



PCA Case No. 2022-03

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE
FEDERAL REPUBLIC OF GERMANY AND THE REPUBLIC OF VENEZUELA ON THE
PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS AND ITS
PROTOCOL, SIGNED ON 14 MAY 1996 AND ENTERED INTO FORCE ON
16 OCTOBER 1998**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW (1976)**

- between -

DEUTSCHE LUFTHANSA AG (Germany)

(the “Claimant”)

- and -

BOLIVARIAN REPUBLIC OF VENEZUELA

(the “Respondent”, and together with the Claimant, the “Parties”)

**DECISION ON THE CHALLENGE TO
DR. WOLFGANG PETER**

10 October 2022

I. BACKGROUND

A. The Arbitration

1. This challenge arises out of an arbitration between Deutsche Lufthansa AG (the “**Claimant**”) and the Bolivarian Republic of Venezuela (the “**Respondent**”, and together with the Claimant, the “**Parties**”) under the *Agreement between the Federal Republic of Germany and the Republic of Venezuela on the Promotion and Reciprocal Protection of Investments* and its Protocol, signed on 18 May 1996, and entered into force on 16 October 1998 (the “**Treaty**”), and the Arbitration Rules of the United Nations Commission on International Trade Law (1976) (the “**UNCITRAL Rules**”).
2. The Claimant is represented in these proceedings by Nigel Blackaby KC, Noiana Marigo, Lluís Paradell and Ruth Montiel of Freshfields Bruckhaus Deringer US LLP; by Patrick Schroeder of Freshfields Bruckhaus Deringer LLP (Germany); by Jean-Paul Dechamps, Gustavo Topalian, Pablo Jaroslavsky, Florencia Wajman and Marcos Sassot of Dechamps International Law; and by José Humberto Frías and Daniel Bustos of D’Empaire.
3. The Respondent is represented in these proceedings by Reinaldo Enrique Muñoz Pedroza (*Procurador General de la República Bolivariana de Venezuela*) and Henry Rodríguez Fachinetti (*Gerente General de Litigio de la Procuraduría General de la República Bolivariana de Venezuela*); by Alfredo De Jesús S. of De Jesús & De Jesús S.A.; and by Alfredo De Jesús O., Eloisa Falcón López, Marie-Thérèse Hervella, Pierre Daureu, Erika Fernández Lozada, Déborah Alessandrini, Daniela A. Brito Pusic, and Victor Datry of Alfredo De Jesús O., Transnational Arbitration & Litigation.

B. Constitution of the Tribunal and Challenge to Dr. Peter

4. These proceedings were commenced by a Request for Arbitration dated 21 June 2021, which was received by the Respondent the same day (the “**Notice of Arbitration**”).
5. By their respective letters dated 13 and 25 January 2022, the Parties informed the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”) that they had agreed to designate him as appointing authority in this arbitration.
6. By its letter dated 27 May 2022, the Claimant appointed Dr. Wolfgang Peter, a national of Switzerland, as the first arbitrator. Enclosed with the Claimant’s letter was Dr. Peter’s Declaration of Acceptance, Availability, Impartiality, and Independence, dated 23 May 2022 (the “**Declaration**”). Among other things, the Declaration states: “[t]o the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality and independence.”
7. On 13 June 2022, the Respondent filed a Notice of Challenge against Dr. Peter (the “**Challenge**”).
8. On 23 June 2022, having taken note of the Respondent’s Challenge, Dr. Peter declined to withdraw as arbitrator.
9. On 23 June 2022, the Claimant informed the Respondent that it did not agree to the Challenge.
10. On 27 June 2022, the Respondent: (i) appointed Prof. Laurence Boisson de Chazournes, a national of France, as the second arbitrator; and (ii) requested that the Secretary-General of the PCA decide its Challenge against Dr. Peter.

