International Centre for Settlement of Investment Disputes

Caratube International Oil Company LLP & Mr. Devincci Salah Hourani

The Claimants

v.

Republic of Kazakhstan

The Respondent

ICSID Case No. ARB/13/13

DECISION ON THE PROPOSAL FOR DISQUALIFICATION OF Mr. Bruno Boesch

---

Rendered by the Unchallenged Arbitrators

Dr. Laurent Lévy, President
Prof. Laurent Aynès, Arbitrator

Secretary of the Tribunal
Ms. Milanka Kostadinova

Date: 20 March 2014

TABLE OF CONTENT

I. THE PARTIES

1. The Claimants are Caratube International Oil Company LLP ("**Caratube**"), a Kazakh-incorporated company, and Mr. Devincci Salah Hourani, a U.S. national (jointly "**the Claimants**")[1].

2. The Respondent is the Republic of Kazakhstan ("**Kazakhstan**" or "**the Respondent**").

II. PROCEDURAL HISTORY

3. On 5 June 2013, the Claimants submitted a Request of Arbitration against the Respondent (the "**Request of Arbitration**") to the International Centre for Settlement of Investment Disputes ("**ICSID**").

4. On 28 June 2013, the Secretary-General of ICSID registered the Request of Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965 (the "**ICSID Convention**").

5. On 4 September 2013, the Claimants, represented by the law firm Derains & Gharavi, appointed Prof. Laurent Aynès to serve as arbitrator.

6. On 26 September 2013, the Respondent, represented by the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP, appointed Mr. Bruno Boesch to serve as arbitrator.

7. By letters dated 1 October and 19 November 2013, the Claimants "flagged their concerns in relation to Mr. Boesch's serving as co-arbitrator appointed by Curtis, Mallet-Prevost, Colt & Mosle LLP in several cases"[2], including the UNCITRAL arbitration in *Ruby Roz Agricol v. The Republic of Kazakhstan*. They therefore requested that Mr. Boesch indicate "the number of appointments he has received by Curtis, Mallet-Prevost, Colt & Mosle LLP, any other professional interactions in any capacity between Curtis, Mallet-Prevost, Colt &

[1] Request of Arbitration dated 5 June 2013, para. 1, p. 3.
[2] Claimants' letter dated 15 January 2014, para. 2.

Mosle LLP and Mr. Boesch, as well as any other circumstances that could in the eyes of the Parties and ICSID affect his independence and impartiality"[3].

8. On 3 December 2013, pursuant to Article 6(2) of the ICSID Arbitration Rules, Mr. Boesch made the following disclosure:

> *"2010 appointment as arbitrator by PDVSA Petróleo S.A., represented by Joseph Pizzurro of Curtis, Mallet-Prevost, Colt & Mosle, New York, in a dispute against ConocoPhillips. Award being finalized.*
>
> *2011 appointment as arbitrator by the Republic of Kazakhstan, represented by Curtis, Mallet-Prevost, Colt & Mosle, in a dispute against Ruby Roz Agricol. Case dismissed for lack of jurisdiction in award dated 1 August 2013."*

9. On 20 December 2013, the Parties jointly nominated Dr. Laurent Lévy to act as President.

10. By letter dated 7 January 2014, the Secretary-General of ICSID informed the Parties that Prof. Laurent Aynès, Mr. Bruno Boesch and Dr. Laurent Lévy had all accepted their appointments as arbitrators and therefore, pursuant to Article 6 of the ICSID Arbitration Rules, the Arbitral Tribunal was deemed to have been constituted and the proceedings to have begun, as of that date. Copies of the arbitrators' signed declarations required under ICSID Arbitration Rule 6(2) were attached to the Secretary-General's letter.

11. On 15 January 2014, the Claimants sent a letter to the ICSID Secretariat, requesting Mr. Boesch to resign from the Arbitral Tribunal pursuant to Article 8 of the ICSID Arbitration Rules ("**Request for Mr. Boesch's Resignation**").

12. On 21 January 2014, the ICSID Secretariat informed the Parties that Mr. Boesch considered himself independent and impartial and therefore did not intend to resign from the Arbitral Tribunal. The Secretariat also requested the Claimants to confirm as quickly as possible their intention to submit a proposal for Mr. Boesch's disqualification and, in the affirmative, to submit such proposal by 28 January 2014.

[3] Claimants' letter dated 15 January 2014, para. 2, quoting Claimants' letter to ICSID dated 1 October 2013 (emphasis omitted).

13. On 22 January 2014, the Claimants confirmed that a proposal for the disqualification of Mr. Boesch would be filed by 28 January 2014.

14. On 28 January 2014, the Claimants proposed the disqualification of Mr. Bruno Boesch pursuant to Article 57 of the ICSID Convention and Article 9 of the ICSID Arbitration Rules (the "**Proposal**").

15. On 29 January 2014, the ICSID Secretariat notified the Parties that the proceedings were suspended until a decision has been taken on the Proposal, pursuant to Article 9(6) of the ICSID Arbitration Rules. Dr. Laurent Lévy and Prof. Laurent Aynès (the "**Unchallenged Arbitrators**") were seized of the disqualification matter pursuant to Article 58 of the ICSID Convention and Article 9(4) of the ICSID Arbitration Rules.

16. On 4 February 2014, the ICSID Secretariat conveyed to the Parties a procedural calendar for the filing of written submissions on the Proposal.

17. On 12 February 2014 and in accordance with the procedural calendar of 4 February 2014, the Respondent filed its Response to the Proposal (the "**Response**"), requesting the Unchallenged Arbitrators to dismiss the Proposal and to order the Claimants to pay Respondent the costs incurred in connection with the Proposal.

18. On 13 February 2014 and in accordance with the procedural calendar of 4 February 2014, Mr. Boesch furnished his explanations as to the Proposal pursuant to Article 9(3) of the ICSID Arbitration Rules (the "**Explanations**").

19. On 28 February 2014 and in accordance with the procedural calendar of 4 February 2014, the Claimants filed additional comments on the Respondent's and Mr. Boesch's observations of 12 and 19 February 2014 respectively (the "**Claimants' Comments**"), and the Respondent reiterated its position set forth in its letter of 12 February 2014 that there is no reason to question the independence or impartiality of Mr. Boesch.

III. POSITION OF THE PARTIES

A. The Claimants' Position

20. According to the Claimants, it is undisputable that under Articles 57 and 14(1) of the ICSID Convention, arbitrators must be, *inter alia*, independent and impartial.

21. The Claimants submit that an objective test "based on the reasonable evaluation of the evidence by a third party*"* must be applied to evaluate the independence and impartiality of an arbitrator[4]. Furthermore, with respect to the applicable burden of proof, the Claimants argue that the word "manifest" in Article 57 of the ICSID Convention applies to the standard to which the lack must be established, rather than the seriousness of the lack of one of the qualities that arbitrators must possess under Article 14 of the ICSID Convention. For the Claimants, the applicable standard and burden of proof are expressed in the following holding of the two "remaining" members of the *ad hoc* committee in *Vivendi v. Argentina*:

> *"[i]f the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld"*[5]*.*

22. From this the Claimants draw the conclusion that Mr. Boesch must be disqualified if the Claimants are able to show that there are "reasonable doubts" as to his independence or impartiality. The appearance of dependence or bias is sufficient. Proof of actual dependence or bias is not required[6]. In particular, the Respondent's position that there must be "clear evidence" of independence or impartiality must be rejected, as it is incompatible with the very notion of impartiality, which constitutes a "state of mind", rather than an objective concept[7].

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[4] Proposal paras 6 and 8, quoting *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, 12 November 2013. See also the Claimants' Comments of 28 February 2014, para. 2.

[5] Proposal, para. 7, quoting *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Challenge, 3 October 2001, para. 25.

