INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

CANEPA GREEN ENERGY OPPORTUNITIES I, S.Á R.L. AND
CANEPA GREEN ENERGY OPPORTUNITIES II, S.Á R.L.

CLAIMANTS

and

KINGDOM OF SPAIN

RESPONDENT

ICSID Case No. ARB/19/4

DECISION ON THE PROPOSAL TO DISQUALIFY MR. PETER REES QC

Issued by
Professor Sean David Murphy
Professor Silvina S. González Napolitano

Secretary of the Tribunal
Ms. Ana Constanza Conover Blancas

Date: 19 November 2019

REPRESENTATION OF THE PARTIES

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Mr. Pablo Elena Abad
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Mr. Mariano Rojo Pérez
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Ms. Ana María Rodriguez Esquivias
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I. INTRODUCTION

A. Request for Arbitration and Constitution of the Tribunal

1. On 1 February 2019, Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. ("**Claimants**") submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") against the Kingdom of Spain ("**Spain**" or "**Respondent**"). The Claimants and the Respondent are hereinafter collectively referred to as the "**Parties**."

2. On 25 February 2019, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**").

3. On 8 May 2019, Mr. Peter Rees QC, a national of the United Kingdom, accepted his appointment by the Claimants as arbitrator in this case.

4. On 16 May 2019, Professor Silvina S. González Napolitano, a national of Argentina, accepted her appointment by the Respondent as arbitrator in this case.

5. On 11 September 2019, Professor Sean Murphy, a national of the United States of America, accepted his appointment by agreement of the Parties as presiding arbitrator. On the same date, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was deemed to have been constituted on 11 September 2019, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**").

B. Mr. Rees' Disclosures

6. On 8 May 2019, Mr. Rees provided a signed declaration and an accompanying statement pursuant to ICSID Arbitration Rule 6(2), copies of which were transmitted by the ICSID Secretariat to the Parties on the same date. In his statement, Mr. Rees disclosed that: ***(1)*** he was co-arbitrator in the arbitration *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, where he was appointed upon the nomination of the investor; ***(2)*** he was co-arbitrator in a pending ICC arbitration, where he was appointed

upon the nomination of clients of Allen & Overy LLP (the "**Firm**") and counsel were from the Australian office of the Firm; and ***(3)*** he was until recently co-arbitrator in another ICC arbitration, where he was appointed upon the nomination of clients of the Firm and counsel were from the Dutch and UK offices of the Firm. Mr. Rees further stated that neither arbitration referred to in *(2)* or *(3)* above had any connection with the present case and, to the best of his knowledge, none of the individuals involved from the Firm had any involvement in this case.

7. On 14 May 2019, the Respondent requested disclosures from Mr. Rees, including with respect to the following:

    i. The arbitrations where Mr. Rees was proposed as arbitrator by the Claimants or any of its affiliates, including the date of the appointment, the name of the parties, the amount of the dispute and if the final award was favourable to the Claimants or its affiliates.

    ii. The arbitrations where Mr. Rees was proposed as arbitrator by the Claimants' attorneys, including cases managed by attorneys formerly working for other law firms and currently working for the Firm.

    iii. Information related to Mr. Rees' remuneration as a member of the Investment Committee of the company Harbour Litigation Funding Limited ("**HLF**" or the "**Company**") and concerning the disputes funded by HLF.

8. On the same date, the ICSID Secretariat transmitted a copy of the Respondent's request to Mr. Rees.

9. On 21 May 2019, at the request of Mr. Rees, ICSID transmitted to the Parties a "Disclosure by the Arbitrator Appointed by the Claimants, Peter Rees QC", dated 20 May 2019. Mr. Rees stated in his disclosure, *inter alia,* that:

    i. He had never been proposed as arbitrator by Claimants or any of its affiliates.

    ii. He was previously proposed as arbitrator by clients of the Firm on two occasions. In the first case (handled by the Firm's Dutch and English offices), he was appointed in March 2016, the case settled, and no award was made. In

the second case (handled by the Firm's Hong Kong and Australian offices), he was appointed in September 2018 and the case remained pending. Neither case involved any of the attorneys representing the Claimants in this arbitration.

iii. He had been a member of HLF's Investment Committee since February 2015 and his total remuneration since then had been GBP 271,169.20. With regard to disputes funded by the Company, Mr. Rees noted ***(1)*** one case between an investor from a European Union ("**EU**") Member State and another EU Member State (*Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14 ("***Rockhopper***")), and ***(2)*** one case before the English High Court where the claimant is represented by the Firm.

10. On 30 May 2019, the Respondent requested further disclosures from Mr. Rees concerning, *inter alia*, HLF's documentation related to the *Rockhopper* case, and all investment arbitration proceedings in which Mr. Rees had served as arbitrator. On the same date, the ICSID Secretariat transmitted a copy of the Respondent's request to Mr. Rees.

11. On 12 June 2019, at the request of Mr. Rees, ICSID transmitted to the Parties a "Further Disclosure by the Arbitrator Appointed by the Claimants, Peter Rees QC". In his disclosure, Mr. Rees stated, *inter alia*, that: ***(1)*** the documents related to the *Rockhopper* case requested by the Respondent were confidential to HLF and he did not have access to them; ***(2)*** when funding that case, there had been no discussion at the Company's Investment Committee in relation to the issue of an investor from an EU country making an arbitral claim against an EU State ("**intra-EU investment arbitration**"); and ***(3)*** he had been appointed as arbitrator in three other investment arbitrations, the information of which was publicly available at the ICSID website.

C. Respondent's Proposal to Disqualify Mr. Rees

12. On 11 October 2019, the Respondent proposed the disqualification of Mr. Peter Rees, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**Proposal**").

13. On the same date, the Centre informed the Parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Parties were also informed that the Proposal would be decided by the other Members of the Tribunal, Professor Murphy and Professor González Napolitano (the "**Unchallenged Arbitrators**"), in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

14. On 11 October 2019, the Centre transmitted to the Parties and Mr. Rees the procedural calendar for the submission of written observations on the Proposal, which had been fixed by the Unchallenged Arbitrators.

15. On 18 October 2019, in compliance with the procedural calendar, the Claimants submitted their Comments on Respondent's Disqualification Proposal of Mr. Peter Rees QC ("**Claimants' Observations**").