11. On 28 June 2022, the PCA invited the Parties to file additional written submissions on the Challenge.
12. On 29 June 2022, the Respondent requested that the co-arbitrators refrain from appointing a presiding arbitrator until its Challenge had been decided. On 4 July 2022, the Claimant noted that it did not object to the Respondent's request. On 7 July 2022, the co-arbitrators confirmed that they would not choose a presiding arbitrator during the pendency of the Challenge.
13. On 5 July 2022, the Claimant submitted its Response to the Respondent's Notice of Challenge of Dr. Wolfgang Peter (the "**Response**").
14. On 12 July 2022, Dr. Peter submitted his comments on the Challenge ("**Dr. Peter's Comments**").
15. On 19 July 2022, the Respondent submitted its Memorial on the Challenge against Dr. Peter (the "**Memorial**").
16. On 26 July 2022, the Claimant submitted its Answer to the Respondent's Memorial of Challenge of Dr. Wolfgang Peter (the "**Answer**").

II. THE RESPONDENT'S CHALLENGE TO DR. WOLFGANG PETER

17. The Respondent bases its Challenge to Dr. Peter on two separate grounds, either of which, in its view, give rise to justifiable doubts as to his impartiality and independence to act as arbitrator in this case:¹ (**A**) the purported "*controversy*" between the Respondent and Mr. Kap-You Kim (who is a partner of Peter & Kim along with Dr. Peter) regarding his conduct and subsequent voluntary withdrawal as a member of the annulment committee in the case *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 (the "**ConocoPhillips Case**"); and (**B**) the involvement of Prof. Pierre Tercier, another member of the Peter & Kim law firm, as president of the tribunal in *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1 (the "**Air Canada Case**") in which, according to the Respondent, "*an award was rendered in relation to similar factual and legal issues as those presented by Lufthansa in its Notice of Arbitration*".² The Parties' arguments regarding these circumstances are summarized below, followed by (**C**) Dr. Peter's Comments.

A. The Purported Controversy between Venezuela, Mr. Kim, and the Law Firm Peter & Kim Stemming from Mr. Kim's Conduct and Subsequent Voluntary Withdrawal from the Annulment Committee in the *ConocoPhillips Case*

(i) The Respondent's Position

18. Mr. Kim acted as an *ad hoc* committee member in the *ConocoPhillips Case* from 3 February 2020 until his withdrawal on 18 March 2022.³ The Respondent explains that, prior to his resignation,

¹ Challenge, ¶ 5.

² Challenge, ¶ 12.

³ Challenge, ¶¶ 7, 9, and 27; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Case Details, ICSID web page (**R-WP-5**). The Respondent points out that, contrary to what the Claimant stated in its Response, it did not accept the voluntary withdrawal of Mr. Kim. The person "*who accepted the referred withdrawal was a third party that does not represent the interests of the Republic*". The Respondent argues that, in any case, the lack of acceptance of such withdrawal "*does not have any impact*

Mr. Kim informed the parties in the *ConocoPhillips* Case that he and his law firm, Peter & Kim, had decided to take on the representation of a client in another arbitral proceeding jointly with Three Crowns (the law firm representing Venezuela's opposing parties in the *ConocoPhillips* Case).⁴ As described in a news release submitted by the Respondent, the proceeding in question is an arbitration administered by the International Chamber of Commerce between four shareholders of the Korean insurer Kyobo⁵ and its CEO, Mr. Chan Jan Shin, in which the shareholders are "*seeking to force [Mr. Chan Jan Shin] into a US\$1.8 billion purchase of shares under a put-option clause*".⁶ The same news release states that the shareholders are represented by the law firms Three Crowns, Peter & Kim, and Bae Kim & Lee.⁷

19. The Respondent criticizes Mr. Kim for revealing his association with Three Crowns only after having taken the decision to pursue this new professional opportunity: it infers that Mr. Kim created "*a channel of communication and a convergence of interests with [Three Crowns]*" prior to his withdrawal.⁸ Under the Respondent's view, this "*created a completely unethical situation that definitely corrupted the integrity of the annulment proceeding in its entirety*"⁹ in violation of the standards enshrined in Article 14(1) of the ICSID Convention.¹⁰ According to the Respondent, Mr. Kim's withdrawal did not solve the situation because as part of his work he gained access to "*all the confidential and privileged information obtained during the committee's deliberations and discussions over the two years of proceedings*".¹¹
20. In the Respondent's view, Dr. Peter's failure to disclose such circumstances in his Declaration amounts to a violation of his duty to disclose under the UNCITRAL Rules¹² and "*gives rise to justifiable doubts concerning his own notion of justice and due process, including his understanding of the necessary requirements of impartiality and independence of an arbitrator*".¹³ The Respondent argues that Dr. Peter, "*in his capacity as partner and co-founder of Peter & Kim, could not have ignored the extremely grave situation caused by Mr. Kim and his firm, especially seeing that the aforementioned events were made public by a specialized news service*".¹⁴

over the existence, nature, or scope of the controversy that exists between Mr. Kim ... and the Republic". Memorial, ¶¶ 5, 23-24 (emphasis by the Respondent).