[6] Proposal, para. 8.

[7] The Claimants' Comments of 28 February 2014, para. 2 with reference to *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013.

23. According to the Claimants, irrespective of the applicable standard and burden of proof, the objective circumstances of Mr. Boesch's appointment as arbitrator in the present arbitration, taken individually, let alone collectively, constitute manifest evidence of Mr. Boesch's lack of independence and impartiality, thereby justifying his disqualification based on Articles 14(1) and 57 of the ICSID Convention. In particular, the Claimants submit that Mr. Boesch manifestly lacks independence and impartiality in the present arbitration for essentially two reasons.

24. First, the Claimants submit that Mr. Boesch manifestly cannot be independent and impartial in this arbitration due to his serving as arbitrator appointed by Curtis, Mallet-Prevost, Colt & Mosle LLP on behalf of Kazakhstan in the case of *Ruby Roz Agricol v. The Republic of Kazakhstan*.

25. According to the Claimants, there are "obvious similarities between the *Ruby Roz* case and the present arbitration". For instance, Ruby Roz Agricol LLP is a company fully owned by Mr. Kassem Omar, who holds 8% of the shares in Caratube and is the brother-in-law of Mr. Devincci Hourani, one of the Claimants in the present arbitration. The *Ruby Roz* case was brought on the basis of the 1994 Kazakh Foreign Investment Law, which is one of the legal instruments relied upon in the present case (and indeed one of the primary bases of jurisdiction in the present arbitration, following the dismissal on 21 February 2014 of Caratube's annulment application of the award in *Caratube v. Kazakhstan*, based on the US-Kazakhstan Bilateral Investment Treaty)[8].

26. Moreover, the Claimants submit that in the present arbitration they rely on essentially the same factual allegations with respect to acts and omissions and pattern of conduct by Kazakhstan against Mr. Omar and the Hourani family, as well as legal grounds, as the claimant in the *Ruby Roz* case. As a result, several individuals who submitted witness statements in the *Ruby Roz* case are likely to also submit witness statements in the present arbitration[9]. With respect to this last point, the Claimants observe that the fact that no witnesses were heard in the *Ruby Roz* case is irrelevant as witness statements were submitted. In addition, if the scheduled hearing of the witnesses did not take place in the

[8] Proposal, para. 13. See also Request for Mr. Boesch's Resignation, para. 6 and the Claimants' Comments of 28 February 2014, paras 5-6.
[9] Proposal, para. 13. See also Request for Mr. Boesch's Resignation, para. 6 and the Claimants' Comments of 28 February 2014, paras 7 and 10.

Ruby Roz case, this was because of the acts of Kazakhstan. Moreover, the matter and content of the witness testimonies were discussed at the hearing and the tribunal formed an opinion as to the credibility of certain of the Claimants' witnesses (including witnesses who will testify in the present arbitration). Indeed, upon deliberations, the tribunal in the *Ruby Roz* arbitration rendered a procedural order, signed by all members of the tribunal, thus including Mr. Boesch, expressing credibility concerns[10].

27. For the Claimants, Mr. Boesch's participation in the *Ruby Roz* case manifestly affects his ability to exercise independent and impartial judgment in the present arbitration despite the fact that said case was dismissed on jurisdiction. In fact, in the *Ruby Roz* case full submissions were exchanged and a hearing was held both on jurisdiction and the merits[11]. Therefore, unlike the Unchallenged Arbitrators, Mr. Boesch has knowledge of the factual and legal arguments pertaining to both jurisdiction and the merits in the *Ruby Roz* case and he participated in the decision on jurisdiction based on the Kazakh Foreign Investment Law. For the Claimants, Mr. Boesch's serving as arbitrator in the *Ruby Roz* case therefore gives rise to a manifest risk of pre-judgment in relation to both jurisdiction and the merits of the present case, an inability to exercise independent and impartial judgment, and an imbalance in the Arbitral Tribunal which is adverse to the Claimants[12]. According to the Claimants, Mr. Boesch's assurance that he considers it "improper to form any opinion based upon external knowledge including in particular what may be found in the public media, and [that he] will not do so" does not suffice to remove doubts as to his impartiality and independence. Quoting from the Partial Award on Jurisdiction in *EnCana Corp v. Ecuador*, the Claimants argue that Mr. Boesch cannot maintain a "'Chinese wall' in his own mind [and] his understanding of the situation may well be affected by information acquired in the [Ruby Roz] arbitration"[13].

28. The Claimants submit that the similarity in cases is an important consideration in the decision on the Proposal. In *Suez v. Argentina* an important criterion leading to the dismissal of the proposal for disqualification was that the two

[10] The Claimants' Comments of 28 February 2014, paras 11-12.
[11] The Unchallenged Arbitrators observe that, following what the *Ruby Roz* award on jurisdiction describes as "a dramatic turn of events", the hearing in the *Ruby Roz* case was rescheduled and its scope confined to the issue of jurisdiction (see *infra*, para. 69).
[12] Proposal, paras. 15-19. See also Request for Mr. Boesch's Resignation, para. 7.
[13] The Claimants' Comments of 28 February 2014, paras 8-10.

cases at issue were "distinctly different"[14]. Moreover, in *Participaciones v. Gabonese Republic* the existence of "common factual elements" between the different cases concerned was considered so as to determine whether there was an imbalance within the tribunal[15]. In response to the Respondent's argument that the similarity in cases does not constitute a good ground for the disqualification of an arbitrator, the Claimants argue that in all the cases relied upon by the Respondent in support of its argument, in particular the *Saba Fakes v. Republic of Turkey* case, the challenge was rejected because the claimant had failed to establish that both cases concerned were related. Unlike in the case at hand, in all the cases cited by the Respondent where the challenge was rejected, the claimants, facts and legal issues were different. Therefore, the Claimants submit that the cases relied upon by the Respondent, including the *Saba Fakes* case, are irrelevant[16]. For the Claimants the same applies to the *Electrabel v. Hungary* case, also relied upon by the Respondent, as the cases at issue in that case were "obviously different". In addition, the Claimants point out that the only available information with respect to the challenge in the *Electrabel v. Hungary* case is a one-paragraph description of the claimant's position in an article drafted by Electrabel's counsel[17].

29. While for the Claimants the above already suffices *per se* to disqualify Mr. Boesch as an arbitrator in the present arbitration, Mr. Boesch's manifest lack of impartiality and independence, as well as the imbalance in the Tribunal, are further aggravated by Mr. Boesch's failure to address the similarities between the *Ruby Roz* case and the present arbitration. For the Claimants, Mr. Boesch thereby "knowingly concealed from the other members of the Tribunal his knowledge of the facts of the [*Ruby Roz*] case and the opinion he had in this respect"[18].

30. Second, the Claimants submit that Mr. Boesch manifestly cannot exercise independent and impartial judgment in the present arbitration due to his numerous appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent. The Claimants observe that while Mr. Boesch

[14] Proposal, para. 17.
[15] Proposal, para. 18. See also the Claimants' Comments of 28 February 2014, para. 9.
[16] The Claimants' Comments of 28 February 2014, para. 13.
[17] The Claimants' Comments of 28 February 2014, para. 14.
[18] Proposal, paras 20-22; the Claimants' Comments of 28 February 2014, paras 8 and 15-17.

disclosed two appointments made by Curtis, Mallet-Prevost, Colt & Mosle LLP in 2010 and 2011 respectively, one of which on behalf of Kazakhstan, he did not disclose at least one other appointment by Curtis, Mallet-Prevost, Colt & Mosle LLP, namely in an ICC arbitration that was active until August 2010. According to the Claimants, by limiting his disclosure to the last three years, without any indication as to such a limitation, Mr. Boesch disregarded the Claimants' request for a broad disclosure as expressed in their letters dated 1 October and 19 November 2013[19]. In response to the Respondent's and Mr. Boesch's argument that Rule 6 of the ICSID Arbitration Rules and the IBA Guidelines on Conflicts of Interests limit an arbitrator's obligation to disclose to the past three years, the Claimants draw the attention to ICSID Arbitration Rule 6 which requires an arbitrator to disclose, *inter alia*, "any other circumstance that might cause [his/her] reliability for independent judgment to be questioned by a party". Because the Claimants have clearly voiced their concerns as to Mr. Boesch's lack of impartiality and independence in their letters of 1 October and 19 November 2013, the Respondent's and Mr. Boesch's explanations with respect to the three year limitation of the latter's disclosures are insufficient[20].