16. On 21 October 2019, Mr. Rees furnished his explanations on the Proposal, as envisaged by ICSID Arbitration Rule 9(3) ("**Explanations**").

17. Both Parties were allowed to submit simultaneously additional observations on the Proposal by 30 October 2019. Respondent's Further Comments Regarding the Disqualification of Mr. Rees ("**Respondent's Further Comments**") were received on 30 October 2019. No additional observations were received from the Claimants.

II. THE PARTIES' SUBMISSIONS

A. Respondent's Submissions

18. The Respondent's arguments on the proposal to disqualify Mr. Rees were set forth in its submissions of 11 and 30 October 2019. These arguments are summarized below.

1. Applicable Legal Standards

19. The Respondent considers as applicable law the sources mentioned in Article 38 of the Statute of the International Court of Justice: international conventions, international custom, and general principles of law recognized by civilized nations.[1]

20. First, the Respondent refers to Articles 14 and 57 of the ICSID Convention, which must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**").[2] Respondent contends that ***(1)*** in light of the three authentic language versions of the ICSID Convention, Article 14 requires arbitrators "to be both independent and impartial;"[3] and ***(2)*** these provisions do not require proof of actual dependence or bias, rather, as held in the *Blue Bank* case, it is sufficient to establish the appearance of dependence or bias.[4] The Respondent further argues that, as held in the *Burlington* and *Repsol* cases, the applicable legal standard is an "objective standard based on the reasonable analysis of evidence by a third party."[5] Moreover, an inference of manifest bias suffices as a basis for disqualification as long as it is anchored to facts.[6] The Respondent also refers to Article 47 of the European Union Charter of Fundamental Rights and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[7]

21. Second, the Respondent argues that the international custom regarding arbitration demands "(1) impartiality and independence on the arbitrators; and (2) that they can be disqualified when there is any reasonable doubt about the lack of those qualities."[8] In Respondent's view,

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[1] Proposal, ¶¶ 2, 6-8.
[2] *Ibid.*, ¶ 20 (referring to Vienna Convention on the Law of the Treaties, 23 May 1969, 1155 U.N.T.S. 331).
[3] *Ibid.*, ¶ 16.
[4] *Ibid.*, ¶ 70 (referring to *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposal to Challenge the Majority of the Tribunal Submitted by the Parties dated 12 November 2013 (Respondent's Annex 13) ("***Blue Bank***"), ¶¶ 37 and 58).
[5] Proposal, ¶ 71 (referring to *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal to Challenge Mr. Francisco Orrego Vicuña dated 13 December 2013 (Respondent's Annex 14) ("***Burlington Resources***"), ¶¶ 65 and 77; and *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposed Challenge of the Majority of the Tribunal dated 13 December 2013 (Respondent's Annex 15) ("***Repsol***"), ¶¶ 71-72).
[6] Proposal, ¶ 73.
[7] *Ibid.*, ¶ 21.
[8] *Ibid.*, ¶ 28. *See also ibid*., ¶ 79.

the use of the term "manifest" in Article 57 of the ICSID Convention cannot be interpreted inconsistently with international custom that protects the nature of the arbitration.[9]

22. Finally, the Respondent submits that it is a general principle of international law that adjudicators must be independent and impartial and that they may be disqualified if "there is any slight doubt that they are biased." Furthermore, according to the Respondent, the general principles of law do not require strict evidence nor require the challenging party to prove actual bias; rather, bias can be inferred from the facts of the case.[10]

2. Grounds for Disqualification

23. The Respondent seeks the disqualification of Mr. Rees on four main grounds: ***(1)*** repeated appointments and lack of proper disclosure; ***(2)*** past and present relationship with Claimants' counsel; ***(3)*** relationship with a litigation fund; and ***(4)*** pre-judgment of a key issue in this case concerning the Tribunal's jurisdiction over intra-EU disputes. The Respondent stresses that these grounds "work together and they should be addressed as a unity."[11]

24. First, the Respondent proposes that Mr. Rees be disqualified because he has been appointed on three occasions (including this case) by the Firm in the past three years for proceedings where the total quantum exceeds 2 billion Euros, which Mr. Rees failed to disclose in his initial declaration and in his *curriculum vitae*. The Respondent argues that this situation falls within Section 3.3.8 of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "**IBA Guidelines**"). The Respondent considers as an aggravating circumstance the silence of Mr. Rees regarding the quantum of the arbitrations where he was appointed by the Firm, and it refers to prior decisions finding that multiple appointments of an arbitrator is an issue relevant to impartiality and independence.[12]

25. Second, the Respondent considers that Mr. Rees ought to be disqualified since he has a long-standing history of working closely with the Firm. The Respondent claims that, while Mr. Rees was the Legal Director of Royal Dutch Shell ("**Shell**") from November 2010 to

[9] *Ibid.*, ¶ 29.
[10] *Ibid.*, ¶¶ 33-35.
[11] Respondent's Further Comments, ¶ 4.
[12] Proposal, ¶¶ 37-48; Respondent's Further Comments, ¶¶ 8-14.

April 2014, the Firm was retained by Shell as its main legal service provider to manage Shell's largest transactions. The Respondent provides a list of examples of such transactions which, in its view, show an old and strong mutual trust relationship between Mr. Rees and the Firm, as it would be highly unusual for the Legal Director not to be involved in the company's largest transactions.[13]

26. Third, the Respondent bases its Proposal on the fact that Mr. Rees was a member of the Investment Committee of HLF and that a former associate at the Firm, Mr. Dominic Afzali, is an associate director at HLF. As a preliminary matter, the Respondent submits that the positions of arbitrator and advisor in a litigation fund ought to be considered incompatible due to the serious risks of bias they raise. In this case, Mr. Rees failed initially to disclose his position at HLF and only did so after a disclosure request from the Respondent. The Respondent considers that such silence must have meant that Mr. Rees was aware of the incompatibility of advising on which disputes should be funded and then being appointed as an arbitrator in similar or identical disputes. The Respondent adds that the current position of Mr. Afzali – who was formerly an attorney at the Firm – as an associate director at HLF shows, once again, the relationship and interconnection "beyond any reasonable line" between the Firm and Mr. Rees.[14]

