

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

KS INVEST GMBH AND TLS INVEST GMBH
Claimants

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/15/25

DECISION ON THE PROPOSAL TO DISQUALIFY PROF. KAJ HOBÉR

Chairman of the Administrative Council
Mr. David R. Malpass

Secretary of the Tribunal
Mr. Francisco Grob D.

Date: May 15, 2020

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I. INTRODUCTION

1. This decision addresses Respondent's proposal to disqualify Prof. Kaj Hobér dated November 12, 2019, as supplemented on December 5, 2019.
2. Initially, the Kingdom of Spain proposed the disqualification of Prof. Hobér on the basis that he lacked independence and impartiality because he was acting as counsel in an arbitration initiated by Switzerland's Nord Stream 2 AG under the Energy Charter Treaty (ECT) against the European Union. Spain subsequently supplemented its proposal, adding a new ground for disqualification relating to the dissenting opinion issued by Prof. Hobér in *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1). The present Decision addresses both grounds.
3. For the reasons set out in section IV below, the proposal to disqualify Prof. Hobér is rejected.

II. PROCEDURAL BACKGROUND

4. This case was registered by the Secretary-General of ICSID on June 16, 2015. The Tribunal was constituted on December 7, 2015. The Tribunal was composed of Judge Bruno Simma, (Germany), President, appointed by agreement of the parties; Prof. Gary Born (US), appointed by the Claimants; and Sir Daniel Bethlehem (UK), appointed by the Respondent. Following the resignation of Mr. Born, the Claimants appointed Prof. Kaj Hóber and the Tribunal was reconstituted with its current composition on August 13, 2018.
5. Following a hearing in London on March 25 and 26, 2019, the parties submitted their second round of post-hearing briefs on July 12, 2019. On the same date, the parties filed their respective submissions on costs.
6. On October 21, 2019, the Respondent submitted a communication to the Tribunal indicating that it had learned of Prof. Hobér's involvement as counsel in a case brought by Nord Stream 2 AG under the ECT against the European Union (the "**Nord Stream Arbitration**"). The Respondent stated that Prof. Hobér's role in that case raised "serious concerns for the Kingdom of Spain as to the ability of Mr. Kaj Hobér to exercise

independent judgement in the present case.” The Respondent requested that Prof. Hobér provided additional information about the parties and nature of the dispute in the Nord Stream arbitration.

7. By communication of October 27, 2019, Prof. Hobér provided details about the Nord Stream arbitration. He stated (a) that the claimant is a Swiss company with investments in the Nord Stream pipeline for transportation of natural gas from Russia to Germany and the European Market and (b) that the respondent is the European Union. According to Prof. Hobér, “the dispute concerns the effects of Directive (EU) 2019/692 amending Directive 2009/73/EC of 13 July 2019 concerning common rules for the internal market in natural gas and the consequent impact of the amending Directive on Nord Stream 2 AG.” Prof. Hobér also disclosed that he was involved in the preparation of the notice of arbitration.
8. On November 12, 2019, the Respondent filed a proposal to disqualify Prof. Hobér pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules (“**Prof. Hóber’s Disqualification Proposal**” or the “**Proposal**”).
9. Upon receipt of Prof. Hobér’s Disqualification Proposal, the Centre confirmed that, in accordance with Arbitration Rule 9(6), the proceeding was suspended until a decision was made by Judge Simma and Sir Daniel Bethlehem (hereinafter, the “**Unchallenged Arbitrators**”), as provided for in Article 58 of the ICSID Convention and Arbitration Rule 9(4).
10. On November 13, 2019, the Unchallenged Arbitrators fixed a timetable for the parties’ submissions and Prof. Hobér’s explanations.
11. As scheduled, the Claimants filed their response to Prof. Hobér’s Disqualification Proposal on November 25, 2019 (“**Claimants’ Response**”).
12. On December 5, 2019, the Respondent filed a second submission entitled “Respondent’s Additional Observations of the Disqualification of Dr. Kaj Hobér”, in which it sought “to supplement the Disqualification Proposal” (“**Respondent’s Supplementary Submission**”). The Respondent added a new ground for disqualification relating to Prof. Hobér’s dissenting opinion in *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1) (“**Stadtwerke**”).