⁴ Challenge, ¶¶ 8 and 28; J. Ballantyne, *Korean executive faces second ICC claim over share buyback*, Global Arbitration Review, 4 March 2022 (**R-WP-6**); C. Sanderson, *Korean arbitrator quits Conoco panel over counsel work*, Global Arbitration Review, 23 March 2022 (**R-WP-7**).

⁵ The shareholders participating in the arbitration are Affinity Equity Partners (Hong Kong), GIC (Singapore's sovereign wealth fund), IMM Private Equity (South Korea), and Baring Private Equity Asia (Hong Kong). See J. Ballantyne, *Korean executive faces second ICC claim over share buyback*, Global Arbitration Review, 4 March 2022 (**R-WP-6**).

⁶ J. Ballantyne, *Korean executive faces second ICC claim over share buyback*, Global Arbitration Review, 4 March 2022 (**R-WP-6**).

⁷ J. Ballantyne, *Korean executive faces second ICC claim over share buyback*, Global Arbitration Review, 4 March 2022 (**R-WP-6**). Regarding the Claimant's argument that the stated controversy does not exist or has not been documented in the submissions, the Respondent asserts that the Claimant has knowledge of the controversy because its legal representatives in this arbitration also represent Venezuela's counterparts in the *ConocoPhillips* Case. Memorial, ¶¶ 25-26.

⁸ Challenge, ¶ 29.

⁹ Challenge, ¶ 8; see Memorial, ¶ 21.

¹⁰ Challenge, ¶ 27.

¹¹ Challenge, ¶¶ 9 and 29.

¹² Challenge, ¶¶ 11, 31; Memorial, ¶ 20; Declaration (**R-WP-4**).

¹³ Challenge, ¶ 31.

¹⁴ Challenge, ¶ 31; see C. Sanderson, *Korean arbitrator quits Conoco panel over counsel work*, Global Arbitration Review, 23 March 2022 (**R-WP-7**).

21. Aside from Dr. Peter’s duty to disclose, the Respondent considers that Mr. Kim’s association with Three Crowns has resulted in a controversy between Venezuela and Dr. Peter’s partner and law firm,¹⁵ thereby giving rise to justifiable doubts about Dr. Peter’s impartiality and independence.¹⁶ The Respondent rejects the Claimant’s proposition that Dr. Peter and Mr. Kim act only in their “*personal capacity*”, since an arbitrator bears the identity of their law firm when assessing conflicts of interest.¹⁷ In this respect, the Respondent emphasizes that Dr. Peter and Mr. Kim are also the co-founders of the law firm.¹⁸

(ii) The Claimant’s Position

22. The Claimant maintains that the Respondent has failed to prove the existence of any controversy concerning Mr. Kim’s voluntary resignation from the *ConocoPhillips* Case.¹⁹ In any case, the circumstances surrounding Mr. Kim’s resignation do not, in the Claimant’s view, create justifiable doubts as to Dr. Peter’s independence and impartiality.²⁰
23. First, the Claimant asserts that Mr. Kim’s actions “*in his personal capacity as a member of an ad hoc committee in an unrelated case are irrelevant for the purposes of assessing Dr. Peter’s impartiality and independence in this case*”,²¹ as are the actions of Peter & Kim.²² In particular, the Claimant notes that the Respondent does not suggest that Dr. Peter had any involvement in the events that led to Mr. Kim’s withdrawal.²³ The Claimant also notes that the IBA Guidelines on Conflicts of Interest in International Arbitration do not in any way address a situation of this sort.²⁴
24. According to the Claimant, the Respondent refers to a supposed “*controversy*” between Peter & Kim and Venezuela, while failing to provide the factual basis for such controversy, such as the terms on which Mr. Kim agreed to withdraw voluntarily.²⁵ According to the Claimant, the fact that Freshfields, one of the firms representing the Claimant in this case, is also representing ConocoPhillips in the *ConocoPhillips* Case cannot excuse the Respondent from proving the existence of any purported controversy.²⁶
25. The Claimant submits that Dr. Peter’s failure to disclose this situation is also not grounds for a challenge, because (i) there was nothing to disclose;²⁷ (ii) the relevant facts were publicly

¹⁵ Challenge, ¶¶ 6, 26, and 30; Memorial, ¶ 21.