27. Finally, the Respondent submits that Mr. Rees should be disqualified because he disclosed that, in the context of HLF considering whether to provide funding in the *Rockhopper* case, there was no discussion at the Company's Investment Committee in relation to the issue of intra-EU investment arbitration. According to the Respondent, this lack of discussion shows that Mr. Rees has prejudged a jurisdictional issue that is critical in this case. In other words, Mr. Rees must have recommended that the Investment Committee finance the *Rockhopper* case, which is an intra-EU investment arbitration, and in doing so must have had a clear idea that a jurisdictional objection to such arbitration was meritless, such that it did not even deserve to be discussed. Therefore, Mr. Rees cannot be regarded in this case as a neutral party with no bias or preconceived ideas on any of the issues in dispute. The Respondent also adds that discussions related to the permissibility of intra-EU investment arbitration predate the

[13] Proposal, ¶¶ 49-58; Respondent's Further Comments, ¶¶ 15-21.
[14] Proposal, ¶¶ 59-64; Respondent's Further Comments, ¶¶ 22-26.

March 2018 decision of the Court of Justice of the European Union in *Slowakische Republik v Achmea B.V.* (*Achmea*).[15]

28. In Respondent's view, the above grounds are obvious, clear and show a manifest lack of impartiality and independence.

B. Claimants' Submissions

29. The Claimants' arguments on the proposal to disqualify Mr. Rees were set forth in their submission of 18 October 2019. These arguments are summarized below.

1. Applicable Legal Standards

30. The Claimants refer to Articles 14 and 57 of the ICSID Convention and argue that ***(1)*** these provisions contain the legal standard applicable to the disqualification of an arbitrator (which the Respondent does not dispute); and ***(2)*** the term "manifest" contained in Article 57 is significant as it requires the challenging party to show "evident" or "obvious" bias (i.e. capable of being discerned with little effort and without deeper analysis).[16]

31. The Claimants submit that the burden of proof for disqualifying an arbitrator is a heavy one as Article 57 imposes an objective standard based on a reasonable evaluation of the evidence by a third party, as opposed to the subjective perceptions or beliefs of the challenging party.[17] The Claimants refer, *inter alia*, to the *Vivendi* case, in which it was held that the challenging party must rely on established facts and not on mere speculation or inference.[18]

32. In addition, the Claimants oppose what they consider to be an attempt from the Respondent to deviate from the proper interpretation of Article 57 in order to apply a different legal standard to that contained in the ICSID Convention. For the Claimants, "the term '*manifest*' is not an '*additional requirement*' but rather the applicable standard".[19] Furthermore, in view of the clear and unambiguous ordinary meaning of Article 57 of the ICSID Convention, the

[15] Proposal, ¶¶ 65-69, 82; Respondent's Further Comments, ¶¶ 27-36.
[16] Claimants' Observations, ¶¶ 5-7, 11.
[17] *Ibid.*, ¶¶ 5-7, 14.
[18] *Ibid.*, ¶ 9 (referring to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee dated 3 October 2001 (Claimants' Annex 6), ¶ 25).
[19] Claimants' Observations, ¶ 9 (emphasis in the original).

Claimants consider that there is no basis for the Respondent to refer to other rules of international law.[20] Finally, while supplementary means of interpretation may be used to confirm the ordinary meaning of Article 57 of the Convention (as permitted by Article 32 of the VCLT), they may not be used to change the otherwise clear meaning of Article 57 of the Convention.[21]

33. Based on the above, the Claimants request the Unchallenged Arbitrators to apply the standard for disqualification contained in Article 57 of the Convention and disregard the Respondent's submissions requesting that a different standard be applied.

2. Grounds for Disqualification

34. The Claimants submit that the Respondent's Proposal is devoid of merit and should be dismissed.

35. First, concerning Mr. Rees' previous appointments by the Firm, the Claimants argue, *inter alia*, that: ***(1)*** Mr. Rees disclosed the two prior cases in which he had been appointed by the Firm in his initial declaration; ***(2)*** Mr. Rees did not initially disclose matters of quantum as this is not required by ICSID Arbitration Rule 6(2); and ***(3)*** upon the Respondent's request, Mr. Rees disclosed promptly the amount in dispute in the cases where he was appointed by clients of the Firm. As recognized in previous ICSID cases such as *Caratube*, *Opic* and *Universal Compression*, which applied Articles 14 and 57 of the ICSID Convention, the mere fact of holding previous arbitral appointments does not, in itself, indicate a manifest lack of independence or impartiality on the part of an arbitrator. The Claimants further argue that there are no valid grounds for disqualification since none of the cases in which Mr. Rees was appointed by the Firm has any relation to the present dispute and there is no relationship of dependence or influence between the Firm and Mr. Rees. In addition, the Claimants submit that the IBA Guidelines are not binding upon the Unchallenged Arbitrators and, even if they were applied, the case at hand does not fall within the Orange list. Section 3.3.8 of the IBA Guidelines refers to situations involving *more* than three repeated appointments within three

[20] *Ibid.*, ¶¶ 8-13.
[21] *Ibid.*, ¶ 15.

years, whereas this case only constitutes Mr. Rees' third appointment, and that appointment took place more than three years after his first appointment on March 2016 by the Firm.[22]

36. Second, in Claimants' view, the arguments regarding the alleged relationship between the Firm and Shell put forward by the Respondent are speculative assertions that fail to satisfy the Article 57 requirement of a fact indicating a manifest lack of independence or impartiality. The Claimants further dispute Respondent's assertion that the Firm was Shell's main legal advisor, given that the Respondent has failed to offer any evidence in support of such assertion and that there were 11 firms on the panel of legal firms retained by Shell to provide advice during Mr. Rees' tenure at Shell. Furthermore, the Claimants submit that no evidence has been offered by the Respondent that Mr. Rees was personally involved in any Shell transaction in which the Firm was retained, and confirm that none of the Firm's team in this case was involved in any of the Shell transactions cited by the Respondent.[23]

37. Third, with respect to Mr. Rees' role on the Investment Committee of HLF, the Claimants first note that the Respondent has failed to substantiate its claim that providing advice to an entity which funds arbitral disputes disqualifies an arbitrator in an unrelated dispute involving different parties. In addition, the Claimants submit that Mr. Rees was not required to disclose his relation to HLF in his declaration and statement since ICSID Arbitration Rule 6(2) contains no requirement for an arbitrator to disclose a professional or business relationship that has no overlap with or connection to the parties to the dispute. In any event, the Claimants consider that even if Mr. Rees' connection to HLF was relevant in this case, non-disclosure would not be sufficient for disqualification. Moreover, as to Respondent's allegations concerning Mr. Afzali, the Claimants confirm that he has never been involved in this case and consider that the Respondent has failed to show why a move by one employee from a large firm to

[22] *Ibid.*, ¶¶ 17-29 (referring, *inter alia*, to *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan,* ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Claimants' Annex 1) ("***Caratube***"), ¶ 108; *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Prof. Philippe Sands (Claimants' Annex 17) ("***Opic***"), ¶ 53; and *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 (Claimants' Annex 18) ("***Universal Compression***"), ¶ 77).