31. According to the Claimants, Mr. Boesch's numerous appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent raise serious doubts as to his ability to exercise independent judgment in the present arbitration. The Claimants submit that "multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case"[21]. Because Mr. Boesch was appointed as arbitrator in a similar case and by the same Respondent State, his multiple appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent warrant his disqualification in the present arbitration. Indeed, unlike in the case at hand, in all the cases where a disqualification based on numerous appointments by the same respondent State was rejected, the claimants, as well as the facts and legal issues were different.

[19] Proposal, paras 23-25. See also Request for Mr. Boesch's Resignation, paras 11-12.
[20] The Claimants' Comments of 28 February 2014, para. 19.
[21] Proposal, para. 26, quoting *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, 5 May 2011.

32. According to the Claimants, Mr. Boesch's disqualification is further warranted by the fact that due to his lack of prior ICSID experience, it is clear that his appointment in the present arbitration was not meritsbased but rather made so that "the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case"[22].

33. Finally, the Claimants submit that should the Unchallenged Arbitrators come to the conclusion that there are doubts as to Mr. Boesch's partiality and lack of independence, his challenge should nevertheless be upheld based on a balancing of the risks and inconveniences at stake for the Parties in the present arbitration. While the Respondent would face only the inconvenience of having to select one new arbitrator among one hundred or so ICSID specialists, the Claimants would face the risk of starting an arbitration with one of the three Tribunal Members already against them[23].

B. The Respondent's Position

34. The Respondent submits that the proposal for the disqualification of Mr. Boesch should be dismissed and that the Claimants should be ordered to pay the Respondent the costs incurred in connection with the Proposal.

35. Concerning the applicable legal standard, the Respondent generally agrees that an arbitrator in ICSID proceedings may be disqualified in case of a manifest lack of independence or impartiality, the term "manifest" meaning "obvious or evident". Therefore, the lack of independence or impartiality has to be "discerned with little effort or without deeper analysis"[24]. The Respondent further agrees that a proposal for disqualification is subject to an objective test in that it has to be based on objective facts that, from the point of view of a reasonable and informed third person, evidently and clearly constitute a manifest lack of independence or impartiality; suppositions, speculative arguments, presumptions or beliefs do not suffice[25].

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[22] Proposal, paras 27-28.
[23] Proposal, para. 29; the Claimants' Comments of 28 February 2014, para. 21.
[24] Response, p. 2, citing *Getma International et al v. The Republic of Guinea*, ICSID Case No. ARB/11/29, Decision on the Proposal to Disqualify Mr. Bernardo M. Cremades, Arbitrator, 28 June 2012 and *EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008.
[25] Response, pp. 2-3.

36. Concerning the burden of proof, the Respondent disagrees with the Claimants' suggestion that the existence of reasonable doubts as to an arbitrator's impartiality or independence suffices to warrant a disqualification. Instead, clear evidence is required. The "heavy burden of proof" requires the challenging party "to establish facts that make it obvious and highly probable, not just possible," that the challenged arbitrator cannot exercise independent or impartial judgment[26].

37. Concerning the merits of the Claimants' proposal for the disqualification of Mr. Boesch, the Respondent submits that the two grounds invoked by the Claimants in support of the Proposal are baseless and should be rejected.

38. First, with respect to Mr. Boesch's serving as an arbitrator in the *Ruby Roz* case, the Respondent submits that the Claimants' arguments do not in any way prove a lack of independence or impartiality. The Claimants do not point out any "conduct" of Mr. Boesch or fact that would meet the requirements for his disqualification. In particular, the fact that the Hourani family may be implicated in both cases does not render Mr. Boesch unable to exercise independent judgment in the present arbitration. Furthermore, according to the Respondent, the *Ruby Roz* case is "significantly different" from the present arbitration in that the claimants in both cases are different and the cases concern "completely unrelated industries". While the *Ruby Roz* case concerned the alleged expropriation of a chicken farm, the present arbitration concerns the termination of an oil concession contract[27].

39. The Respondent draws the attention to the *Saba Fakes v. Republic of Turkey* case and the *Electrabel S.A. v. Republic of Hungary* case. In these cases, the proposal for disqualification was based on the similarities between the two arbitrations in which the challenged arbitrator was appointed, the argument being that the involvement in the first proceeding would affect the challenged arbitrator's independence or impartiality in the second proceeding and thus warrant a disqualification. However, the Respondent points out that in both cases the proposal for disqualification was dismissed on the ground that the challenging party had failed to establish the existence of any objective

[26] Response, p. 3, citing the *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008.
[27] Response, p. 4.

circumstance that would cast doubt on the challenged arbitrator's ability to exercise independent judgment.

40. For the Respondent, the same holds true in the case at hand. First, the Respondent argues that the facts in the *Ruby Roz* case and the present arbitration are "not substantially similar"[28]. Even if they were, the mere fact that an arbitrator has faced similar facts or legal issues in another arbitration cannot be a ground for finding a manifest lack of independence or impartiality[29]. Second, the Respondent points out that no witnesses ever testified on the merits in the *Ruby Roz* case and no decision on the merits was ever taken. For the Respondent, even if this had been the case, this would not constitute facts or conduct demonstrating Mr. Boesch's lack of independence or impartiality. Third, Mr. Boesch cannot be disqualified as an arbitrator in the present arbitration on the ground that the Kazakh Foreign Investment Law is invoked as an alternative basis for jurisdiction in the present arbitration, and was invoked unsuccessfully in the *Ruby Roz* case. In fact, relying on *Universal v. Venezuela*, the Respondent submits that the fact that Mr. Boesch participated in the unanimous decision in *Ruby Roz* to deny jurisdiction does not mean that Mr. Boesch cannot decide the law and the facts impartially in the present case. Moreover, to the extent that any similarities exist between the *Ruby Roz* case and the present arbitration, what is decisive is the intrinsic value of a particular legal argument and not the number of times the challenged arbitrator hears a pleading. Finally, the Respondent points out that the decision on jurisdiction in the *Ruby Roz* case was rendered unanimously and that the Claimants' dissatisfaction with this decision cannot be accepted as evidence of a lack of independence or impartiality[30].

41. Second, with respect to the Claimants' second argument concerning Mr. Boesch's multiple appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent, the Respondent observes that prior to the present arbitration, Kazakhstan appointed Mr. Boesch only once, namely in the *Ruby Roz* case and this fact was duly and timely disclosed by Mr. Boesch in conformity with Article 6(2) of the ICSID Arbitration Rules, as well as Section 3.1.3 of the IBA Guidelines on Conflicts of Interest, which provides for an

[28] Response, p. 5.
[29] Response, pp. 5-6.
[30] Response, p. 6.

obligation to disclose two or more repeat appointments within the past three years.

42. As to Mr. Boesch's prior appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP, the Respondent refers to Section 3.3.7 of the IBA Guidelines on Conflicts of Interest, according to which an obligation to disclose arises if an arbitrator was appointed more than three times by the same counsel or law firm within the past three years. Because Mr. Boesch had only received two appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP within the last three years (namely in the *Ruby Roz* case and the *ConocoPhillips* case), he had no obligation of disclosure. This notwithstanding, Mr. Boesch still disclosed both appointments.