¹⁶ Challenge, ¶¶ 30 and 32.

¹⁷ Memorial, ¶¶ 7, 14-17, 28-30; Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 1 January 2021, ¶ 32 (**R-WP-16**); IBA Guidelines on Conflicts of Interest in International Arbitration of 2014, 23 October 2014, General Standard No. 6(a), p. 13 (**C-WP-01**); IA Reporter, *ICJ President rules that investment arbitrator should be disqualified due to conflict created by his law firm’s involvement in separate matter*, 15 July 2022 (**R-WP-17**).

¹⁸ Memorial, ¶ 28.

¹⁹ Answer, ¶ 11; Response, ¶ 22.

²⁰ Response, ¶ 19.

²¹ Response, ¶¶ 21-23; see Answer, ¶¶ 11 and 14.

²² Answer, ¶ 14.

²³ Response, ¶ 23.

²⁴ Response, ¶ 24. The Claimant also rejects the Respondent’s reliance on *Khaitan Holdings v. India*, which it submits “*involved a situation in which the law firm of the challenged arbitrator was acting as counsel in another proceeding against one of the parties to the arbitration (India)*” and is, therefore, inapposite.

Answer, ¶ 15.

²⁵ Response, ¶¶ 21-22; Answer, ¶ 11.

²⁶ Answer, ¶ 13.

²⁷ Response, ¶ 25.

available;²⁸ and (iii) Venezuela is a party to the *ConocoPhillips* Case.²⁹ In any event, the Claimant holds that the merit of the challenge depends on the alleged undisclosed circumstances, not on the lack of disclosure itself.³⁰

B. Prof. Tercier's Involvement in the *Air Canada* Case and his Professional Relationship with Dr. Peter

(i) The Respondent's Position

26. The Respondent argues that Prof. Tercier, in his capacity as presiding arbitrator in the *Air Canada* Case, has expressed views on factual and legal issues that are similar to those raised by the Claimant in these proceedings.³¹ In light of those pronouncements and the existing professional relationship between Dr. Peter and Prof. Tercier through the law firm of Peter & Kim (where Prof. Tercier is a Senior Counsel), the Respondent concludes that there are justifiable doubts regarding Dr. Peter's capacity to act as an independent and impartial arbitrator in these proceedings.³² In this respect, the Respondent reiterates that an arbitrator's independence may be affected by the activities of other members of the same law firm.³³
27. According to the Respondent, the similarities between the *Air Canada* Case and the present one include the following circumstances: (i) both companies “*are business partners*” as members of Star Alliance³⁴ and the International Air Transport Association (“IATA”);³⁵ (ii) both companies operated routes to Venezuela, subjecting their activities to Venezuelan foreign exchange rules and regulations;³⁶ (iii) both companies submitted applications for the authorization of foreign currency purchases within the context of that regulatory scheme concerning income they had generated in local currency;³⁷ (iv) both cases concern the same period, with Air Canada having suspended its operations in Venezuela in 2014 and Lufthansa in 2016;³⁸ and (v) both disputes stem from alleged breaches of investment treaties in relation to the currency exchange regime established in Venezuela since 2003.³⁹ According to the Respondent, the Claimant itself has

²⁸ Response, ¶ 27; See J. Ballantyne, *Korean executive faces second ICC claim over share buyback*, Global Arbitration Review, 4 March 2022 (**R-WP-6**).

²⁹ Response, ¶ 27.

³⁰ Response, ¶ 26; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008, ¶ 123 (**CLA-WP-02**); IBA Guidelines on Conflicts of Interest in International Arbitration of 2014, 23 October 2014, Part II: Practical Application of the General Standards, ¶¶ 4-5 (**C-WP-01**).