[23] Claimants' Observations, ¶¶ 30-32.

another company means that those two companies would be closely intertwined, as the Respondent claims.[24]

38. Finally, concerning Mr. Rees' alleged pre-judgement of the issue of intra-EU investment arbitration, the Claimants argue that "[t]he only fact that Mr Rees' declaration makes clear is that the 'intra-EU' issue was not discussed by the Investment Committee in relation to the *Rockhopper v Italy* case. Any speculation relating to the committee's lack of discussion on the matter cannot manifestly demonstrate that Mr Rees has prejudged the issue. Spain has not proved or even asserted that Mr Rees has expressed any opinion on the issue."[25] The Claimants add that it would be no surprise that there was no discussion of the issue as all investment tribunals to date that have considered the "intra-EU" jurisdictional objection have rejected it. Furthermore, the Claimants point out that the Respondent itself has appointed an arbitrator in another case who had previously issued a decision on the "intra-EU" jurisdictional objection and, hence, the Respondent must not have considered this to constitute a manifest lack of independence or pre-judgement by the arbitrator.[26]

III. MR. REES' EXPLANATIONS

39. Mr. Rees provided his explanations on 21 October 2019, together with copies of his disclosures of 20 May and 12 June 2019.

40. With respect to the first ground for disqualification, Mr. Rees noted that his disclosure of 20 May 2019 set out his previous appointments by clients of the Firm and the amounts involved in the arbitrations in question.

41. Concerning the second ground for disqualification, Mr. Rees noted that: ***(1)*** he took over as Legal Director of Shell on January 2011 at which time Shell had a panel of five law firms that had been established by the former Legal Director (and included the Firm for transactional work); ***(2)*** at the time he joined, Shell had approximately 720 in-house lawyers in 40 different jurisdictions who were required to use the panel firms for the work for which those firms had been appointed on the panel; ***(3)*** he conducted a new panel selection procedure, which was

[24] *Ibid.*, ¶¶ 33-37.
[25] *Ibid.*, ¶ 40.
[26] *Ibid.*, ¶ 43.

completed in May 2013, that broadened the number of firms on the panel from five to more than 150 (11 firms, including the Firm, were selected as panel members for particular work in more than three jurisdictions); and ***(4)*** the Legal Director was not involved in law firm selection for particular transactions, nor was it practical for the Legal Director to do so given the high volume of contracts and pieces of legislation and arbitration in which Shell was involved.

42. With regard to the third ground for disqualification, Mr. Rees referenced his prior disclosures of 20 May and 12 June 2019 in which he had provided details of his involvement with the Company. In addition, Mr. Rees noted that he was no longer a member of HLF's Investment Committee since July 2019. Mr. Rees also confirmed that he had never met, nor had any communications with, Mr. Afzali.

43. Finally, regarding the fourth ground for disqualification, Mr. Rees referenced his prior disclosure that there was no discussion at the Investment Committee in relation to the issue of an investor from an EU country making a claim against any EU State. Moreover, the decision to fund the *Rockhopper* case was taken by the Investment Committee in September 2016, while the *Achmea* decision on the issue of intra-EU investment arbitration was issued on March 2018, so it could not have been a subject of debate.

IV. ANALYSIS OF THE UNCHALLENGED ARBITRATORS

A. Applicable Law

1. Applicable Legal Standards

44. The relevant treaty for deciding on the Proposal is the ICSID Convention, and in particular Articles 57 and 14.[27] The Unchallenged Arbitrators acknowledge as well the relevance of Articles 31 and 32 of the VCLT when interpreting a treaty,[28] which includes taking into

[27] Both Parties cite to the ICSID Convention and ICSID Arbitration Rules. *See* Proposal, ¶¶ 9-12; Claimants' Observations, ¶ 5.

[28] Spain acceded to the VCLT on 16 May 1972. Luxembourg acceded to the VCLT on 23 May 2003. Although the VCLT applies only to treaties that are concluded by States after the entry into force of the VCLT as between those States (VCLT, Article 4), the rules set forth in Articles 31 and 32 are widely accepted as reflecting customary international law, and have been used as such repeatedly by the International Court of Justice, other international courts and tribunals, and States since the adoption of the VCLT in 1969.

account any relevant rules of international law applicable in the relations between the parties to that treaty.[29] In the context of the Proposal, however, the salient rules are to be found in the ICSID Convention and the ICSID Arbitration Rules.

45. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads 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. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

46. The disqualification proposed in this case alleges that Mr. Rees manifestly lacks the qualities required by Article 14(1) of the ICSID Convention. Accordingly, it is unnecessary to address disqualification "on the ground that [an arbitrator] was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."[30]

47. Article 14(1) of the ICSID Convention in English 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.

48. For its part, Article 14(1) of the ICSID Convention in Spanish provides:

> *Las personas designadas para figurar en las Listas deberán gozar de amplia consideración moral, tener reconocida competencia en el campo del Derecho, del comercio, de la industria o de las finanzas e inspirar plena confianza en su imparcialidad de juicio. La competencia en el campo del Derecho será circunstancia particularmente relevante para las personas designadas en la Lista de Árbitros*.

49. While the English version of Article 14 of the ICSID Convention refers to "independent judgment" (and the French version to "*toute garantie d'indépendance dans l'exercice de leurs*

[29] VCLT, Article 31(3)(c).