43. According to the Respondent, even if Curtis, Mallet-Prevost, Colt & Mosle LLP had appointed Mr. Boesch more often within the last three years, importantly this would only have given rise to an obligation to disclose, but not constitute a ground for a disqualification. The explanation to General Standard 3(b) to the IBA Guidelines on Conflicts of Interest expressly states that "disclosure is not an admission of a conflict of interest. […] [A]ny challenge should be successful only if an objective test […] is met".

44. Finally, with respect to the appointment of Mr. Boesch by Curtis, Mallet-Prevost, Colt & Mosle LLP in an unrelated ICC arbitration in February 2008, the Respondent argues that Mr. Boesch had no obligation to disclose this appointment. Accordingly, a failure to disclose this appointment cannot be grounds for Mr. Boesch's disqualification in the present arbitration.

IV. MR. BRUNO BOESCH'S EXPLANATIONS

45. As was stated in paragraph 8 above, on 3 December 2013, Mr. Boesch disclosed his appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP in the *Ruby Roz* case (on behalf of Kazakhstan) and the *ConocoPhillips* case, pursuant to Article 6(2) of the ICSID Arbitration Rules.

46. As was stated in paragraph 12 above, on 21 January 2014, the ICSID Secretariat informed the Parties that Mr. Boesch considered himself independent and impartial and therefore did not intend to resign from the Arbitral Tribunal.

47. On 13 February 2014, Mr. Boesch also furnished explanations in accordance with Article 9(3) of the ICSID Arbitration Rules, stating in relevant part as follows:

> "*1. I wish to reiterate my assurance that I am independent of the parties and I am and will remain impartial.*
>
> *2. Acting as an arbitrator in the UNCITRAL arbitration Ruby Roz Agricol LLP v. the Republic of Kazakhstan does not affect my ability to exercise independent judgement in this case. In particular, the award on jurisdiction in the Ruby Roz Agricol LLP case, a unanimous award, was made on the basis of the particular facts of that case. No decision on the merits was ever made, and no witnesses on the merits ever heard.*
>
> *3. I consider that it would be improper for me to discuss or disclose anything that transpired in the Ruby Roz Agricol LLP case, and I will not do so.*
>
> *4. I shall form an opinion in this case on the basis of the evidence and the arguments that will be presented by the parties. I consider it improper to form any opinion based upon external knowledge including in particular what may be found in the public media, and I will not do so.*
>
> *5. In accordance with ICSID Arbitration Rule 6 and the IBA Guidelines on Conflicts of Interest in International Arbitration I disclosed the cases in which I had been appointed by either the Republic of Kazakhstan or Curtis, Mallet-Prevost, Colt & Mosle in the three prior years to December 3, 2013, the date of my disclosure. I continue to consider that such disclosure was sufficient and in accordance with good practice. However, since the question has been raised, you may wish to note that prior to that three year period I was appointed by Curtis, MalletPrevost, Colt & Mosle (never by the Republic of Kazakhstan however) as an arbitrator in another three matters over a period of twenty years.*
>
> *I do not consider that this in any way affects my independence or impartiality."*

V. APPLICABLE LEGAL FRAMEWORK AND STANDARD

48. The relevant provisions on disqualification proceedings are to be found in the ICSID Convention and the ICSID Arbitration Rules. Regarding the initiation of the disqualification procedure, Article 57 of the ICSID Convention provides in relevant part as follows:

> *"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".*

49. Article 14(1), to which Article 57 of the ICSID Convention refers, specifies the qualities required from an arbitrator:

> *"Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators".*[31]

50. Article 58 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules provide guidance on the disqualification procedure. Article 58 reads:

> *"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 whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter II or Section 2 of Chapter IV".*

51. And Rule 9 provides:

> *"(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 therefore.*
>
> *(2) The Secretary-General shall forthwith:*
>
> *(a) transmit the proposal to the members of the Tribunal and if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and*
>
> *(b) notify the other party of the proposal.*

[31] Article 57 read in combination with Article 14(1) shows that the qualities expected of members serving on the Panels of Arbitrators (persons designated by Contracting States to the ICSID Convention or the Chairman of the ICSID Administrative Council and willing to serve as arbitrators) also apply to arbitrators not nominated from these Panels.

> *(3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.*
>
> *(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.*
>
> *(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.*
>
> *(6) The proceeding shall be suspended until a decision has been taken on the proposal".*

52. It is generally accepted, and indeed not disputed by the Parties in the present arbitration, that under the ICSID Convention and Arbitration Rules, arbitrators must be both impartial and independent[32].

53. It is equally not disputed that while impartiality refers to the absence of bias or predisposition towards one party, independence relates to the absence of external control, in particular of relations with a party that might influence an arbitrator's decision[33]. Together, independence and impartiality "protect parties against arbitrators being influenced by factors other than those related to the merits of the case"[34].

54. The Parties agree that the applicable legal standard is "an objective standard based on a reasonable evaluation of the evidence by a third party"[35] or, in other words, on the "point of view of a reasonable and informed third person"[36].

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[32] See *Burlington Resources, Inc. v. Republic of Ecuador*, *op. cit.* fn 7, para. 65, with the references cited; *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser (Spanish), 13 December 2013, para. 70, with the references cited; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, *op. cit.* fn 4, para. 58, with the references cited; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, para. 74, with the references cited.

[33] Proposal, para. 6; Response, p. 2.

[34] *Burlington Resources, Inc. v. Republic of Ecuador*, *op. cit.* fn 7, para. 66, with the references cited; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, *op. cit.* fn 4, para. 59, with the references cited; *Abaclat and Others v. Argentine Republic*, *op. cit.* fn 32, para. 75.

[35] Proposal, para. 8, quoting *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, *op. cit.* fn 4, para. 60.

55. Moreover, the Parties agree that the word "manifest" in Article 57 of the ICSID Convention means "evident" or "obvious" in that it "relates to the ease with which the alleged lack of [independence or impartiality] can be perceived"[37]. Expressed differently, the lack of independence and impartiality is "evident" or "obvious" (and therefore "manifest") if it can be "discerned with little effort and without deeper analysis"[38].

56. However, the Parties disagree with respect to the applicable burden of proof. The Claimants argue that Mr. Boesch must be disqualified if they can show that there are "reasonable doubts" as to his independence or impartiality[39]. The Respondent, on the other hand, submits that the existence of reasonable doubts is not enough. Instead, the Claimants must submit clear evidence of Mr. Boesch's lack of impartiality and independence[40].

57. Having considered the Parties' respective positions and in the light of recent ICSID jurisprudence, the Unchallenged Arbitrators find that the applicable burden of proof is expressed in the Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal in *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, as subsequently confirmed in *Burlington Resources, Inc. v. Republic of Ecuador*, *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina* and *Abaclat and Others v. Argentine Republic*. In these cases, Dr. Kim Yong Kim, the Chairman of the ICSID Administrative Council found 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"[41]. Therefore, the Claimants must show that a third party would find that there is an evident or

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[36] Response, p. 2.
[37] Proposal, para. 8, quoting *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, *op. cit.* fn 4, para. 61.
[38] Response, p. 2, quoting *EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A. v. Argentine Republic*, *op. cit.* fn 24, para. 68.
[39] See *supra*, para. 22. See also *Abaclat and Others v. Argentine Republic*, *op. cit.* fn 32, para. 71.
[40] See *supra*, para. 36.
[41] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, *op. cit.* fn 4, para. 59. See also *Burlington Resources, Inc. v. Republic of Ecuador*, *op. cit.* fn 7, para. 66; *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina*, *op. cit.* fn 32, para. 71; *Abaclat and Others v. Argentine Republic*, *op. cit.* fn 32, para. 76.

obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case[42].