³¹ Challenge, ¶¶ 12 and 35; Memorial, ¶ 35; see *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021 (**R-WP-8**).

³² Challenge, ¶¶ 12 and 34; Memorial, ¶¶ 32 and 36.

³³ Memorial, ¶ 34.

³⁴ Challenge, ¶ 35; *Star Alliance Members: Operating Carrier and Codeshare Information*, Star Alliance web page (**R-WP-12**).

³⁵ Challenge, ¶ 35; Memorial, fn. 46; *IATA - Lufthansa*, IATA web page (**R-WP-13**); *IATA - Air Canada*, IATA web page (**R-WP-14**).

³⁶ Challenge, ¶ 35.

³⁷ Challenge, ¶ 35; Notice of Arbitration, ¶¶ 13, 25, 28 and 29; see D. Thomson, *Air Canada lands claim on Venezuela*, Global Arbitration Review, 23 January 2017 (**R-WP-15**); *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 16-23 (**R-WP-8**).

³⁸ Memorial, ¶ 35 and fn. 45; Notice of Arbitration, ¶¶ 32; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶ 25 (**R-WP-8**).

³⁹ Challenge, ¶¶ 35 and 36; Notice of Arbitration, ¶¶ 40-48; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 320 and 400 (**R-WP-8**); see D. Thomson, *Air Canada lands claim on Venezuela*, Global Arbitration Review, 23 January 2017 (**R-WP-15**).

admitted similarities between both cases, regardless of whether it has fully laid out its position in its Notice of Arbitration.⁴⁰

28. Against this backdrop, the Claimant considers that Prof. Tercier's conduct as president in the *Air Canada* Case impacts Dr. Peter's impartiality and independence for two reasons.⁴¹ First, the Respondent considers it impossible to ensure that Dr. Peter will not be influenced, consciously or unconsciously, by the opinions of a Senior Counsel of his firm,⁴² meaning that Dr. Peter might give undue deference or unjustified weight to Prof. Tercier's decisions.⁴³ Second, in the Respondent's view, one cannot rule out that Dr. Peter and Prof. Tercier might exchange opinions, directly or indirectly, concerning the factual and legal circumstances of both cases.⁴⁴
29. In the Respondent's view, the possibility that Dr. Peter might be influenced in this manner would elicit justifiable doubts about his impartiality and independence in any reasonable third party, his level of experience being irrelevant under such standard. Holding otherwise, argues the Respondent, would lead to the conclusion that a more experienced arbitrator should receive more deference regarding their impartiality and independence than a less experienced one, "*which would transform the standard into a highly subjective one.*"⁴⁵ According to the Respondent, the fact that Prof. Tercier was only one of the three members of the tribunal in the *Air Canada* Case is irrelevant, as a unanimous award "*represents the opinions of the arbitrators that have worked on the case and, particularly, the opinions of the president of the arbitral tribunal.*"⁴⁶ The Respondent also recalls that the Challenge is not based on an issue conflict, but rather on the factual and legal similarities between both cases, a ground on which challenges have been upheld in the past.⁴⁷ Lastly, while noting that Prof. Tercier's participation in the *Air Canada* Case is public knowledge,⁴⁸ the Respondent considers that Dr. Peter's failure to disclose such circumstance in his Declaration aggravates the existing justifiable doubts regarding his impartiality and independence.⁴⁹

(ii) The Claimant's Position

30. The Claimant dismisses the Respondent's allegations regarding the relationship between Dr. Peter and Prof. Tercier as "*untenable*"⁵⁰ and argues that they are based "*not on the actions of Dr Peter himself but those of another individual, in this case, Prof. Tercier.*"⁵¹
31. First, while acknowledging that an arbitrator's impartiality and independence may be affected by the actions of other members of their law firm, the Claimant submits that the Respondent offers no evidence to show "*that Dr Peter was somehow involved in the Air Canada case such that he*

⁴⁰ Memorial, ¶ 35.

⁴¹ Challenge, ¶ 37.

⁴² Challenge, ¶¶ 12 and 37.

⁴³ Challenge, ¶ 37.

⁴⁴ Challenge, ¶¶ 12 and 38.