[30] Further, it is noted that the Claimants have not contended that the Respondent's Proposal was untimely under ICSID Arbitration Rule 9(1).

fonctions"), the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that all three versions are equally authentic, the Unchallenged Arbitrators agree with earlier decisions that arbitrators must be both independent and impartial.[31]

50. The Respondent argues that "Articles 57 and 14 of the ICSID Convention must be interpreted as an obligation to disqualify an arbitrator if there is '*any indication*' of its lack of independence or impartiality"[32] or "any doubt" of bias.[33] The Unchallenged Arbitrators, however, are of the view that the word "manifest" in Article 57 of the ICSID Convention should be understood as meaning "evident" or "obvious,"[34] and that it relates to the ease with which the alleged lack of the required qualities can be perceived. As such, there is a burden to establish facts showing that the arbitrator is a person who may not be relied upon to exercise independent and impartial judgment. As for who bears that burden, "the party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made."[35] In this instance, that Party is the Respondent.

51. As for what is meant by the allied concepts of "independence" and of "impartiality," the former concept speaks principally to the absence of external control, while the latter concept relates to the absence of bias or predisposition towards a party. Both concepts seek to protect

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[31] *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine Republic*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal dated 22 October 2007 (Claimants' Annex 3) ("***Suez***"), ¶ 28; *OPIC*, ¶ 44; *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. dated 27 February 2012 (Claimants' Annex 16), ¶ 54; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz dated 19 March 2010) (Claimants' Annex 7) ("***Alpha***"), ¶ 36; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern dated 23 December 2010) (Claimants' Annex 15) ("***Tidewater***"), ¶ 37; *Burlington Resources*, ¶ 65; *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal dated 4 February2014 (Claimants' Annex 11) ("***Abaclat***"), ¶ 74; *Repsol*, ¶ 70.

[32] Proposal, ¶ 25 (emphasis in the original).

[33] *Ibid*., ¶¶ 27, 34.

[34] *See Suez*, ¶ 34; *Alpha*, ¶ 37; *Universal Compression*, ¶ 71; *Blue Bank*, ¶ 47; *Burlington*, ¶ 68; *Abaclat*, ¶ 71; *Repsol*, ¶ 73.

[35] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify J. Christopher Thomas dated 19 December 2002 (Claimants' Annex 9), ¶ 20.

the parties from having arbitrators who are influenced by factors unrelated to the merits of the case.

2. Relationship between Disclosure and Independence/Impartiality

52. ICSID Arbitration Rule 6(2) sets out the form of the declaration currently required of arbitrators who accept to serve on an ICSID tribunal. That declaration provides as follows:

> To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____and_____.
>
> I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.
>
> I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.
>
> Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.

53. As has been noted by other tribunals, there is a clear distinction between the disclosure standards of Arbitration Rule 6(2) and the disqualification standard set forth in Articles 14(1) and 57 of the ICSID Convention. A failure to disclose a fact that should have been disclosed is not, of itself, a sufficient reason to find a manifest lack of independence or impartiality. Rather, non-disclosure would indicate a manifest lack of such qualities "only if the facts or circumstances surrounding such non-disclosure are of such gravity (whether alone or in combination with other factors) as to call into question the ability of the arbitrator to exercise independent and impartial judgment."[36]

[36] *Tidewater*, ¶ 40.

3. Relevance of the IBA Guidelines

54. In the course of their pleadings, the Parties have referred to the IBA Guidelines. While these guidelines may serve as a reference, the Unchallenged Arbitrators are bound by the standards set forth in the ICSID Convention. Accordingly, this decision is made based upon the relevant provisions of the ICSID Convention and ICSID Arbitration Rules.[37]

B. Nature of the Challenge Concerning Mr. Rees

55. As indicated above, the ICSID Convention's standard for a challenge, which is found in Article 57, embodies an objective criterion that imposes the stringent requirement of a "manifest" lack of the three types of qualities set forth in Article 14(1) – namely the qualities of "high moral character," "recognized competence," and reliability to exercise independent and impartial judgment.

56. The Respondent does not seek to impugn Mr. Rees' character, nor does it raise any doubt as to his legal competence. Instead, the Respondent focuses its attention on the last of the three qualifications: reliability to exercise independent or impartial judgment.

C. Ground 1: Repeated Appointments and Lack of Proper Disclosure

57. The first ground for disqualification asserts that Mr. Rees lacks independence or impartiality because he: (***1***) failed to disclose that he had been previously appointed by the Firm in two, multi-million-dollar cases, which the Respondent asserts are the "most relevant Arbitration cases the Firm is running";[38] and (***2***) has now been appointed in three cases by the Firm.

58. At the outset of his appointment, Mr. Rees disclosed in his Declaration and Statement dated 8 May 2019 that he had previously been appointed by clients of the Firm in two arbitral cases held under the auspices of the International Chamber of Commerce.[39] The Respondent is correct that the 8 May 2019 disclosure did not specify the quantum in dispute for the two cases, but Rule 6(2) of the ICSID Arbitration Rules does not require such disclosure. Rather, Arbitration Rule 6(2) provides the form of the declaration that each arbitrator must sign, which

[37] *See Blue Bank*, ¶ 62.
[38] Proposal, ¶ 46; *see also ibid*., ¶ 48 ("economically most relevant cases").
[39] Mr. Peter Rees Declaration and Statement dated 8 May 2019, p. 2, ¶¶ 2-3.

states that an arbitrator shall provide a statement of "(a) [his/her] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause [his/her] reliability for independent judgment to be questioned by a party." [40] Mr. Rees disclosed on 8 May 2019 the fact of his two prior appointments relating to the Firm, thereby alerting the Respondent to those two cases.

59. Further, when the Respondent shortly thereafter queried Mr. Rees about the quantum at issue in those two cases, Mr. Rees promptly disclosed the amounts in a further Disclosure dated 20 May 2019.[41] Although the Respondent asserts that these two cases are the most relevant arbitration cases that the Firm is running, the Respondent has not presented evidence to that effect,[42] nor explained how the quantum at issue in those cases bears upon Mr. Rees' reliability to exercise independent or impartial judgment in this case. It is noted that Mr. Rees' 20 May 2019 disclosure indicates that one of those two cases has settled and no award was made, while the other remains ongoing.[43]

60. It is the view of the Unchallenged Arbitrators that Mr. Rees' non-disclosure in his 8 May 2019 declaration of the quantum at issue in his two previous appointments relating to the Firm does not evidence a manifest lack on his part of independence or impartiality in this case.