58. Finally, Mr. Boesch and the Parties, in particular the Respondent, have referred to the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration (the **"IBA Guidelines**").

59. As a general matter, in reaching their decision on the Proposal for the disqualification of Mr. Boesch, the Unchallenged Arbitrators are only bound by the standards set forth in the ICSID Convention and Arbitration Rules. They are not bound by the IBA Guidelines and consider them as merely indicative. Indeed, the IBA Guidelines are concerned with the issue of disclosure by arbitrators, rather than disqualification. They do state that they "are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties"[43]. This does not mean that bodies deciding on challenges may not seek guidance from the Guidelines as a helpful instrument reflecting a transnational consensus on their subject matter. Other arbitrators have recognized the usefulness of the IBA Guidelines, albeit always with the understanding of their non-binding nature. For instance, in *Blue Bank* and *Burlington*, the Chairman of the ICSID Administrative Council found them to be "useful references"[44]. In *Alpha Projekt*, the two remaining arbitrators found them "instructive",[45] and in *Urbaser*, they referred to them as "a most valuable source of inspiration".[46] In any case, as will be seen, the question does not arise in this arbitration as there is no need for any guidance from the IBA Guidelines for deciding on the Proposal.

60. After deliberating, and considering all facts alleged and arguments submitted by the Parties, the Unchallenged Arbitrators reach the following decision.

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[42] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, *op. cit.* fn 4, para. 69. See also *Burlington Resources, Inc. v. Republic of Ecuador*, *op. cit.* fn 7, para. 80; *Abaclat and Others v. Argentine Republic*, *op. cit.* fn 32, para. 82.
[43] IBA Guidelines, Introduction, para. 6.
[44] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, *op. cit.* fn 4, para. 62; *Burlington Resources, Inc. v. Republic of Ecuador*, *op. cit.* fn 7, para. 69.
[45] *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 March 2010, para. 56.
[46] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Cambell McLachlan, 12 August 2010, para. 37.

VI. ANALYSIS

61. Claimants invoke two grounds for the disqualification of Mr. Boesch:

- First, Mr. Boesch's serving as arbitrator appointed by Curtis, Mallet-Prevost, Colt & Mosle LLP on behalf of Kazakhstan in the case of *Ruby Roz Agricol LLP v. The Republic of Kazakhstan*;
- Second, Mr. Boesch's numerous appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent.

62. The first ground concerning the *Ruby Roz* case in turn results in three alleged cases to disqualify Mr. Boesch, namely: 1) his participation in the *Ruby Roz* case will lead Mr. Boesch to some inclination towards the position of the Respondent who prevailed in that case, thus putting his impartiality and independence into question; 2) his knowledge acquired in the *Ruby Roz* case will lead to a manifest imbalance within the Tribunal as the two other arbitrators, namely the undersigned, will not be privy to that body of knowledge; and 3) Mr. Boesch concealed from the other members of this Tribunal his knowledge of the facts of the *Ruby Roz* case and the opinion he had in this respect, thus aggravating the imbalance within the Tribunal.

63. The Unchallenged Arbitrators will review the above grounds in the order listed (A. and B.), before setting forth their decision (VII).

64. However, before opening the discussion of the Claimants' grounds for disqualification it is important to underscore what is not disputed in the present case: Mr. Boesch is a "person of high moral character and recognized competence in the field of law" within the meaning of Article 14(1) of the ICSID Convention. Moreover, it has not been suggested by the Claimants that there is proof of actual dependence or bias. As was pointed out in paragraph 57 above, the issue is not Mr. Boesch's actual independence and, even more so, not his actual impartiality, his state of mind, his ethical or moral strength, but rather whether a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case. To avoid any ambiguity, the Unchallenged Arbitrators have no doubt about the truth of Mr. Boesch's representations as made in particular in his Explanations**.**

65. Furthermore, there is a need immediately to stress that the situation where an arbitrator has possible prior knowledge of facts relevant to the outcome of the dispute must be carefully distinguished from the situation where an arbitrator has possible prior exposure to legal issues that would be equally relevant in that regard. First, in case of an overlap between issues of law in two otherwise unrelated cases, the record on which such issues will be decided will not be of the same nature in the two instances: as to the facts, the arbitrators will rely on documents and witnesses specific to each dispute (or more than one dispute), which are not of a general and impersonal character; as to the law, the arbitrators will rely on generally available knowledge of an impersonal and general character, including expert-witness testimony. The expert will opine on matters about which he has authoritative knowledge, as opposed to a fact-witness who states what he has seen or otherwise knows. Second, the arbitrators should be experts in their field, especially in general in the field of law[47], while they should never be witnesses.

A. Mr. Boesch's serving as arbitrator appointed by Curtis, Mallet-Prevost, Colt & Mosle LLP on behalf of Kazakhstan in the case of *Ruby Roz Agricol LLP v. The Republic of Kazakhstan*

66. Before examining the Claimants' ground regarding Mr. Boesch's serving as arbitrator in the case of *Ruby Roz Agricol LLP v. The Republic of Kazakhstan* it is useful to briefly describe the dispute underlying that case. In doing so, the Unchallenged Arbitrators exclusively rely on the information provided by the Parties in their written submissions concerning the proposal for Mr. Boesch's disqualification, including on the Award on Jurisdiction rendered in the *Ruby Roz* case, a hyperlink to which was provided by the Claimants in footnote 11 to the Proposal.

67. In October 2010, Ruby Roz Agricol LLP, a Kazakh-incorporated company active in the poultry sector, and its owner, Mr. Kassem Abdullah Omar, commenced an UNCITRAL arbitration against The Republic of Kazakhstan. In December 2010, Mr. Bruno Boesch was appointed as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP on behalf of Kazakhstan. In October 2011, Mr. Omar

[47] See Art. 14(1) of the ICSID Convention: "Persons designated to serve on the Panels shall be persons of […] recognized competence in the fields of law, commerce, industry or finance […]. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators".

withdrew from the proceedings and the arbitration continued with Ruby Roz as the only claimant.

68. In the *Ruby Roz* case the claimant argued that from April 2007, as a result of the breakdown of relations between the President of Kazakhstan and his then son-in-law, Mr. Aliyev, various Kazakh government agencies and authorities engaged in "a campaign of persecution" against Mr. Aliyev and those associated with him, including the Hourani family and Mr. Omar, who is the brother-in-law of Mr. Devincci Hourani. It was the claimant's case in the *Ruby Roz* arbitration that Kazakhstan's actions, allegedly in violation of the laws of Kazakhstan and principles of international law, resulted in the expropriation of Ruby Roz's assets, after the company had been encouraged to invest over US$ 40 million and expand its business in Kazakhstan, transforming it from a once badly managed into a "flourishing enterprise". Kazakhstan denied that the actions carried out by its government agencies and authorities were unlawful and that it was responsible for any losses suffered by Ruby Roz[48].

69. Following the parties' written submissions on the issues of jurisdiction and the merits and only days before the scheduled (full) evidentiary hearing, occurred what the *Ruby Roz* award on jurisdiction describes as "a dramatic turn of events", *i.e.* the initiation by the State Prosecutor of Kazakhstan of criminal proceedings and investigations against several of Ruby Roz's principal fact witnesses, namely Messrs. Issam Hourani, Devincci Hourani, Hussan Hourani and Kassem Omar[49]. In these circumstances, the parties and the tribunal agreed to reschedule the hearing and to confine its scope to the issue of jurisdiction[50].

70. On 1 August 2013, the arbitral tribunal in *Ruby Roz*, in a unanimous award, denied jurisdiction to determine the dispute.

[48] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, Award on Jurisdiction, 1 August 2013, paras 6-8 and paras 36-57.
[49] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, paras 125-134.
[50] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, paras 135-142.