13. On the same day, the Unchallenged Arbitrators wrote to the parties advising “that it would be efficient to address all proposed disqualification grounds together” and inviting the Claimants to indicate whether they agreed to include Respondent’s Supplementary Submission “into the current disqualification procedure”.
14. On December 9, 2019, the Claimants confirmed their agreement to “include Spain’s additional observations with its current disqualification application.”
15. In response, the Unchallenged Arbitrators set a revised timetable for Prof. Hobér’s explanations and the parties’ additional submissions. The revised schedule was communicated to the parties on December 10, 2019.
16. In accordance with the revised schedule, on December 23, 2019, Prof. Hobér furnished his explanations pursuant to Arbitration Rule 9(3).
17. On December 27, 2019, the Respondent filed further observations on Prof. Hobér’s Disqualification Proposal (“**Respondent’s Additional Observations**”).
18. On January 3, 2020, the Claimants filed their additional observations on Prof. Hobér’s Disqualification Proposal (“**Claimants’ Additional Observations**”).
19. On January 16, 2020, the Unchallenged Arbitrators invited the parties to file a copy of the reasoned decision of the Stockholm Chamber of Commerce Board concerning Spain’s challenge to Prof. Hobér in *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Arbitration V2017/060 (the “**SCC Decision**”), which had been referenced to by both parties in their submissions. The parties were also invited to submit comments on the SCC Decision by January 29, 2020.
20. On January 23, 2020, the Claimants informed the Unchallenged Arbitrators of the parties’ agreement to introduce the SCC Decision into the record. On the same day, the Respondent submitted a copy of the SCC Decision.
21. On January 28, 2020, the Secretary of the Tribunal informed the parties that the Unchallenged Arbitrators had received a copy of the SCC Decision and that they would keep it confidential.
22. On January 29, 2020, the parties filed their respective comments on the SCC Decision.

23. On March 12, 2020, the two Unchallenged Arbitrators advised the Secretary-General that they were unable to decide the Disqualification Proposal as they found themselves “equally divided”. The parties were thus informed that the Disqualification Proposal would be decided by the Chairman of the Administrative Council (the “**Chairman**”) pursuant to Article 58 of the ICSID Convention and Arbitration Rule 9(4).

III. PARTIES’ POSITIONS AND PROF. HOBÉR’S EXPLANATIONS

A. PROF. HOBÉR’S DISQUALIFICATION PROPOSAL AND RESPONDENT’S OBSERVATIONS

24. In its submissions, the Respondent puts forward two main grounds in support of its Proposal to Disqualify Prof. Hobér, namely: (i) his role as counsel in the Nord Stream Arbitration, and (ii) his dissenting opinion in *Stadtwerke*.

(i) Prof. Hobér’s representation of Nord Stream 2 AG

25. The Respondent argues that the fact that Prof. Hobér is acting as counsel in the Nord Stream Arbitration creates a conflict of interest, which prevents Prof. Hobér from exercising independent and impartial judgment as required by Article 14(1) of the ICSID Convention.
26. The Respondent submits that there is an “intimate relationship” between the Nord Stream Arbitration and the present case. Both are cases in which EU Law is “at the heart of the dispute” and where claims are made under Articles 10(1) and 13 of the ECT, concerning an amendment of the legal framework of the European energy market.¹
27. According to the Respondent, the Disqualification Proposal should be decided pursuant to Article 57 of the ICSID Convention, ICSID Arbitration Rule 9, and “all sources of Public International Law mentioned in Article 38 of the Statute of the [ICJ]”², interpreted in light of the Vienna Convention on the Law of Treaties (VCLT). Applying these rules, the Respondent submits, the word “manifestly” in Article 57 cannot be interpreted as permitting “an arbitrator to be more partial or less independent than judges”.³ According

¹ Prof. Hobér’s Disqualification Proposal, ¶¶ 52 and 49.

² Prof. Hobér’s Disqualification Proposal, ¶¶ 2 and 3.

³ *Ibid.*, ¶ 24.

to the Respondent, “if there is any reasonable doubt or indication of a lack of impartiality the ... arbitrator must be disqualified”.⁴

28. The Respondent also states that Prof. Hobér has breached his duty to promptly disclose any circumstance that might call into question his ability to exercise independent judgement under ICSID Arbitration Rule 6(2) by failing to inform the parties of his involvement in the Nord Stream Arbitration.

(ii) Prof. Hobér’s dissent in the *Stadtwerke* case

29. In its Supplementary Submission, the Respondent contends that Prof. Hobér’s dissenting opinion in *Stadtwerke*, a parallel ECT arbitration brought against Spain, constitutes an additional, self-standing, ground for disqualification.
30. The Respondent states that there are “substantial similarities” between *Stadtwerke* and the present case.⁵ Because Prof. Hobér has already expressed his opinion on many of these “essential issues” and he has done so “in a way that simply leaves no room for a different determination in the present arbitration”,⁶ he can no longer sit on this arbitration without “depriving the Respondent of an arbitrator that will exercise an independent judgment”.⁷
31. *First*, Prof. Hobér has “categorically” concluded that the RD 661 regime “contained a stabilization representation that Claimants were entitled to rely upon, so that no changes whatsoever could be introduced by the Kingdom of Spain to such regulation.”⁸ To support his conclusions, Prof. Hobér points to “some of the very same factual elements to which Claimants make reference in the present proceedings”, such as a press release by the Ministry of Industry, CNE reports and presentations made by employees from *Invest in Spain*.⁹ Furthermore, Prof. Hobér’s conclusions are worded in a manner that makes them

⁴ *Ibid.*, ¶ 23.