61. The Respondent's first ground for disqualification is also based on the fact that the Firm has now been involved in appointing Mr. Rees to three cases. Those appointments occurred on the following dates:

- 11 March 2016 (involving the Firm's Netherlands and U.K. offices)
- 12 September 2018 (involving its Australian and Hong Kong offices)
- 8 May 2019 (involving its Madrid office)[44]

[40] *See supra* ¶ 52.

[41] Disclosure by the Arbitrator Appointed by the Claimants, Peter Rees, dated 20 May 2019, p. 1 ("**Rees 20 May Disclosure")**.

[42] At times, the Respondent appears to seek to impose the burden in this proceeding on the Claimants. *See* Respondent's Further Comments, ¶ 17. As indicated *supra* at ¶ 50, however, the burden of demonstrating that there exist facts indicating a manifest lack of the qualities required by Article 14(1) rests in this instance with the Respondent, as the proponent of the Proposal, and not with the Claimants.

[43] Rees 20 May Disclosure, p. 1.

[44] For the first two appointments, *see ibid*., pp. 1-2; for the appointment in this case, *see* Letter of 8 May 2019 from ICSID to the Parties.

62. The Unchallenged Arbitrators agree with the Respondent that multiple appointments of an arbitrator by a party or its counsel are a factor that must be carefully considered in the context of a challenge. As the unchallenged arbitrators stated in *OPIC*:

> In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the Convention.[45]

63. At the same time, the mere fact that an arbitrator has been appointed twice previously by a law firm in arbitral cases is not, standing alone, a basis for finding either an actual or an appearance of a manifest lack of independence or impartiality when appointed in a third case.[46] No objective fact has been presented demonstrating that Mr. Rees' independence or impartiality is impacted in this case by the three appointments involving the Firm. For example, it has not been shown that Mr. Rees is in a relationship of financial dependence to the Firm based on these three appointments, nor that these cases are related in some way that would affect Mr. Rees' decision in this case.[47] A relationship of familiarity and confidence between Mr. Rees and the Firm is not obvious from the fact of the three appointments, particularly given that the three cases involve different counsel from different offices of the Firm. Nor do three appointments on this time frame, standing alone, create an appearance of a manifest lack of independence or impartiality.

64. Although the IBA Guidelines are not applicable in this proceeding, it is noted that Section 3.3.8 of the IBA Guidelines' Orange List is not implicated on these facts. The Orange List "is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or

[45] *OPIC*, ¶ 47.

[46] *See, e.g.*, *Caratube*, ¶ 107 ("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"); *OPIC*, ¶ 53 (noting two prior appointments involving the same law firm, but noting that "these two appointments by Respondent's counsel do not in our view reach the level of multiple appointments that would by themselves demonstrate the manifest lack of independence required to be established for a successful proposal to disqualify under the Convention").

[47] *See Tidewater*, ¶ 62.

independence."[48] Section 3.3.8 envisages a situation where "[t]he arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm."[49] Mr. Rees has not received more than three appointments by the Firm within the past three years; rather, as of the date of Mr. Rees' appointment in this case, there had been two such appointments (12 September 2018 and 8 May 2019).

65. In conclusion, the Unchallenged Arbitrators find that Mr. Rees properly disclosed his appointment on two prior occasions by the Firm and further disclosed the quantum at issue in those cases upon being requested. Further, the Unchallenged Arbitrators find that such appointments in conjunction with his appointment in this case do not demonstrate a manifest lack of independence or impartiality.

D. Ground 2: Past and Present Relationship with the Claimants' Counsel

66. The second ground for disqualification asserts that Mr. Rees lacks independence or impartiality because of a past and present relationship with the Claimants' counsel. The principal focus of this ground concerns Mr. Rees's prior service as the Legal Director of Shell. This service appears to have been from an initial transition period that began in November 2010 (he formally became Shell's Legal Director in January 2011) and continued until April 2014.[50]

67. During that time, the Respondent identifies six times that Shell used the Firm for advice regarding mergers and acquisitions or antitrust litigation.[51] While the Respondent asserts that these constituted "the largest transactions conducted under the Challenged Arbitrator's tenure,"[52] it does not produce any evidence supporting that proposition.

68. At the same time, Shell apparently used multiple law firms throughout this period. According to Mr. Rees, when he arrived at Shell, there was a panel of five firms that could be used by Shell employees for particular transactions, which already included the Firm for transactional

[48] IBA Guidelines, Part II, ¶ 3.
[49] *Ibid*., § 3.3.8.
[50] Explanations, ¶ 5.
[51] Proposal, ¶¶ 51-56.
[52] Respondent's Further Comments, ¶ 21.

work.[53] By the time Mr. Rees departed Shell, a panel of more than 150 firms could be used, which continued to include the Firm.[54] Further, Shell itself employed more than 700 lawyers who were directly involved in selecting which law firms would be used for particular transactions.[55] According to Mr. Rees, he was not involved in the selection of law firms for particular transactions throughout this period; it was not practical to do so, as "Shell entered into approximately one million contracts each year involving annual capital expenditure of approximately USD 30 billion each year" and had "over 10,000 pieces of litigation and arbitration [at] any one time."[56] Though the Respondent has expressed doubts in this regard,[57] the Respondent has not shown that Mr. Rees was directly involved in any of the six instances that Shell used the Firm for advice during Mr. Rees' time as Shell's Legal Director.[58]

69. The Respondent also contends that the Claimants' Observations of 18 October 2019 in opposition to the Proposal constitutes such a "passionate defense" by the Firm that it raises serious doubt about the impartiality and independence of Mr. Rees.[59] The Unchallenged Arbitrators do not regard the Claimants' Observations as outside the bounds of normal advocacy on behalf of a client, in this instance engaging on the Respondent's grounds for disqualification by raising relevant points of fact and law. Nor do the Unchallenged Arbitrators view Mr. Rees' Explanations of 21 October 2019 as making any inappropriate reference to those Observations.[60]

70. In light of the above, the Unchallenged Arbitrators do not find it has been proved that Mr. Rees' position as Legal Director at Shell created an intertwined relationship between him and the Firm that now manifestly calls into question Mr. Rees' ability to act independently or impartially in this case.