1. Will Mr. Boesch's participation in the *Ruby Roz* case lead him to some inclination towards the position of the Respondent who prevailed in that case, thus putting his impartiality and independence into question?

71. As was seen in paragraphs 25 to 29 above, the Claimants submit that Mr. Boesch's serving as arbitrator in the *Ruby Roz* case gives rise to a manifest risk of pre-judgment in relation to both jurisdiction and the merits in the present case, namely due to the "obvious similarities between the Ruby Roz case and the present arbitration". Because of these similarities, the Claimants say that they will rely on essentially the same factual allegations with respect to Kazakhstan's acts and omissions and pattern of conduct against Mr. Omar and the Hourani family, as well as the same legal grounds, as the claimant in the *Ruby Roz* arbitration. Moreover, witness statements of the same individuals will also be submitted in the present case.

72. As was seen in paragraphs 38 to 40 above, the Respondent contends that the *Ruby Roz* case and the present arbitration are "significantly different" or "not substantially similar" in that they involve different claimants and concern unrelated industries. However, even if the cases were similar and Mr. Boesch had been faced with similar facts or legal issues in the *Ruby Roz* case, in the Respondent's submission, this does not constitute facts or conduct demonstrating his manifest lack of impartiality or independence.

73. Furthermore, it was seen in paragraph 47 above that, according to Mr. Boesch, his acting as an arbitrator in the *Ruby Roz* case will not affect his ability to exercise independent judgment in this case, in particular given the fact that no decision on the merits was ever made, and no witnesses on the merits ever heard. Moreover, the award on jurisdiction was unanimous and made on the basis of the particular facts of that case. Mr. Boesch further stated that he will not discuss or disclose anything that transpired in the *Ruby Roz* case and that he will not form any opinion in the present arbitration based upon external knowledge including in particular what may be found in the public media.

74. For the Unchallenged Arbitrators, the Claimants' arguments as to the existence of a manifest risk of pre-judgment regarding the jurisdiction and the merits in the present arbitration pertain to impartiality, rather than independence. In other

words, what is at issue is Mr. Boesch's (in an objective view) perceived ability to serve as arbitrator in the present arbitration without bias or predisposition towards one party, in particular without any inclination towards the Respondent.

75. The Unchallenged Arbitrators agree with the Claimants that the similarity in cases, in particular in the facts underlying the *Ruby Roz* case and the present arbitration, is an important consideration in the assessment of Mr. Boesch's perceived impartiality in the present arbitration. As was observed in *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela*[51] and *EnCana Corporation v. Republic of Ecuador*, a problem can arise where an arbitrator has obtained documents or information in one arbitration that are relevant to the dispute to be determined in another arbitration[52]. In this situation, the arbitrator "cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration"[53]. Again, what is at issue is Mr. Boesch's perceived impartiality and independence from an objective point of view: while it may well be that Mr. Boesch might be able to maintain a proverbial "Chinese wall" in his own mind and remain fully impartial, the objective view of a reasonable and informed third party would be that expressed in the two cases referred to.

76. The Unchallenged Arbitrators further agree with the Claimants that the cases relied upon by the Respondent, in particular the *Saba Fakes* case and the *Electrabel* case, do not demonstrate the contrary proposition: the similarity in cases does constitute an important consideration for the decision on the proposal for the disqualification of Mr. Boesch.

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[51] See *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela* ICSID Case No. ARB/10/5, Decision on the Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, paras. 65-72. The Unchallenged Arbitrators observe that in the *Tidewater* case, unlike the present arbitration, the claimants did not allege that there was an overlap in the underlying facts between the cases concerned so that Professor Stern would benefit from knowledge of facts on the record in one case, which may not be available in the other case. Rather, the alleged lack of impartiality was based on an overlap between the legal issues raised in both cases (para. 66).

[52] In this sense, see also *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on Challenge, 12 November 2009, para. 32 (quoted at Proposal, para. 18).

[53] *EnCana Corporation v. Republic of Ecuador*, Partial Award on Jurisdiction, 27 February 2004, para. 45.

77. Accordingly, the Unchallenged Arbitrators find that they must examine whether facts underlying the *Ruby Roz* case are similar or identical to facts alleged in the present arbitration and whether they are relevant for the determination of the legal issues in the present arbitration. If so, they must then examine whether, based on a reasonable evaluation of the facts in the present case, a third party would find that Mr. Boesch's knowledge of the facts of the *Ruby Roz* case gives rise to an evident or obvious appearance of lack of impartiality.

78. It emerges from the Parties' written submissions in this arbitration so far, in particular the submissions of the Claimants (which, in this regard, are not convincingly rebutted) and the Award on Jurisdiction in *Ruby Roz*, that the dispute in the present arbitration arises out of broadly the same factual context as in the *Ruby Roz* case (see also paragraphs 66 to 70 above). In both the *Ruby Roz* case and the present arbitration the Claimants rely on the "frequent and harassing intrusions in their affairs"[54], an alleged "State-organized campaign"[55], a "campaign of persecution"[56], or still a "concerted campaign"[57] by various Kazakh government agencies and authorities against the Hourani family and Mr. Omar, motivated simply by their ties to Mr. Aliyev. In both the *Ruby Roz* case and the present arbitration the Claimants' case is that these actions by Kazakhstan were in violation of Kazakhstan's legal obligations and ultimately resulted in the expropriation of Kazakh-incorporated companies owned and operated by Messrs. Devincci Hourani and Kassem Omar, *i.e.* in the taking of their investments in Kazakhstan[58].

79. In particular, in both the *Ruby Roz* case and the present arbitration the Claimants, as evidence of Kazakhstan's harassment of the Hourani family and Mr. Omar, invoke an "unsubstantiated and non-sensical" criminal complaint filed on 28 May 2007 against Mr. Issam Hourani by Mr. Sabsabi, a former employee

[54] Request of Arbitration, para. 52.
[55] Proposal, para. 13.
[56] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 45.
[57] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 46.
[58] Compare *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 7 and paras 36 to 57 with Request of Arbitration, paras 14-15 and paras 47-61.

of Ruby Roz[59]. According to the Claimants, these criminal proceedings were later extended to the entire Hourani and Omar families and businesses[60].

80. In both cases the Claimants describe the raid, on 27 June 2007, of a building in Almaty where offices of several companies owned and operated by Mr. Omar and the Hourani family, including Ruby Roz and Caratube, were located[61].

81. Moreover, in the present arbitration the Claimants rely on the seizure on 12 October 2007 of legal and accounting documents of Caratube on the basis of the alleged fishing expedition by Kazakhstan against Ruby Roz, despite the fact that Mr. Devincci Hourani was not a shareholder of Ruby Roz nor held any executive functions therein[62]. The Claimants in the present arbitration further rely on the seizure, also on 12 October 2007, of legal and accounting documents of Ruby Roz. The order on execution of seizure concerning documents of Ruby Roz refers to criminal investigations against Mr. Issam Hourani, a brother of Mr. Devincci Hourani, in his capacity as "the founder of Ruby Roz Agricol LLP"[63].

82. Finally, in both cases the Claimants rely on "frivolous" criminal proceedings initiated by the State Prosecutor of Kazakhstan in February 2013 against Mr. Devincci Hourani in relation to the death in 2004 of Ms. Anastasia Novikova in Lebanon[64].