⁵ Respondent’s Supplementary Submission, ¶ 7.

⁶ *Ibid.*, ¶ 7.

⁷ *Ibid.*, ¶ 17.

⁸ *Ibid.*, ¶ 26.

⁹ *Ibid.*, ¶ 27.

- “applicable to any investor whatsoever, regardless of whether there was a specific representation made to it or not.”¹⁰
32. *Second*, Prof. Hobér has passed judgment “on the lawfulness of the disputed measures.”¹¹ According to the Respondent, Prof. Hobér’s Dissenting Opinion is clear in defining the measures disputed in the present arbitration as “a radical and fundamental change in the [sic] regulatory framework.”¹² In addition, Prof. Hobér has also held “that, in his view, the 2013-2014 measures’ effects were retroactive”.¹³
33. According to the Respondent, “a reasonably informed third party would find that very possibly Dr. Hobér’s position in relation to the facts and issues addressed in this arbitration is [sic] very clearly prejudged against the Respondent’s position, and that hence this arbitrator lacks the independence required by the applicable legal standards”.¹⁴ Having decided on much of the facts and legal arguments at issue in this proceeding, he will be unable to consider this case impartially and independently.
34. In its Additional Observations, the Respondent denied that it was seeking Prof. Hobér’s disqualification because it disagreed with his views in the Dissenting Opinion. Other arbitrators have decided against Spain and have not been challenged. The problem, according to the Respondent, is that Prof. Hobér’s Dissenting Opinion “leaves no room for a different decision in this arbitration, hence calling into question his impartiality to act as an independent arbitrator in the present proceeding”.¹⁵
35. The Respondent contends that Prof. Hobér’s explanations do not “point out any concrete difference” between *Stadtwerke* and this case to substantiate his statement that the two proceedings are different.¹⁶ The “many other elements” that he refers to, which would distinguish the “factual matrix” of this case from *Stadtwerke*—such as “statements, declarations and presentations by representatives of Spain, publications by representatives

¹⁰ *Ibid.*, ¶ 30.

¹¹ *Ibid.*, Section B.

¹² *Ibid.*, ¶ 34.

¹³ *Ibid.*, ¶ 35.

¹⁴ Respondent’s Supplementary Submission, ¶ 10.

¹⁵ Respondent’s Additional Observations, ¶ 25.

¹⁶ *Ibid.*, ¶ 28. See also ¶¶ 19, 26-33.

and governmental bodies of Spain, agreements and understandings entered by into by representatives of Spain etc.” – are, in fact, “the very same evidence on which he based his Dissenting Opinion”.¹⁷ Moreover, the Respondent contends, Prof. Hobér acknowledges that “the basic regulatory scheme in Spain is the same in both cases”.¹⁸

36. In this connection, the Respondent brought to the attention of the Tribunal a challenge that it filed against Prof. Hobér in an SCC arbitration “for exactly the same reasons as those presented in this arbitration”.¹⁹ This challenge was upheld by the SCC Board in a decision dated January 7, 2020.
37. In its comments on the SCC Decision, the Respondent points out that the “only informed third party” that has addressed Prof. Hobér’s situation, the SCC Board, has agreed with Spain and has upheld Spain’s challenge.²⁰ This decision concludes that “the *Stadtwerke* arbitration includes issues of fact and law which overlap with the present arbitration”, a situation that is likewise present here.²¹
38. In the Respondent’s view, the standard for disqualification under the SCC Arbitration Rules and the ICSID Convention is “exactly the same”.²² The Respondent submits that Article 57 and Rule 14(1) “do not require proof of actual dependence or bias; rather it is sufficient to establish the *appearance of dependence or bias* – that is to say, *reasonable or justifiable doubts*”.²³ This is supported, the Respondent says, by a long and consistent line of decisions.²⁴
39. Since obvious similarities exist between the *Stadtwerke* case and the current proceeding, the Respondent contends that Prof. Hobér’s Disqualification Proposal should be upheld in order to preserve Spain’s right to have an impartial arbitrator deciding the case.²⁵

¹⁷ *Ibid.*, ¶¶ 30-32 (citing Prof. Hobér’s Explanations of December 23, 2019)

¹⁸ *Ibid.*, ¶ 29 (citing Prof. Hobér’s Explanations of December 23, 2019).