⁴⁵ Challenge, ¶ 37; Memorial, ¶ 37.

⁴⁶ Memorial, ¶ 36.

⁴⁷ Memorial, ¶ 38; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, ¶¶ 90-91 (**RLA-WP-5**); *Anaklia Development Consortium LLC v. Georgia*, ICC Case No. 25542/HBH, Decision of the International Court of Arbitration of the ICC on the Disqualification of Arbitrator Klaus Sachs, 25 February 2021, ¶¶ 24-28 (**RLA-WP-6**).

⁴⁸ Challenge, ¶ 37.

⁴⁹ Memorial, ¶ 20.

⁵⁰ Response, ¶ 28; Answer, ¶ 16.

⁵¹ Response, ¶ 29.

may be influenced by its outcome", nor "*that Prof. Tercier would breach his professional obligations not to discuss confidential information from the Air Canada case with Dr Peter or that Dr Peter would breach his own obligations by discussing this case with Prof. Tercier*".⁵²

32. According to the Claimant, if the Respondent's position were taken to its logical conclusion, partners of the same law firm, as Dr. Peter and Prof. Tercier, "would not be able to act as arbitrators in any case without checking the awards of all the other members of their law firm in prior cases for fear of a concern that they would be 'loyal' to those members."⁵³ The Claimant holds that requiring the commission of such an analysis in every case would be impracticable and would constitute "*an extreme and unreasonable extension of the concept of issue conflict*".⁵⁴ In this regard, the Claimant observes that (i) arbitrator challenges have been rejected even when the same arbitrator has been involved in cases raising similar issues;⁵⁵ and (ii) the Respondent itself has appointed the same arbitrators in cases dealing with similar issues involving similar expropriations.⁵⁶
33. The Claimant also calls into question the extent to which the instant case raises factual or legal issues similar to those in the *Air Canada* Case. According to the Claimant, this case "*involves a different investor, is based on a different investment treaty, concerns a different investment, and involves claims for breaches that occurred at different times*".⁵⁷ Even if this case does ultimately raise related issues, the Claimant believes it is too early to make such a determination, as the only submission on the merits yet to be entered into the record is the Notice of Arbitration.⁵⁸ The Claimant adds that Dr. Peter would also be within his rights as an arbitrator to draw from the award in *Air Canada* without relying on the personal views of Prof. Tercier as such.⁵⁹

⁵² Response, ¶ 29; *see Answer*, ¶¶ 16 and 20.

⁵³ Response, ¶ 30.

⁵⁴ Response, ¶ 30.

⁵⁵ Response, ¶ 31; *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, 20 May 2011, ¶ 83 (**CLA-WP-05**).

⁵⁶ Response, ¶ 31 (referring to Venezuela's appointments of Prof. Torres Bernárdez in *Manuel García Armas, Pedro García Armas, Sebastián García Armas, Domingo García Armas, Manuel García Piñero, Margaret García Piñero, Alicia García Piñero, Domingo García Piñero and Carmen García Piñero v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, *Luis García Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1, and *Dick Fernando Abanto Ishivata v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/18/6; and of Prof. Brigitte Stern in *Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/1, *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, *Kimberly-Clark BVBA, Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/18/3, and *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26).

⁵⁷ Response, ¶ 32; *see Answer*, ¶ 19.

⁵⁸ Response, ¶ 33; *Tidewater Inc. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, ¶ 69 (**CLA-WP-04**) ("[a]t this stage in the present proceeding, it would be premature to make any judgment as to what issues of law may be pleaded by the parties (and thus as to the similarities or differences between the context for the issues of law to be determined in the two cases), since no pleadings other than the Request for Arbitration have yet been filed.").

⁵⁹ Response, ¶ 34.

C. Dr. Peter's Comments

34. Dr. Peter's Comments are the following:

I take note of the two grounds raised by Respondent in its Challenge and wish to briefly comment as follows.

Concerning the first ground, Respondent invokes that my partner at Peter & Kim, Mr Kap-You Kim, who was serving as a member of the *ad hoc* annulment committee in the case *ConocoPhillips v. Venezuela*, resigned from the committee as he took on co-counsel work with one of the legal representatives of ConocoPhillips to act in an unrelated arbitration involving different parties.