83. It is undisputed that the Respondent in the present arbitration is the same as in the *Ruby Roz* case, *i.e.* The Republic of Kazakhstan. However, the Respondent correctly points out that the Claimants in the present arbitration are not the same as in the *Ruby Roz* arbitration. As was seen in paragraph 67 above, following Mr. Kassem Omar's withdrawal from the proceeding, the *Ruby Roz* arbitration continued with Ruby Roz as the only claimant, it being specified that during the arbitration proceeding Ruby Roz remained under the full ownership

[59] Request of Arbitration, paras 54-55 ; *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 50.
[60] Request of Arbitration, para. 55.
[61] Request of Arbitration, paras 57-58 ; *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 48.
[62] Request of Arbitration, para. 59.
[63] Exh. C-32.
[64] Request of Arbitration, para. 132; *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, paras 125-134.

of Mr. Kassem Omar[65]. By contrast, the Claimants in the present arbitration are Caratube, which is owned to 92% by Mr. Devincci Hourani and to 8% by Mr. Kassem Omar, and Mr. Devincci Hourani. Therefore, the Claimants in both of these cases are not the same.

84. This said, it emerges from the above that the Claimants in the present arbitration and in the *Ruby Roz* case are closely related. For instance, Ruby Roz's owner, Mr. Omar, owns a participation (8% of the shares) in Caratube. Mr. Devincci Hourani's brother, Mr. Issam Hourani, appears to be the founder of Ruby Roz and owner of the land on which Ruby Roz's facilities are located[66]. Mr. Devincci Hourani is Mr. Kassem Omar's brother-in-law and was also one of Ruby Roz's "key witnesses"[67] in that case, along with his brothers Issam and Hussan.

85. The Respondent also correctly points out that the present arbitration and the *Ruby Roz* case concern "completely unrelated industries", the former concerning the termination of an oil concession contract and the latter concerning the alleged expropriation of a chicken farm[68]. However, the differences in the industries concerned appear of minor importance in the light of the allegation, common to both arbitration proceedings, that Kazakhstan's "campaign of persecution" and the resulting taking of the different investments were not directed against any particular industry, but specifically targeted the individuals behind these investments, who are closely related.

86. Finally, the similarity and, to a limited but not inexistent extent, the identity of the facts underlying the present arbitration and the *Ruby Roz* case are further evidenced by the fact that several members of the Hourani and Omar families who submitted witness statements in the *Ruby Roz* case are (in the Claimants' submission which is not convincingly rebutted) likely to submit witness statements in relation to the same facts in the present arbitration[69]. In this regard, the Unchallenged Arbitrators agree with the Claimants that it is immaterial that no witnesses were ever heard at the hearing in the *Ruby Roz*

[65] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 57.
[66] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 39.
[67] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 135.
[68] Response, p. 4.
[69] Proposal, para. 13.

case, given that witness statements were submitted and that their contents were examined and their probative value assessed by the tribunal in that case[70].

87. Having determined that the facts underlying the *Ruby Roz* case are at a minimum similar to the facts alleged in the present arbitration, the Unchallenged Arbitrators now turn to the question whether these facts are potentially relevant for the determination of the legal issues in the present arbitration. In both the *Ruby Roz* case and the present arbitration the Claimants argue that the acts and omissions of the Respondent against the Claimants were in violation of Kazakhstan's legal obligations, in particular its obligations under customary international law and Kazakhstan's Foreign Investment Law[71]. It is observed that some of the breaches listed in the Claimants' Request of Arbitration are the same as those invoked in the *Ruby Roz* arbitration, namely "the persecution of Claimants [albeit not the same claimants] on the basis of actions allegedly targeting third parties in violation of due process, without legal merit or causal link, and in a disproportionate manner and extent to the allegations advanced, as set forth in paragraphs 56 to 59 [of the Request of Arbitration]" and "the harassment of Claimant Devincci Hourani by initiating frivolous criminal proceedings in Lebanon for alleged murder, including in February 2013 in relation to the death of Ms. Anastasia Novikova, an Uzbek citizen, in Lebanon that occurred on July 19, 2014, so as to intimidate Claimants and have them drop legal proceedings against The Republic of Kazakhstan […], whereas the case (which at the time did not involve in any manner Mr. Devincci Hourani) had been investigated, found to be a suicide and closed in 2010 by Lebanese authorities"[72].

88. As a result of this overlap in facts and legal issues, the Unchallenged Arbitrators find that the facts of which Mr. Boesch has gained knowledge (or been able to gain knowledge) through his serving as arbitrator in the *Ruby Roz* case are also relevant for the determination of some of the legal issues in the present arbitration.

[70] *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 136.
[71] Request of Arbitration, paras 117-133 ; *Ruby Roz Agricol LLP v. The Rebublic of Kazakhstan*, *op. cit.* fn 48, para. 80.
[72] Request of Arbitration, para. 132.

89. The Unchallenged Arbitrators have carefully considered Mr. Boesch's Explanations of 13 February 2014, in particular his assurances that he "consider[s] that it would be improper for [him] to discuss or disclose anything that transpired in the Ruby Roz Agricol LLP case, and [he] will not do so" and that he "consider[s] it improper to form any opinion based upon external knowledge including in particular what may be found in the public media, and [he] will not do so". However, the Unchallenged Arbitrators agree with the tribunal in *EnCana Corporation v. Republic of Ecuador* in that Mr. Boesch "cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the [*Ruby Roz*] arbitration"[73]. That Mr. Boesch would consider it improper to form any opinion based upon external knowledge is not to be doubted and neither is his intention not to do so: it remains that Mr. Boesch is privy to information that would possibly permit a judgment based on elements not in the record in the present arbitration and hence there is an evident or obvious appearance of lack of impartiality as this concept is understood without any moral appraisal: a reasonable and informed third party observer would hold that Mr. Boesch, even unwittingly, may make a determination in favor of one or as a matter of fact the other party that could be based on such external knowledge.

90. Based on a careful consideration of the Parties' respective arguments and in the light of the significant overlap in the underlying facts between the *Ruby Roz* case and the present arbitration, as well as the relevance of these facts for the determination of legal issues in the present arbitration, the Unchallenged Arbitrators find that – independently of Mr. Boesch's intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the *Ruby Roz* case and his exposure to the facts and legal arguments in that case, Mr. Boesch's objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that Mr. Boesch would pre-judge legal issues in the present arbitration based on the facts underlying the *Ruby Roz* case.

[73] *EnCana Corporation v. Republic of Ecuador*, Partial Award on Jurisdiction, 27 February 2004, para. 45.

91. The Unchallenged Arbitrators therefore conclude that the Claimants have demonstrated that a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case. Accordingly, the Unchallenged Arbitrators find that Mr. Boesch manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention in this particular case.

2. Will Mr. Boesch's knowledge acquired in the *Ruby Roz* case lead to a manifest imbalance within the Tribunal as the two other arbitrators, namely the Unchallenged Arbitrators, will not be privy to that body of knowledge?

92. Having concluded that there is an evident or obvious appearance of lack of impartiality and that Mr. Boesch therefore manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention in this particular case, the Claimants' proposal for disqualification pursuant to Article 57 of the ICSID Convention must be upheld on this ground alone. However, for the sake of completeness and because the Parties have argued this aspect extensively, the Unchallenged Arbitrators will examine the question whether Mr. Boesch's knowledge acquired in the *Ruby Roz* case will lead to a manifest imbalance within the Tribunal.

93. For the same reasons as those set forth in section A.1., namely the significant overlap in the underlying facts between the *Ruby Roz* case and the present arbitration, the Unchallenged Arbitrators find that a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the *Ruby Roz* case, Mr. Boesch has benefitted from knowledge of facts on the record in that case which may not be available to the two other arbitrators in the present arbitration (or even be incompatible or contradictory with some facts on the record of the present arbitration), thereby giving rise to a manifest imbalance within the Tribunal to the disadvantage of the Claimants.

94. This finding is corroborated by the fact that the claimants in both sets of proceedings are not the same, albeit that they are closely related. Therefore, it cannot be excluded that the Parties in the present arbitration do not have access to or, for example for reasons of confidentiality, cannot use all the information or documents available to the parties in the *Ruby Roz* case, even

though such information or documents would be relevant for the determination of the legal issues in the present arbitration.

