance of lack of impartiality or independence, instead of an almost certain manifest lack of independence. This interpretation raises questions of how wide the interpretation can further go and potentially how much discretion it gives to the ones deciding on the disqualification request. Another important aspect of the decision is that the Chairman explicitly noted that he is basing his decision on the legal standard set by the ICSID Convention, not on other rules and guidelines such as the IBA Guidelines. Given the fact that the IBA Guidelines[182], as well as other commercial arbitration rules, such as UNCITRAL Rules and LCIA Rules, operate with a "justifiable doubts" as a legal standard for disqualification of an arbitrator, it makes the Chairman's decision even more controversial. Namely, the legal standard of "justifiable doubts" is often explained as doubts that give rise to an apprehension of bias that is reasonable to an objective observer. There is no requirement for establishing an actual bias.[183] It appears that this interpretation is much closer to the Chairman's interpretation framed as "appearance of manifest lack", than the actual language of the ICSID Convention "manifest".

Blue Bank was not the first case in the ICSID jurisprudence that introduced this approach. Two years before, in 2010, in the *Urbaser case,*[184] the tribunal noted that the legal standard test *"does not require that the actual bias demonstrate a lack of independence or impartiality"*, but *"an appearance of such bias*

[179] Ibid, para 27 - 30
[180] Ibid, para 33
[181] Ibid, para 59
[182] IBA Guidelines on Conflict of Interest in International Arbitration, 2014. Available on: www.sccinstitute.com/media/49791/iba-guidelines-on-conflict-of-interest-nov-2014-full-1.pdf, accessed on: 02.03.2022
[183] See more: Yearbook Commercial Arbitration 1997 - Volume XXII (Van den Berg (ed.); Jan 1997), Country X v. Company Q, Challenge Decision, 11 January 1995, p. 234, para 23 and 24
[184] Urbaser S.A. and Conorcio De Aguas Bilbao Biskaia Ur Part Zuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26

from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality."[185] Although the panel decided that the facts, in that case, did not meet the threshold for an appearance of such bias, they introduced the idea for such interpretation of the Convention's legal standard for the disqualification of an arbitrator.

3.4. The application of the facts of the case

As to the present case, finally, it is convenient to look at how the Chairman applied this legal standard to the facts of the case. On first look, one will notice that the Chairman's decision that disqualified Mr. Alonso contains only four paragraphs written on a half-page. However, this should not necessarily have to imply a lack of quality of the reasoning.

The Chairman noted that considering Mr. Alonso's statement and his explanation, the parties did not dispute the following facts: Mr. Alonso was a Partner at Baker & McKenzie Madrid and he was a Member of Baker & McKenzie's International Arbitration Steering Committee. Baker & McKenzie New York and Baker & McKenzie Caracas represented another investor (Longreef Investments A.V.V.) in a parallel proceeding against Venezuela, but Mr. Alonso was not directly involved in those proceedings.[186]

Given the circumstances and the facts of the case, the dispute required answers to at least four main questions: (i) whether Mr. Alonso might have had any interest in the parallel proceedings that the firms from New York and Caracas represented against Venezuela; (ii) if that is the case, whether that interest was probable enough to raise concerns of Mr. Alonso's impartiality and independence as an arbitrator in the present case; (iii) whether both cases – the *Blue Bank case* and the *Langreef case* were similar; and (iv) in case they were similar, whether that potential similarity could have risen concerns on Mr. Alonso's impartiality if he was an arbitrator of the present case.

On the first question, the Chairman found that the sharing of the corporate name, the existence of an arbitration steering committee where Mr. Alonso was a member, and based on his statement that his income depends primarily, but not exclusively on the economic return of his firm in Madrid implied a degree connection or overall coordination within the firms of Baker & McKenzie International.[187] This conclusion may imply a conclusion that Mr. Alonso might have had an interest in the parallel case. The Chairman did not go any deeper in revealing the actual link between the firms and the economic interest that a partner from one firm may have from the income of another firm. His previous interpretation of the legal standard implied that such an analysis is not necessary, because proof of actual bias is not necessary, but only an appearance suffices to reach the threshold for disqualification.

This leads to the second question concerning the level of probability. There was no further elaboration on this matter, but the radical departure from the previous interpretation of the legal standard may give answers to the question. Namely, the possibility of the existence of coordination and connections between the different firms was enough to reach the lowered threshold.

The major critique goes on the decision's reference to the third and fourth questions, concerning the allegations for similarity of the cases and its possible influence on the arbitrator's independence. The Chairman's conclusions are pretty vague, considering that the decision did not disclose what were the similar legal questions, facts, or circumstances between the two cases. Therefore, a third party cannot really see how much the cases were alike and if those facts could have influenced the arbitrator's impartiality or independence. This puts a serious mark on the overall conclusion and outcome of the case.

[185] Ibid, para 43
[186] Supra Note 4, the Decision, para 66
[187] Ibid, para 67

Conclusion

At the very least, the Blue Bank decision is evocative. On one hand, it can be seen as a "revolutionary", as the first decision for disqualification of an arbitrator was taken by ICSID itself.[188] It revealed that the previously established threshold was too high and almost impossible to reach by the challenging party. Such a threshold basically made the protection rules from bias and partiality more theoretical than practical. Hence, the decision can be considered as an evolution in the interpretation approach of the ICSID Convention's rules on arbitrator's independence and impartiality. Some authors even speak about the evolving burden of proof for the disqualification of arbitrators.[189]

On the other hand, the decision departs from the previously established consistency in the interpretation of the rules. This may have effects on the legal certainty and possible chilling effects within the arbitration community.[190]

In conclusion, the principles of independence and impartiality are the cornerstones of the arbitration process in investment-state disputes. These principles are vital in ensuring a fair and just resolution, protecting the rights of both parties involved. While challenges remain, the ongoing efforts to strengthen the integrity of the system demonstrate a commitment to upholding the highest standards of justice and fairness in international dispute resolution.

However, the debate over the rules and standards for the independence and impartiality of arbitrators is not over. It is even more interesting in the context of the discussions of the possible reform of the ISDS.[191]

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[188] There was one decision before the Blue Bank case. Namely, in the Pay v. Chile case, ICSID asked the Permanent Court of Arbitration to offer a recommendation on disqualification of Mr. Mohamed Bedjaoui.

[189] See more: Supra note 20, Horn P., p.353

[190] Commenting the decision, the Blue Bank's counsel expressed disappointment with the decision, noting that we are "witnessing a concentration of the legal profession into major international firms." (Comments to IAReporter). Another lawyer from DLA Piper commented that the decision could make it much more difficult to appoint arbitrators from a large global legal firms whose other offices may have claims against the same state. See more: Peterson E. L.: ICSID removes arbitrator in Blue Bank v. Venezuela case due to his law firm elsewhere acting against Venezuela, 18.11.2013

[191] 2018 Report of UNCITRAL Working Group III, para 67: "[…] It was re-affirmed that, in order to be considered effective, the ISDS framework should not only ensure actual impartiality and independence of decision makers, but also the appearance thereof. Therefore, it was said that any reform in that respect should aim at addressing both actual and perceived lack of independence and impartiality."

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