I believe that the above-mentioned facts do not relate to me personally and, as such, do not raise doubts or concerns as to my impartiality and independence in the present proceedings.

Concerning the second ground, Respondent invokes that a senior counsel at my firm, Professor Pierre Tercier, rendered an award as president of the arbitral tribunal in a case, *Air Canada v. Venezuela*, which allegedly presents similar factual and legal issues as the ones raised by Claimant in the present arbitration. As a consequence, Respondent expresses concern that I might give undue deference to Professor Tercier's opinion as conveyed in the *Air Canada v. Venezuela* award, as well as exchange views with him about matters that may be of relevance in the present proceedings.

Further to the fact that Professor Tercier and I are both bound by a professional duty of confidentiality as regards our respective mandates as arbitrators, I would like to insist on my obligation and capacity as an arbitrator after forty years of practice to form my own opinion and judgment on any given case, which are unaffected by and independent of any of the circumstances presently invoked by Respondent.

For these reasons, I maintain the position expressed in my letter dated June 23 2022 that I do not consider that the matters stated in the Challenge give rise to any issues as to my independence or impartiality in this arbitration.⁶⁰

III. REASONING

A. Introduction

35. The Parties agree that the legal standard applicable to the Challenge is set forth in Article 10(1) of the UNCITRAL Rules, according to which an arbitrator may be challenged if "justifiable doubts" exist as to the arbitrator's impartiality or independence.⁶¹ The Parties also agree that it is an objective standard, whereby the situation must be analyzed from the perspective of a reasonable, fair, and informed third party, taking into consideration all relevant circumstances.⁶²
36. The Challenge is based on two distinct grounds: (i) the purported controversy between Venezuela, Mr. Kim, and the law firm of Peter & Kim stemming from Mr. Kim's conduct and subsequent withdrawal from the annulment committee in the *ConocoPhillips* Case; and (ii) the involvement of Prof. Tercier in the *Air Canada* Case and his professional relationship with Dr. Peter. For the reasons set out below, I conclude that the second of these grounds constitutes a sufficient basis to

⁶⁰ Dr. Peter's Comments.

⁶¹ Challenge, ¶ 17; Memorial, ¶ 9; Answer, ¶ 8; Response, ¶ 3.

⁶² Challenge, ¶¶ 19-22; Memorial, ¶ 9; Answer, ¶ 8; Response, ¶ 3.

uphold the Challenge. However, I take pains to note that I have considered all of the Parties' submissions, as well as Dr. Peter's Comments, even if I address below only those issues that I consider necessary to reach my decision.

B. Prof. Tercier's Involvement in the *Air Canada* Case and his Professional Relationship with Dr. Peter

37. The basis for the alleged conflict of interest under this heading is a narrow one. It does not involve any relationship with the Parties or a typical situation of bias directly for or against one of them. The alleged conflict is based on a concern that an arbitrator might unduly defer to the decisions already reached by another member of his law firm in adjudicating a case arising out of broadly the same factual and legal matrix.
38. It is clear that an arbitrator's involvement in a closely connected case may lead to a disqualifying risk of prejudgment.⁶³ Likewise, the impartiality and independence of an arbitrator operating a practice from a law firm may be affected by the activities of other members of his firm.⁶⁴ The question in this case, however, is whether the risk of prejudgment that might exclude Prof. Tercier from serving as arbitrator in the present case extends also to precluding another member of his law firm, Dr. Peter, from doing so.
39. The Respondent's Challenge to Dr. Peter is based on the premise that Prof. Tercier, acting as President of the Tribunal, expressed views on factual and legal issues in the *Air Canada* Case that are closely related to those raised by the Claimant in these proceedings. In that sense, even a superficial analysis of the Claimant's Notice of Arbitration and the *Air Canada* Award suffices to show that the claimants in both cases claim (or claimed) to be: (i) airlines operating in Venezuela;⁶⁵ (ii) that regularly applied to convert into hard currency their income denominated in VEF and to repatriate such funds under the same domestic regulations;⁶⁶ (iii) that experienced delays, from 2012 onwards, in receiving approval for the periodic repatriation of funds;⁶⁷ (iv) that were forced to suspend operations in Venezuela as a result of their inability to repatriate their

⁶³ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, ¶ 90 (**R-WP-5**).