95. Therefore, the Unchallenged Arbitrators conclude that a third party would find that there is an evident or obvious appearance of imbalance within the Tribunal based on a reasonable evaluation of the facts in the present case.

96. In the light of the Unchallenged Arbitrators' conclusion as to the existence of an evident or obvious appearance of lack of impartiality, the question whether the existence of an imbalance within the Tribunal may constitute a free-standing ground to disqualify Mr. Boesch in this particular case or whether it can be considered only as an aggravating circumstance can be left open.

3. Did Mr. Boesch conceal from the other members of this Tribunal his knowledge of the facts of the *Ruby Roz* case and the opinion he had in this respect, thus aggravating the imbalance within the Tribunal?

97. As was seen in paragraph 29 above, the Claimants submit that Mr. Boesch "knowingly concealed from the other members of the Tribunal his knowledge of the facts of the [*Ruby Roz*] case and the opinion he had in this respect".

98. Neither the Respondent nor Mr. Boesch appear directly and comprehensively to respond to this argument. Rather, they aver that Mr. Boesch's disclosure in the present arbitration was in accordance with Article 6(2) of the ICSID Arbitration Rules and the IBA Guidelines on Conflicts of Interest.

99. The Parties' written exchanges do not further substantiate the Claimants' allegation. Therefore, the Unchallenged Arbitrators would lack sufficient evidence to conclude that Mr. Boesch "knowingly concealed from the other members of the Tribunal his knowledge of the facts of the [*Ruby Roz*] case and the opinion he had in this respect". A third party would thus not be in a position to make a determination of possible partiality either on that account. In any event, given the Unchallenged Arbitrators' conclusion in paragraph 91 above that Mr. Boesch manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention in this particular case, the question does not call for an answer and can be left open.

B. Mr. Boesch's numerous appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent

100. As was seen in paragraphs 30 to 33 above, the Claimants submit that Mr. Boesch manifestly cannot exercise independent and impartial judgment in the present arbitration due to his numerous prior appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP and (on one occasion) the Respondent, namely in the *ConocoPhillips* and *Ruby Roz* arbitrations in 2010 and 2011 respectively and in an ICC arbitration in 2008. For the Claimants, the fact that Mr. Boesch limited the disclosure of his prior appointments to the last three years without any indication to this effect and failed to address the similarities between the *Ruby Roz* case and the present arbitration, despite the Claimants' request for a broad disclosure, further aggravate Mr. Boesch's manifest lack of independence and impartiality.

101. As was seen in paragraphs 41 to 44, the Respondent submits that Mr. Boesch duly and timely disclosed his prior appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent, in conformity with Article 6(2) of the ICSID Arbitration Rules and the IBA Guidelines. The IBA Guidelines only provide for an obligation for disclosure in case of two or more prior appointments by a party or one of its affiliates or more than three appointments by counsel within the last three years. Moreover, even if there had been a duty to disclose under the IBA Guidelines, this would not constitute an admission of a conflict of interest.

102. As was seen in paragraph 47 above, Mr. Boesch considers that the disclosure of his prior appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent was sufficient and in accordance with good practice.

103. In support of their argument that Mr. Boesch manifestly is unable to exercise independent judgment in the present arbitration due to his numerous appointments by the Respondent and its Counsel the Claimants have relied on the Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator in *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, in which the two remaining arbitrators held that "[i]n a dispute resolution environment, a party's choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute. In our view, multiple appointments of an

arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case. […] [M]ultiple appointments of an arbitrator by a party or its counsel is a factor which – contrary to the view expressed in *Tidewater* – may lead to the conclusion that it is manifest that the arbitrator cannot be relied upon to exercise independent judgment as required by the [ICSID] Convention"[74].

104. In *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela* the two remaining arbitrators found that "there would be a rationale for the potential conflict of interest which may arise from multiple arbitral appointments by the same party if either (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence on the arbitrator's judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his knowledge derived from other cases"[75].

105. Point (b) has been dealt with in Section A. above. Having concluded that there is an evident or obvious appearance of lack of impartiality due to Mr. Boesch's prior appointment by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent in the *Ruby Roz* case justifying his disqualification in the present arbitration, point (a) can be left open. However, for the sake of completeness and because the Parties have argued this aspect extensively, the Unchallenged Arbitrators will examine the question whether Mr. Boesch's prior appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent may constitute an additional ground for his disqualification.

106. The Claimants have not alleged that Mr. Boesch is financially dependent upon appointments as arbitrator by either Curtis, Mallet-Prevost, Colt & Mosle LLP or the Respondent. Therefore, the only question that remains to be answered is whether Mr. Boesch's prior appointments may otherwise influence on his judgment in the present arbitration.

[74] *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, *op. cit.* fn 21, paras 47 and 50.
[75] *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela*, *op. cit.* fn 51, para. 62.

107. The Unchallenged Arbitrators agree with the two remaining arbitrators in *Tidewater* that the mere fact of Mr. Boesch's prior appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP, one of which was made on behalf of the Respondent in the *Ruby Roz* arbitration, does not, without more, indicate a manifest lack of independence or impartiality on the part of Mr. Boesch. Absent any other objective circumstances demonstrating that these prior appointments manifestly influence his ability to exercise independent judgment in the present arbitration, they do not on their own justify Mr. Boesch's disqualification. In particular, the Unchallenged Arbitrators cannot follow the Claimants' argument drawn from *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela* according to which Mr. Boesch cannot serve as an arbitrator because his appointment in the present arbitration is not based on merits but on the Respondent's and its Counsel's view "that the outcome of the dispute [in the present arbitration] is more likely to be successful with [Mr. Boesch] as a member of the tribunal than would otherwise be the case". What is decisive is not a party's or its counsel's expectation that the arbitrator appointed by them will decide in their favor, but the appointed arbitrator's ability to exercise independent judgment. The fact that Mr. Boesch does not have prior ICSID experience does not constitute an objective circumstance demonstrating that his prior appointments manifestly influence his ability to exercise independent judgment in the present arbitration.

108. That determination is not made with a view to decide whether "repeat appointments" would in general be good causes for the disqualification of an arbitrator, an issue that is highly controversial. Be it only said that the Unchallenged Arbitrators are impressed in particular by the fact that there exists a sufficient number of potential arbitrators for an appointment to be made without any appearance being given of an existing link, real or suspected, between the arbitrator and the appointing party and its counsel. And conversely, that it is quite natural that a party and its counsel will wish to appoint the "best" arbitrator available for a given case and that prior experiences with that potential arbitrator are of course adequate to give that assurance: it is a matter of public record that some high repute firms active in investment arbitrations and of the highest ethical standards will repeatedly call for the same arbitrators to serve in several arbitrations.

109. However, for the reasons set forth under Section A. above, the Unchallenged Arbitrators find that Mr. Boesch's prior appointment by Curtis, Mallet-Prevost, Colt & Mosle LLP and the Respondent in the *Ruby Roz* case does constitute an objective circumstance demonstrating his inability to exercise independent and impartial judgment in the present arbitration. The question whether or not Mr. Boesch's disclosure was sufficient and in accordance with the relevant rules and good practice can therefore be left open.

110. Based on the foregoing, the Unchallenged Arbitrators reiterate their conclusion set forth in paragraph 91 above that the Claimants have demonstrated that a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case and that, therefore, Mr. Boesch manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention in this particular case.

VII. DECISION

111. For the foregoing reasons

(i) The Claimants' Proposal for Disqualification of Mr. Bruno Boesch is upheld;

(ii) Costs are reserved for a later decision.

For the Unchallenged Arbitrators:

[Signed]

Dr. Laurent Lévy, President