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[53] Explanations, ¶ 6.
[54] *Ibid*., ¶ 9.
[55] *Ibid*., ¶ 7.
[56] *Ibid*., ¶ 8.
[57] Respondent's Further Comments, ¶¶ 18-20.
[58] Respondent points to a document produced by the Claimants in which Mr. Rees is quoted in relation to Shell's expansion in 2013 of its panel of firms. *Ibid.*, ¶ 19. That document, however, does not indicate that Mr. Rees personally was involved in the selection of any firm for a particular transaction; references to "we" appear to refer to Shell as an entity (Claimants' Annex 20).
[59] Respondent's Further Comments, ¶¶ 5-6.
[60] *See ibid*., ¶ 7.

E. Ground 3: Relationship with a Third-Party Litigation Fund

71. The third ground for disqualification asserts that Mr. Rees lacks independence or impartiality because at the time of his appointment in this case: ***(1)*** Mr. Rees was serving on the investment committee of a third-party litigation fund, HLF;[61] ***(2)*** he failed to disclose that role in his Declaration and Statement at the outset of this case;[62] ***(3)*** HLF had funded a claimant that was represented by the Firm;[63] and ***(4)*** HLF had hired an individual from the Hong Kong office of the Firm.

72. Taking the issue of disclosure first, the Respondent is correct that Mr. Rees did not disclose in his Declaration and Statement dated 8 May 2019 that he had been serving since February 2015 on HLF's Investment Committee. When the Respondent shortly thereafter queried Mr. Rees about his role with HLF, Mr. Rees disclosed the specifics of that role in his Disclosure dated 20 May 2019.[64] Further, Mr. Rees stepped down as a member of HLF's Investment Committee in July 2019 and no longer has any involvement with that company.[65]

73. It is the view of the Unchallenged Arbitrators that Mr. Rees should have disclosed his connection with HLF as a part of his Declaration and Statement dated 8 May 2019. This third-party litigation fund appears to be actively involved in funding investor-State disputes, which is a circumstance that might cause Mr. Rees' reliability for independent judgment or impartiality to be questioned by a party. If Mr. Rees had advised for or against the pursuit of one or more investor-State claims, such advice might well be pertinent as to his views as an arbitrator in a dispute that involves similar or identical issues of law or fact. Rather than learn of Mr. Rees' connection to HLF through disclosure, the Respondent on its own had to discover such information, leading it to pursue further, valid questions as to the nature of the cases for which Mr. Rees provided advice.

74. A failure to disclose a relevant fact, however, does not by itself demonstrate a manifest lack of impartiality or independence.[66] Rather, the purpose of disclosure is to inform the parties of

[61] Proposal, ¶ 63; Respondent's Further Comments, ¶ 23.
[62] Proposal, ¶¶ 61-62; Respondent's Further Comments, ¶¶ 24-25.
[63] Respondent's Further Comments, ¶ 13.
[64] Rees 20 May Disclosure, p. 2.
[65] Explanations, ¶ 12.
[66] *See supra* ¶ 53.

a situation that they may wish to explore further in order to determine whether there are justifiable doubts as to the arbitrator's independence or impartiality.

75. In this instance, the initial failure to disclose such information is not of sufficient gravity to merit disqualification. Rule 6(2) of the ICSID Arbitration Rules does not expressly require disclosure of an arbitrator's connection with a third-party litigation fund, such that it is difficult to conclude that Mr. Rees affirmatively sought to conceal such information from either Party. Further, the Respondent identified the relevant information within a matter of days after Mr. Rees' 8 May 2019 Declaration and Statement, allowing it to pursue the matter through further appropriate queries. Mr. Rees then confirmed and explained his connection with HLF in his Declaration dated 20 May 2019. As such, the failure of Mr. Rees to disclose this information in his initial Declaration and Statement does not, standing alone, indicate a manifest lack of independence or impartiality.

76. The Respondent also argues that the simple fact that Mr. Rees was a member of HLF's Investment Committee at the time of his appointment is *per se* a basis for finding a manifest lack of independence or impartiality. According to the Respondent, an "impartial and independent arbitrator cannot, under one hat, [advise] and encourage litigation on disputes, and, under another hat, adjudicate on those same disputes."[67] The Unchallenged Arbitrators agree that such "dual hatting" is problematic if, in context, there is a specific connection of some kind between the person's role as an adviser and the person's role as an arbitrator. For example, providing advice on the merits of a specific claim and then sitting as an arbitrator concerning that same claim (or a similar claim) would be a basis for finding a manifest lack of independence or impartiality. The Respondent's Ground 4, which is discussed below, advances such an argument. But a person's involvement in a third-party litigation fund, standing alone and in light of the current rules, does not demonstrate a manifest lack of independence or impartiality of that person as an arbitrator for all ICSID cases. Moreover, it is recalled that, as of July 2019, Mr. Rees no longer has any involvement with HLF.

77. The Respondent further argues that, because HLF has funded a claim where the claimant is represented by the Firm, this too shows that there is a close connection between Mr. Rees and

[67] Respondent's Further Comments, ¶ 23.

the Firm, thereby demonstrating that Mr. Rees lacks independence and impartiality. In his Declaration of 20 May 2019, Mr. Rees stated that HLF funded a claim for fraud in U.K. courts, and that the Firm represented the claimant in the U.K. case. According to Mr. Rees, the U.K. case commenced in 2013 and the decision by HLF to fund the case was taken before Mr. Rees joined HLF's Investment Committee.[68] Under these circumstances, the Unchallenged Arbitrators do not see any significant connection between HLF's funding of such a claim and Mr. Rees, so as to demonstrate any manifest lack of independence or impartiality on the part of Mr. Rees in this case.

78. Finally, the Respondent argues that the hiring by HLF of Mr. Afzali from the Firm (its Hong Kong office), further demonstrates a disqualifying connection between Mr. Rees and the Firm. In its Proposal, the Respondent asserts that Mr. Afzali "maintains contacts with the Firm and with the Challenged Arbitrator…",[69] but does not identify any specifics in that regard. Mr. Rees, however, indicates that he has "never met Mr Afzali nor, to the best of [his] recollection, had any communications with him."[70] The Firm indicated that "Mr Afzali has never been involved in this case."[71] After considering these facts, the Unchallenged Arbitrators do not see the hiring of Mr. Afzali by HLF as demonstrating any manifest lack of independence or impartiality on the part of Mr. Rees in this case.