⁶⁴ Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 1 January 2021, ¶ 32 (**R-WP-16**) (“*For the scope of disclosures, an arbitrator is considered to bear the identity of his or her law firm, and a legal entity includes its affiliates. In addressing possible objections to confirmation or challenges, the Court will consider the activities of the arbitrator’s law firm and the relationship of the law firm with the arbitrator in each individual case. In each case, arbitrators should consider disclosing relationships with another arbitrator or counsel who is a member of the same barristers’ chambers. Arbitrators should also consider disclosing relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award*”); IBA Guidelines on Conflicts of Interest in International Arbitration of 2014, 23 October 2014, Explanation to General Standard 6, ¶ (a) (**C-WP-01**) (“*The arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator’s firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator’s firm, such as the nature, timing and scope of the work by the law firm, and the relationship of the arbitrator with the law firm, should be considered in each case.*”)

⁶⁵ Notice of Arbitration, ¶¶ 9-12; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 6-34 (**R-WP-8**).

⁶⁶ Notice of Arbitration, ¶¶ 13-15; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 20-23 (**R-WP-8**).

⁶⁷ Notice of Arbitration, ¶¶ 27-32; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 20-23 (**R-WP-8**).

income;⁶⁸ and (v) that were ultimately unable to repatriate large amounts of income from their operations in Venezuela.⁶⁹ While brought under different investment treaties, the claims in both cases concern purported breaches of the treaty standards of free transfer of funds,⁷⁰ fair and equitable treatment,⁷¹ and expropriation.⁷² From the Parties' submissions, it would appear that the *Air Canada* Case is the only other investment treaty arbitration to overlap with the present arbitration in this manner, involving claims against the same respondent for the same effects caused by the same measures to similarly-placed actors in the same industry.

40. Given that Prof. Tercier is the only presiding arbitrator to have ruled on a case with these characteristics, the selection of his law firm colleague to serve on this tribunal would appear as more than a coincidence to a reasonable and informed third party. The appointment of Dr. Peter would be perceived as being motivated by the influence that Prof. Tercier's decisions in the *Air Canada* Case would hold for Dr. Peter, and the fact that Dr. Peter would potentially have to call into question the judgment of a close colleague in order to come to a different result on a substantially similar factual and legal pattern.
41. I wish to make absolutely clear I have no doubts about Dr. Peter's professionalism, legal ability, or intention to serve with the utmost integrity. I have also found no evidence of actual bias on his behalf. Nevertheless, as agreed by both Parties, actual bias need not be established: appearance is enough to raise justifiable doubts. The question, thus, is one of determining if, in view of the overlap between the present case and the *Air Canada* Case, from the perspective of a reasonable, fair, and informed third party, there is a clear risk that Dr. Peter might be influenced by factors other than the merits of the case put before him when deciding the present dispute. This question must be answered in the affirmative and, accordingly, the Challenge must be upheld.
42. In view of this conclusion, I do not consider it necessary to address the first ground of the Challenge concerning the alleged controversy between the Respondent and Mr. Kim.

⁶⁸ Notice of Arbitration, ¶ 32; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 24-34 (**R-WP-8**).

⁶⁹ Notice of Arbitration, ¶ 32; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶ 367 (**R-WP-8**).

⁷⁰ Notice of Arbitration, ¶¶ 40-43; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 320-329 (**R-WP-8**).

⁷¹ Notice of Arbitration, ¶¶ 44-46; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 400-416 (**R-WP-8**).

⁷² Notice of Arbitration, ¶¶ 47-48; *Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/17/1, Award, 13 September 2021, ¶¶ 472-489 (**R-WP-8**).

IV. DECISION

NOW THEREFORE, I, Marcin Czepelak, Secretary-General of the PCA, having established to my satisfaction my competence to decide this Challenge in accordance with the UNCITRAL Rules, and having considered the submissions of the Parties and Dr. Peter's Comments;

HEREBY ACCEPT the Challenge brought by the Respondent against Dr. Wolfgang Peter.

Done at The Hague, 10 October 2022.

A handwritten signature in blue ink, appearing to read "Marcin Czepelak".

Marcin Czepelak