¹⁹ *Ibid.*, ¶ 34.

²⁰ Respondent’s Comments on the SCC Decision, ¶ 7.

²¹ *Ibid.*, ¶ 9.

²² *Ibid.*, ¶ 16.

²³ *Ibid.*, ¶ 17. See also the decisions referenced by the Respondent in ¶¶ 18-22.

²⁴ See the decisions referenced by the Respondent in ¶¶ 18-22.

²⁵ *Ibid.*, paras. 23-24.

B. CLAIMANTS' RESPONSE AND OBSERVATIONS

(i) Prof. Hobér's representation of Nord Stream 2 AG

40. In their Response, the Claimants contend that Prof. Hobér's Disqualification Proposal is untimely and should be dismissed under ICSID Arbitration Rule 9(1). Even if it is considered timely, the Claimants submit that Spain's Disqualification Proposal lacks any merit and should be dismissed under the "manifest lack" of impartiality and independence standard of Article 57 of the ICSID Convention.
41. On the issue of timeliness, the Claimants contend that the Respondent waited "more than a month and a half after the circumstances became public" to file Prof. Hobér's Disqualification Proposal.²⁶ Although the Claimants accept that neither the ICSID Convention nor the ICSID Arbitration Rules "specify the number of days that would satisfy the requirement of a 'prompt' application", the Claimants point out to Spain's own position that "one week was sufficient for it to learn the facts of a purported ...conflict... and to file a challenge" in another case.²⁷
42. As to the merits of the challenge, the Claimants submit that Prof. Hobér's Disqualification Proposal fails to meet the "demanding standard" of Article 57 of the ICSID Convention,²⁸ which -in their view- the Respondent has completely mischaracterized in its submissions. This standard requires a "manifest lack of the qualities", that should be proven by the Respondent.
43. In support of their position, the Claimants argue that challenges like this have been "routinely" rejected and that there is no reason why the Unchallenged Arbitrators should "depart from this long line of clear, well established authority"²⁹, even more so if Spain has failed to objectively prove that Prof. Hobér lacks the impartiality and independence required to rule over the present proceeding.

²⁶ Claimants' Response, ¶ 11.

²⁷ *Ibid.*, ¶ 9.

²⁸ *Ibid.*, ¶ 12.

²⁹ *Ibid.*, ¶ 24.

44. Specifically, the Claimants allege that the Respondent has adduced no objective evidence of bias. According to the Claimants, Spain deliberately ignores the facts that the present arbitration and the Nord Stream Arbitration concern (a) different claimants; (b) different respondents; (c) in a different subsector of the energy industry. Once this is sorted out, Spain’s challenge turns solely on the fact that “Nord Stream is basing its claim on Article 10(1) and 13 of the ECT, the same Articles invoked in the present case.”³⁰ However, these are frequently invoked standards in investment treaty cases. According to the Claimants, “[i]t would be ludicrous to find that invoking, as counsel, the broadest and most commonly asserted claims in treaty arbitration means that the individual cannot independently and impartially assess those claims as arbitrator.”³¹
45. In their comments on the SCC Decision, the Claimants noted that the SCC Board accepted in its decisions that there “is no soft or hard rule preventing individuals from serving as both arbitrator and counsel in concurrent but unrelated arbitrations”.³² Therefore, the Claimants argue that Prof. Hobér’s role as counsel in the Nord Stream Arbitration - which is “unrelated” to the current proceeding - because the only thing they have in common is that “both arise under the ECT”,³³ should not affect the Unchallenged Arbitrators’ decision, which should follow the “unanimous practice” of rejecting arbitrator’s challenges.³⁴

(ii) Prof. Hobér’s dissent in the *Stadtwerke* case

46. In their Additional Observations, the Claimants contend that Spain’s additional ground to seek Prof. Hobér’s disqualification based on his dissent in *Stadtwerke* is “procedurally barred as inequitable” and “does not meet the applicable legal standard.”³⁵
47. According to the Claimants, Spain knew of Prof. Hobér’s involvement in *Stadtwerke* when he was appointed arbitrator in the current proceeding; yet Spain raised no concern or objection at the time. Instead, Spain “consented to Prof. Hobér’s service in this arbitration and waived its right to challenge” or, at a minimum, “should be estopped” from raising its

³⁰ Claimants’ Response, ¶ 28, citing Prof. Hobér’s Disqualification Proposal, ¶ 53.