F. Ground 4: Pre-judgment of a Matter at Issue in this Case

79. The fourth ground for disqualification asserts that Mr. Rees lacks independence or impartiality because in September 2016, during the time that he served on the Investment Committee of HLF, he was part of a decision to fund the *Rockhopper* case.[72] According to the Respondent, the decision to invest in that claim necessarily meant that Mr. Rees considered and rejected the possibility that there could be a jurisdictional objection to intra-EU investment arbitration.

[68] Rees 20 May Disclosure, pp. 2-3.
[69] Proposal, ¶ 64.
[70] Explanations, ¶ 13.
[71] Claimants' Observations, ¶ 37.
[72] *Rockhopper Italia S.P.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection dated 26 June 2019 (Claimants' Annex 21).

As such, the Respondent argues that Mr. Rees "had a clear idea that the intra-EU objection was meritless,"[73] and thus has prejudged an issue that will arise in this case.[74]

80. According to the Claimants, the Respondent's position rests on mere speculation as to Mr. Rees' state of mind in 2016. Further, the Claimants question the inference that the Respondent seeks to make by noting that the Respondent itself has acted in a manner that appears inconsistent with the logic it now invokes.[75]

81. In a Further Disclosure of 12 June 2019, Mr. Rees stated "that there was no discussion at the Investment Committee in relation to the issue of an investor from an EU country making a claim against an EU state."[76] Moreover, in his Explanations of 21 October 2019, he reiterates that when HLF's Investment Committee decided to invest in the *Rockhopper* claim in September 2016, "there was no discussion at the Investment Committee in relation to the issue of an investor from an EU country making a claim against an EU state. The *Achmea* decision was not given by the ECJ until March 2018, so it could not have been a subject of debate."[77] The Respondent, however, maintains that the potential impermissibility of intra-EU investment arbitration had been raised by the European Commission and debated in academic circles in 2015-2016, such that the validity of a jurisdictional objection to intra-EU investment arbitration must have been a factor in the Investment Committee's decision, even before issuance of the *Achmea* decision.

82. The Respondent has not identified any specific, clear opinion rendered by Mr. Rees as to the validity or invalidity of a jurisdictional objection to intra-EU investment arbitration.[78] Rather, this ground for disqualification is based on a conjecture as to what Mr. Rees' must have believed as of September 2016. The Unchallenged Arbitrators acknowledge the Respondent's

[73] Proposal, ¶ 68.
[74] Respondent's Further Comments, ¶ 35.
[75] *See supra* ¶ 38.
[76] Further Disclosure by the Arbitrator Appointed by the Claimants, Peter Rees QC, dated 12 June 2019, p. 1.
[77] Explanations, ¶ 14.
[78] *See 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 Campbell McLachlan, Arbitrator (Claimants' Annex 22), ¶ 44 ("What matters is whether the opinions expressed by [the arbitrator] . . . are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceeding.").

general point that, in the period before the issuance of the *Achmea* decision, there was some debate about the permissibility of intra-EU investment arbitration.[79] Yet there is always debate of one kind or another, at least in academic circles, about many possible decisions that courts or tribunals might reach in the future. It is not obvious, however, that such pre-*Achmea* debate would inescapably lead to an analysis in September 2016 of the issue by the Investment Committee upon which Mr. Rees served. As such, it is too speculative to assume that Mr. Rees must have previously considered and rejected the validity of a jurisdictional objection to intra-EU investment arbitration.

83. Based on these facts, the Unchallenged Arbitrators do not find that Mr. Rees' involvement in the decision to fund the *Rockhopper* case in September 2016 demonstrates his manifest inability to act independently or impartially in this case.

G. Viewing the Disqualification Grounds Collectively

84. The Respondent has asked that the Unchallenged Arbitrators view the various grounds for disqualification "as a unity," rather than as just individual components.[80] According to the Respondent, Mr. Rees maintains "a very close relationship" with the Firm, a relationship that has "strong and old roots," to include his repeated appointment as an arbitrator and the links between the Firm and the litigation fund for which Mr. Rees worked.[81]

85. The Unchallenged Arbitrators have considered the totality of the points raised by the Respondent, so as to consider whether, collectively, they demonstrate a manifest lack of

[79] The Respondent emphasizes the European Commission's view in 2015 with respect to the *Micula* case. Respondent's Further Comments, ¶¶ 31-32. Yet, that view may not be directly on point. In 2015, the European Commission decided that Romania's payment of the €178 million *Micula* award, which was rendered by an ICSID tribunal in 2013, would constitute illegal State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union. Specifically, the issue was whether the reinstating of privileges that had been abolished by Romania in the course of its accession to the European Union (or compensating the investors for the loss of these privileges) would lead to the granting of new aid incompatible with EU State aid rules. Such a view might not be regarded as pertinent in the context of the *Rockhopper* claim (it is noted that on 18 June 2019, the General Court of the Court of Justice of the European Union overturned the European Commission's 2015 decision, finding that (1) the *Micula* award recognized a right to compensation for the investors existing before Romania's accession to the EU; and (2) the Commission was precluded from applying EU State aid rules to this situation, at least with respect to the pre-accession period.).

[80] *See* Proposal, ¶¶ 44, 75; Respondent's Further Comments, ¶ 4.

[81] Proposal, ¶ 5.

independence or impartiality on the part of Mr. Rees in this case. After careful consideration, the Unchallenged Arbitrators do not view such points as establishing a particular relationship of Mr. Rees to the Firm that demonstrates a manifest lack of independence, nor as establishing that Mr. Rees has a particular bias or predisposition, so as to merit disqualification. Nor do such points considered collectively establish an appearance of a manifest lack of independence or impartiality.

V. DECISION

86. Having considered all the facts alleged and the arguments submitted by the Parties, and for the reasons stated above, the Unchallenged Arbitrators reject the Respondent's Proposal to disqualify Mr. Rees.

87. The costs of this challenge proceeding are reserved.

Professor Sean David Murphy

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