³¹ *Ibid.*, ¶ 28.

³² Claimants’ Comments on the SCC Decision, ¶ 5.

³³ *Ibid.*, ¶ 4.

³⁴ *Ibid.*, ¶ 7.

³⁵ Claimants’ Additional Observations, sections II and III.

additional ground for disqualification, in accordance with the “doctrine of estoppel in international law”.³⁶ Accordingly, Spain ‘lost its chance’ to raise any challenge against Prof. Hobér, firstly because it waited over a month and a half to file its Proposal and secondly, by failing to raise any concerns regarding Prof. Hobér’s appointment in this proceeding back in 2018.

48. Concerning the merits of the Proposal, the Claimants state that Spain has failed to meet its burden of proof: “Evidence that an arbitrator holds genuine and good faith views regarding the legal consequences of a particular fact pattern is not evidence that the arbitrator is subject to improper influences or partial to a particular party.”³⁷
49. In support of their position, the Claimants argue that “tribunals have routinely rejected challenges to investment treaty arbitrators based on “issue conflicts” related to prior awards deciding similar factual and legal issues.”³⁸ In their view, there is no reason for the Unchallenged Arbitrators to depart from the “consistent and nearly unanimous line of jurisprudence”³⁹ that has routinely rejected the “suggestion that ‘issue conflicts’...are sufficient to disqualify a challenged arbitrator”.⁴⁰
50. They also state that the present case is easily distinguishable from *Caratube v. Kazakhstan*, which Spain relies on to support its position. According to the Claimants, “Claimants in this arbitration and the claimants in *Stadtwerke* are completely unrelated - evidence relating to the *Stadtwerke* claimants and their investments, which Prof. Hobér will have seen, has no bearing on Claimants.”⁴¹
51. In their comments on the SCC Decision, the Claimants emphasized that the SCC Board was bound by a different legal standard, *i.e.*, the Swedish Arbitration Act which is less rigorous than the “considerably higher standard” of the ICSID Convention.⁴²

³⁶ Claimants’ Additional Observations, ¶¶ 8 and 12.

³⁷ *Ibid.*, ¶ 18.

³⁸ *Ibid.*, ¶ 17.

³⁹ *Ibid.*, ¶ 25.

⁴⁰ *Ibid.*, ¶ 23.

⁴¹ *Ibid.*, ¶ 32.

⁴² Claimants’ Comments on the SCC Decision, ¶¶ 11 and 12.

52. Under the Swedish Arbitration Act, an arbitrator will be disqualified “even if there is no reason to assume he will be partial” but if there exists “any circumstance which may diminish confidence” in his impartiality.⁴³ On the other hand, the ICSID Convention standard requires the moving party to prove that the arbitrator “manifestly” lacks the ability to exercise independent judgment. In Claimants’ opinion, Spain has failed to meet its burden of proof.⁴⁴
53. Additionally, the Claimants recalled that they have asserted the doctrine of estoppel in the present case.⁴⁵ The Claimants allege that the Respondent knew that Prof. Hobér was sitting in *Stadtwerke* when he was nominated as arbitrator, and did not raise any issue until now. Additionally, since *Stadtwerke* and the current proceeding “had all but completed by the summer of 2019”, it’s probable that Prof. Hobér “was digesting the issues of both cases and forming his views about them during the same time period”.⁴⁶
54. Therefore, Prof. Hobér’s dissenting opinion in *Stadtwerke* is “not evidence that he has *pre*-judged any issues in the present case”, but that he had “developed his views on the issues... in this case that overlap with *Stadtwerke* well before he authored his dissent”.⁴⁷
55. The Claimants have also requested that the Respondent bear all costs arising of or in connection with Prof. Hobér’s Disqualification Proposal.⁴⁸

C. PROF. HOBÉR’S EXPLANATIONS

56. Prof. Hobér furnished his explanations in two separate documents. His explanations of December 5, 2019, concerned the Respondent’s initial Proposal and his involvement in the Nord Stream Arbitration and his explanations of December 23, 2019, addressed the Respondent’s additional ground for disqualification, *i.e.*, his dissenting opinion in *Stadtwerke*.

⁴³ *Ibid.*, ¶ 12.

⁴⁴ *Ibid.*, paras. 12 and 14.

⁴⁵ See paragraph 58 above, and Claimants’ Comments on the SCC Decision, paras. 20-22.

⁴⁶ Claimants’ Comments on the SCC Decision, ¶ 25.

⁴⁷ *Id.*, emphasis in the original.

⁴⁸ Claimants’ Response, ¶ 38; Claimants’ Additional Observations, ¶ 33(b).

57. In his explanations of December 5, 2019, Prof. Hobér states that he has been impartial and independent throughout the proceeding and that he will continue to be so until its conclusion.
58. Regarding his involvement in the Nord Stream Arbitration, Prof. Hobér confirmed that he is acting as counsel for Nord Stream in a case against the European Union as a party to the ECT, which concerns an EU regulation for natural gas.
59. Prof. Hobér disagrees with Spain’s position that he lacks the qualities of Article 14(1) of the ICSID Convention. He explains that in his role as counsel, he is not putting forward his own views but his client’s. He states that arbitrators decide cases based not on their own personal views but rather on the facts and evidence produced by the parties in the arbitration. Therefore, the fact that he “act[s] as counsel in an arbitration against the EU – not Spain – in a dispute which is different from and unrelated to the [present proceeding] ... does not indicate a manifest lack of qualities required by paragraph (1) of Article 14 of the ICSID Convention”.⁴⁹
60. In relation to Spain’s contention that he failed to abide by his duty to disclose under ICSID Arbitration Rule 6(2), Prof. Hobér states that since his actions do not fail to meet the test of Article 57 of the ICSID Convention, no disclosure was necessary.
61. As to his dissenting opinion in *Stadtwerke*, Prof. Hobér states that although Spain “has been fully aware” of his involvement in that case, it never raised any concerns until now when he issued a dissenting opinion that “might not be to its liking”.⁵⁰
62. In contrast with Spain’s position, Prof. Hobér contends that although there are some similarities between both cases, each case is different. He states that cases are decided based on the “particular facts, evidence and arguments presented by the parties [in each case]”⁵¹. Therefore, the fact that he issued a dissenting opinion in another case does not mean that he lacks the qualities required by paragraph (1) of Article 14 of the ICSID Convention.

⁴⁹ Prof. Hobér’s explanations of December 5, 2019.

⁵⁰ Prof. Hobér’s explanations of December 23, 2019.

⁵¹ *Id.*

IV. ANALYSIS

63. The Chairman of the Administrative Council has considered all of the parties' submissions but will refer to them only inasmuch as they are relevant for the present Decision.

A. TIMELINESS

64. ICSID Arbitration Rule 9(1) provides:

A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

65. Neither the ICSID Convention nor the ICSID Arbitration Rules specify a number of days within which a disqualification proposal must be filed. Accordingly, the timeliness of a disqualification proposal must be determined on a case-by-case basis.⁵²

66. For example, in *BSG*, a disqualification proposal filed 7 days after the tribunal's ruling giving rise to the proposal was considered timely.⁵³ In *Fábrica*, a challenge filed 45 days after the latest fact on which it was based was considered untimely.⁵⁴ In *Burlington*, two grounds were dismissed because they related to facts which had been public for more than 4 months prior to filing the challenge.⁵⁵ And in *Interocean*, a number of grounds were

⁵² See, e.g., *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, October 3, 2017 ("**Interocean**"), ¶ 71; **CA-004**, *BSG Resources Limited, BSG Resources (Guinea) Limited and BCG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal, December 28, 2016 ("**BSG**"), ¶ 60; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify a Majority of the Tribunal, June 16, 2015 ("**Fábrica 2015 Decision**"), ¶ 40; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014 ("**Conoco 2014 Decision**"), ¶ 39; **CA-012**, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014 ("**Abaclat 2014 Decision**"), ¶ 68; **RA-013**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna, December 13, 2013 ("**Burlington**"), ¶ 73.

⁵³ **CA-004**, *BSG*, ¶ 62.

⁵⁴ *Fábrica 2015 Decision*, ¶¶ 44-46.

⁵⁵ **RA-013**, *Burlington*, ¶¶ 71-75.

found untimely, including two invoked 377 days and 305 days after the date on which the challenging party became aware of the factual basis of the proposal.⁵⁶

67. Here, the Claimants have argued that Spain's first ground to seek Prof. Hobér's disqualification based on his role in the Nord Stream Arbitration should be dismissed because of untimeliness.
68. As noted above, the Respondent informed the Tribunal on October 21, 2019, that it had learned of Prof. Hobér's involvement in the Nord Stream Arbitration based on a note published on September 26, 2019. A total of 26 days went by between this date and the date when the Respondent first brought this matter to the attention of the Tribunal in the form of an inquiry. The Chairman observes in this regard that the Claimants have not argued, nor provided any evidence that the Respondent knew or should have known of Prof. Hobér's involvement in the Nord Stream Arbitration before September 26, 2019.
69. Prof. Hobér replied on October 27, 2019, and the Respondent filed its Disqualification Proposal on November 12, 2019. Thus, another 17 days then passed from Prof. Hobér's response of October 27, 2019, and the Respondent's filing of its Disqualification Proposal on November 12, 2019.
70. In view of the foregoing, the Chairman considers that the time period between the facts relied upon by the Respondent and the filing of the Disqualification Proposal does not exceed acceptable margins of timeliness.
71. The Chairman concludes therefore that the Proposal, with respect to this ground, was filed promptly for the purpose of ICSID Arbitration Rule 9(1).

B. LEGAL STANDARD

72. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It provides that:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition,

⁵⁶ *Interocean*, ¶¶ 78, 83.

propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

73. Several decisions have concluded that the word “manifest” in Article 57 of the Convention means “evident” or “obvious,” and that it relates to the ease with which the alleged lack of the required qualities can be perceived.⁵⁷
74. The required qualities are stated in Article 14(1) of the ICSID Convention, which provides:
- 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.
75. While the English version of Article 14 refers to “independent judgment,” and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*” (guaranteed independence in exercising their functions), the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, it is understood that pursuant to Article 14(1) arbitrators must be both impartial and independent.⁵⁸
76. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both

⁵⁷ See, e.g., *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposal of the Bolivarian Republic of Venezuela to Disqualify Mr. Alvaro Castellanos, March 2, 2018 (“**Blue Bank 2018 Decision**”), ¶ 78; **CA-004**, *BSG*, ¶ 54; *Fábrica de Vidrios Los Andes, C.A. and Owen s-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Reasoned Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (“**Fábrica 2016 Decision**”), ¶ 33; *Conoco* 2014 Decision, ¶ 47; **CA-012**, *Abaclat* 2014 Decision, ¶ 71.

⁵⁸ See, e.g., *Blue Bank* 2018 Decision, ¶ 77; **CA-004**, *BSG*, ¶ 56; *Fábrica* 2015 Decision, ¶ 27; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify a Majority of the Tribunal, July 1, 2015 (“**Conoco 2015 Decision**”), ¶ 80; *Conoco* 2014 Decision, ¶ 50; **CA-012**, *Abaclat* 2014 Decision, ¶ 74; **RA-013**, *Burlington*, ¶ 65; **RA-014**, *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal to Disqualify a Majority of the Tribunal (“**Repsol**”), ¶ 70; **RA-010**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, November 12, 2013 (“**Blue Bank 2013 Decision**”), ¶ 58.

“protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”⁵⁹

77. 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.⁶⁰
78. The legal standard applied to a proposal to disqualify an arbitrator is an “objective standard based on a reasonable evaluation of the evidence by a third party.”⁶¹ Therefore, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.⁶²
79. The Respondent and the Claimant have referred to other sets of standards in their arguments. While such standards may serve as useful guidance, the Chairman is bound by the standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

C. APPLICATION OF THE STANDARD

(i) Prof. Hobér’s representation of Nord Stream 2 AG

80. The first ground upon which Spain is seeking to disqualify Prof. Hobér as an arbitrator in this case relates to his involvement as counsel in the Nord Stream Arbitration.

⁵⁹ See, e.g., *Blue Bank* 2018 Decision, ¶ 77; **CA-004**, *BSG*, ¶ 57; *Fábrica* 2016 Decision, ¶ 29; *Conoco* 2015 Decision, ¶ 81; *Conoco* 2014 Decision, ¶ 51; **RA-010**, *Caratube International Oil Company LLP & Mr. Devinci Salah v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, March 20, 2014 (“*Caratube*”), ¶ 53; **RA-010**, *Blue Bank* 2013 Decision, ¶ 59; *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, May 20, 2011 (“*Universal*”), ¶ 70; **CA-005**, *Urbaser S.A. and Others v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, August 12, 2010 (“*Urbaser*”), ¶ 43.

⁶⁰ See, e.g., **CA-004**, *BSG*, ¶ 57; *Conoco* 2015 Decision, ¶ 83; *Conoco* 2014 Decision, ¶ 52; **RA-010**, *Caratube*, ¶ 57; **CA-012**, *Abaclat* 2014 Decision, ¶ 76; **RA-013**, *Burlington*, ¶ 66; **RA-014**, *Repsol*, ¶ 71; **RA-010**, *Blue Bank* 2013 Decision, ¶ 59.

⁶¹ See, e.g., *Blue Bank* 2018 Decision, ¶ 79; **CA-004**, *BSG*, ¶ 58; *Fábrica* 2016 Decision, ¶¶ 30-32; *Conoco* 2015 Decision, ¶ 84; *Conoco* 2014 Decision, ¶ 53; **RA-010**, *Caratube*, ¶ 54; **RA-010**, *Blue Bank* 2013 Decision, ¶ 60; **CA-006**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, ¶ 39.

⁶² See, e.g., *Blue Bank* 2018 Decision, ¶ 79; **CA-004**, *BSG*, ¶ 58; *Conoco* 2015 Decision, ¶ 84; *Conoco* 2014 Decision, ¶ 53.

81. Spain contends that because of the similarities between the Nord Stream Arbitration and the present case, Prof. Hobér will be unable to exercise independent and impartial judgment in this case.
82. Spain explains that in both cases the respondent’s right to regulate is contested. Spain also notes that “in both arbitrations claimants have submitted their claims under Articles 10(1) and 13 of the ECT.”⁶³
83. It is to be noted that the present arbitration and the Nord Stream Arbitration concern (i) different claimants; (ii) different respondents; (iii) different subsectors of the energy industry; and (iv) different measures. As Prof. Hobér indicated in his October 27, 2019 letter, the claimant in the Nord Stream Arbitration is the Swiss owner and operator of a gas pipeline; the respondent is the European Union. The energy subsector involved is the transportation of natural gas, and the measures challenged are European EU directives which are not at stake in the present ICSID proceeding.
84. Given the multiple differences between the two cases, a third party undertaking a reasonable evaluation of the facts would not conclude that there is evidence: (i) that Prof. Hobér manifestly appears to lack the qualities required under Article 14(1) of the ICSID Convention, or (ii) that Prof. Hobér breached his duty to disclose a circumstance that might call into question his ability to exercise independent and impartial judgement.
85. The first ground for disqualification submitted by Spain is therefore dismissed.

(ii) Prof. Hobér’s dissent in the *Stadtwerke* case

86. The second ground upon which Spain is seeking to disqualify Prof. Hobér relates to the Dissenting Opinion he issued in *Stadtwerke*.
87. The Respondent’s position is that because Prof. Hobér expressed his views on many “key issues” at stake in this case, and did so in a way that, according to the Respondent, “leaves no room for a different decision in this arbitration”, he can no longer sit in this arbitration

⁶³ *Ibid.*, ¶ 56.

without “depriving the Respondent of an arbitrator that will exercise an independent judgment”.⁶⁴

88. The Claimants acknowledge that some facts in *Stadtwerke* overlap with the present case but maintain that the two cases are not identical. So did Prof. Hobér in his explanations.
89. *First*, it should be noted that the circumstance that an arbitrator has expressed views on issues of law or fact common to two or more parallel arbitrations in which that arbitrator is involved is not -without more- evidence of partiality or appearance thereof.
90. *Second*, the two cases at stake involve investments in Spain by unrelated companies, made at different times, and in different sectors. These are not distinctions without relevance in the context of renewable energy cases against Spain, as decisions of ICSID tribunals have shown. Even in cases where issues could be similar, the arguments and the manner in which they are presented by different parties could differ depending on the particularities of each case.
91. Finally, *Stadtwerke* and the present arbitration commenced within six months of each other, in January and June 2015, respectively. In *Stadtwerke*, the claimants appointed Prof. Hobér on April 15, 2015. In the present case, the Claimants appointed Prof. Hobér on August 12, 2018, following Mr. Born’s resignation.
92. The parties could anticipate at the time of Prof. Hobér’s appointment that both cases would deal with similar issues of fact and law. They also knew that one of the cases could be decided in advance of the other; yet neither party asked that the two cases be decided simultaneously. Spain did not raise concerns upon the appointment of Prof. Hobér in this case, and, it should be noted, has appointed the same individuals in several other investor-State arbitrations.
93. Accordingly, in these circumstances, a third party undertaking a reasonable evaluation of the facts would not conclude that Prof. Hobér manifestly appears to lack the required impartiality and independence to judge this case based on the information and evidentiary record submitted by the parties in the course of the proceeding.


⁶⁴ Respondent’s Supplementary Submission, ¶¶ 32, 38 and 17.

94. The proposal to disqualify Prof. Hobér on the basis of his Dissenting Opinion in the *Stadtwerke* case is likewise dismissed.

V. DECISION

95. Having considered all the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Chairman rejects the Respondent's Proposal to Disqualify Prof. Hobér in this case.

96. The allocation of costs incurred in connection with his decision is a matter for determination by the Tribunal in the course of the arbitration in accordance with ICSID Arbitration Rule 28(1) and the Chairman makes no decision in this regard.

A handwritten signature in black ink that reads "David Malpass". The signature is written in a cursive style with a horizontal line underneath it.

David Malpass
Chairman of the ICSID Administrative Council